

## COMPULSORY PRODUCTION OF DOCUMENTS

The provisions of the United States Code regarding summons enforcement proceedings, 26 U.S.C., Sec. 7601 through 7610, have over the last two decades been the subject of much litigation and have been construed by the Federal Courts of Appeal as well as the United States Supreme Court. In *Reisman v. Caplin*, 375 U.S. 440, 84 S.Ct. 508 (1964), the Supreme Court held that a witness or taxpayer could challenge an I.R.S. summons on any appropriate grounds and may assert as a defense to the proceedings the fact that the materials sought by the I.R.S. relate solely for use as evidence in a criminal prosecution. In *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964), the Court delineated the four requisites necessary for any summons to be enforced. In *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534 (1971), the Court held that an I.R.S. summons could lawfully be used for a criminal investigation provided the summons had a civil purpose. In *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973), the Court held that the Fifth Amendment to the U.S. Constitution did not protect tax records in the possession of a taxpayer's accountant. In *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915 (1975), the Court allowed the issuance of a John Doe summons for the purpose of investigating a \$40,000.00 deposit of \$100.00 bills. In *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569 (1976), the Court held that the Fifth Amendment did not protect tax records in the possession of the taxpayer's attorney. This line of cases affirmatively shows that the Internal Revenue Service has very broad summons authority and is lawfully entitled to secure virtually any record or document in the possession of a third party.

I.R.S. summonses are issued to two separate and distinct classes of persons, with one class representing third parties who have possession and custody of books and records of the taxpayers under investigation, and the other class comprising taxpayers under investigation. A summons enforcement action is utilized when compliance with the summons has not been obtained, due to the taxpayer notifying the third party not to comply, by the institution of a suit to enjoin enforcement, or by the refusal on the part of the taxpayer to comply when summons is directed to him. When the Service proceeds to enforce a summons issued to either a third party recordholder or the taxpayer himself, its burden of proof is very minimal and amounts to nothing more than proof of compliance with the requirements of *Powell*, supra; see *United States v. Will*, 671 F.2d 963 (6th Cir. 1982).

Whereas the burden of proof upon the Service is relatively light in summons enforcement actions, a taxpayer opposing

enforcement of the summons has a far heavier burden to carry. Basically, a taxpayer seeking denial of enforcement of the summons has available three defenses: bad faith, institutional posture and the Fifth Amendment. The "bad faith" defense is based upon *Reisman v. Caplin*, supra, and *Donaldson v. United States*, supra, and involves those situations wherein the summons has been issued for the improper purpose of gathering evidence needed for a criminal prosecution after referral to the Department of Justice. The "institutional posture" defense is based upon *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357 (1978), and relates to those situations when the Service has made an institutional commitment to criminally prosecute the taxpayer under investigation but desires to withhold referral to the Justice Department to allow for the gathering of additional evidence needed for a successful criminal prosecution. These two defenses are most often utilized by a taxpayer when intervening in a third party summons enforcement action or commencing an action to enjoin enforcement of the summons.

Although a taxpayer opposing enforcement of a summons issued to him may assert the defenses of "bad faith" and "institutional posture," he will most likely rely upon the third defense available to him, that of the Fifth Amendment. The summoinee under investigation in this cause, is relying solely on this defense to oppose enforcement of the Service summons which is the subject of this action. It is the Summoinee's contention that the Fifth Amendment protects him from compulsory production of books and records concerning his "income" for the tax years under investigation, especially where such production would provide all the evidence needed by the Service to commence a successful criminal prosecution against him.

The history and development of the Fifth Amendment right against self-incrimination has been one of slow but sure expansion of the benefits of its protection. James Madison, the prime author of this provision in the Bill of Rights to the U.S. Constitution, sought this provision to prevent the development in our country of proceedings similar to or identical with Spanish Inquisitions or Star Chamber proceedings. A cursory examination of the *William Penn Case*, 6 How. St. Tr. 951 (1670), reveals that resort to "Spanish Inquisitions" has on many occasions been desired in order to bring about the "efficient" operation of governmental machinery; this is what Madison desired to avoid by inserting the Fifth Amendment into our Constitution. The original intent or purpose for the Fifth Amendment was to compel the government to procure independent evidence of the facts and proof of a crime other than through the mouth of the accused. Without such a requirement and with the availability of procedures such as the Inquisition or Star

Chamber, the government could constantly harass law abiding citizens and might on some occasion procure, through duress and coercion, a confession. But as is well known, such "confessions" are highly suspect, hence we have the protection of the Fifth Amendment.

One of the most appropriate statements concerning the Fifth Amendment and its operation was made by U.S. Supreme Court Justice John Marshall in the case of United States v. Aaron Burr. Chief Justice Marshall, quoted in Counselman v. Hitchcock, 142 U.S. 547, 565, 12 S.Ct. 195 (1892), maintained that a witness could plead the Fifth Amendment not only in situations where his answer to a question would directly implicate him in a crime, but also in response to questions the answer to which would provide a link in the chain of evidence needed to convict the witness of a crime. Protection from compulsory testimony designed to implicate a witness in a crime has been secured through the Fifth Amendment and has been one of the most sacred principles known to American jurisprudence. This principle of the Fifth Amendment protection from compulsory testimony, absent a grant of immunity, has seen no erosion in its application since first expounded and requires but few citations to support this general proposition; see Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906), Blau v. United States, 340 U.S. 159, 71 S.Ct. 223 (1950), and Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814 (1951).

The question of Fifth Amendment protection for the books, records and personal documents of a witness who may be implicated in a crime was first really considered in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886), wherein the Supreme Court expanded Fifth Amendment protection against compulsory testimony to books and records of the witness. In granting such protection, the Court held as follows:

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom," 116 U.S., at 631, 632.

"And we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within

the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure -- and an unreasonable search and seizure -- within the meaning of the fourth amendment," 116 U.S., at 634, 635.

Since the rendition of the decision in *Boyd*, the Supreme Court has on some occasions limited the full import of that historic ruling. In *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911), the Court held that the *Boyd* principle did not apply to corporations; see also *United States v. Peter*, 479 F.2d 147 (6th Cir. 1973); and *In Re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294 (6th Cir. 1983). Still later, application of *Boyd* to partnership records was prohibited in *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179 (1974). However, up until February 28, 1984, it still appeared that personal, non-corporate tax records of a person with potential criminal liability were still protected by *Boyd* principles. When the Supreme Court held that *Boyd* protection did not apply to partnership records in *Bellis*, *supra*, it expressly affirmed this proposition by stating as follows:

"The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life," 417 U.S., at 87, 88.

Likewise, *Fisher*, *supra*, did not emasculate *Boyd* in any respect as the issue in that case was completely different; in fact, the Court in *Fisher* definitely appeared to have sided with *Boyd* in the last paragraph of its opinion, when it stated as follows:

"Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' see *Boyd v. United States*," 425 U.S., at 414.

Shortly after the Supreme Court rendered its decision in *Fisher* on April 21, 1976, it was confronted with a similar issue in *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737 (1976), which was rendered on June 29, 1976. In *Andresen*, a search warrant had been issued for the seizure of certain private books and records, and the criminal defendant was not required to produce such records or authenticate the same as authentication was achieved by the use of third parties. The Supreme Court in *Andresen* did not emasculate *Boyd* in any way and in fact expressly affirmed *Boyd* by stating as follows:

"Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information ..., a seizure of the same materials by law enforcement officers differs in a crucial respect -- the individual against whom the search is directed is not required to aid in the discovery, production or authentication of incriminating evidence," 427 U.S., at 473, 474.

The Fifth Amendment to the U.S. Constitution states that no person shall be compelled to be a "witness" against himself in a criminal prosecution. Similar provisions exist in the constitutions of the various states of our nation, with some such constitutional provisions following the Fifth Amendment via use of the word "witness" while other provisions offer more expansive protection by stating that no person shall be compelled to give "evidence" against himself in a criminal prosecution. There exist distinct and crucial differences in the type of protection offered under these two different types of constitutional provisions. The protection against being compelled to give "evidence" against the accused is far broader than protection only afforded to "witnessing" and giving "evidence" arguably would include providing to the prosecution documents incriminating to the accused. The protection afforded by the Fifth Amendment is only that of proscribing testimonial compulsion and is not as all encompassing as the provisions prohibiting compulsory production of "evidence."

Neither Fisher nor Andresen disturbed the holding in Boyd or Bellis and both are wholly consistent with these two other cases. What the Supreme Court has seen fit to do is note the crucial difference between protecting "evidence" and being a compelled "witness"; private papers may no longer be specially protected and in a distinct and different class from other evidence, property or contraband. What the Supreme Court has directed is that an accused cannot be compelled to produce his own incriminating books and records because such would involve to a degree an amount of authentication of such books and records on the part of the accused; such is tantamount to compelled testimony specifically proscribed by the Fifth Amendment. What the Supreme Court has commanded is that if the government desires to obtain personal books and records and use the same against the accused, it must be done through witnesses other than the accused himself. Prior to February 28, 1984, the last known pronouncement by the Supreme Court concerning Boyd was its decision in Bellis, and that opinion expressly affirmed Boyd.

Prior to February 28, 1984, a survey of the various Circuits likewise revealed the continued vitality of the principles of Boyd and the crucial government-citizen relationship which it protects. In the First Circuit case of *In Re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051 (1st Cir. 1980), the Court found that "personal, self-created business records in the possession of a sole proprietor or practitioner would enjoy a privilege against subpoena," 626 F.2d, at 1056. In the Second Circuit, the case of *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313 (2nd Cir. 1979), held that a corporate official's Fifth Amendment plea to questions concerning the location of corporate records was valid; see also *United States v. Beattie*, 522 F.2d 267 (2nd Cir. 1975), *United States v. Patterson*, 219 F.2d 659 (2nd Cir. 1955), *In Re Grand Jury Subpoena Duces Tecum*, 657 F.2d 5 (2nd Cir. 1981), *In Re Grand Jury Witness (Gilboe)*, 699 F.2d 71 (2nd Cir. 1983), and *United States v. Bobart Travel Agency, Inc.*, 699 F.2d 618 (2nd Cir. 1983). The three cases of *In Re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3rd Cir. 1982), *In Re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3rd Cir. 1980), and *In Re Grand Jury (Colucci)*, 597 F.2d 851 (3rd Cir. 1979), demonstrated that the Third Circuit protects from production private books and records. In *United States v. Henry*, 491 F.2d 702 (6th Cir. 1974), the Sixth Circuit quashed an I.R.S. summons to a taxpayer already indicted on a narcotics offense. The Seventh Circuit, faced with a pro se litigant in *United States v. Awerkamp*, 497 F.2d 832 (7th Cir. 1974), who was prematurely raising Fifth Amendment objections to the enforcement of an I.R.S. summons, held that the taxpayer could make specific Fifth Amendment pleas to questions directed at him when he complied with the order of enforcement.

In two other Seventh Circuit cases, *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971), and *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), that the Court held that the records of an individual taxpayer were immune from a summons. The Eighth Circuit, in *Isaacs v. United States*, 256 F.2d 654 (8th Cir. 1958), held a Fifth Amendment plea of a corporate official, in response to questions relating to \$99,000.00 in checks written by the corporation, to be valid. Another Eighth Circuit opinion in *United States v. Plesons*, 560 F.2d 890 (8th Cir. 1977), would have granted protection to the records of a doctor if he had raised his Fifth Amendment plea to a grand jury subpoena before testifying concerning such records. In the Ninth Circuit, in the case of *United States v. Helina*, 549 F.2d 713 (9th Cir. 1977), protection of a taxpayer's records from production was upheld. The Ninth Circuit also has directly addressed the issue of protection of taxpayer records in *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), and has protected the same from compelled production. The preceding cases demonstrate that the great weight of authority in

the various Circuits is that an individual taxpayer's records are protected from compulsory production because of the Fifth Amendment.

The Fifth and Eleventh Circuits have apparently treated this precise issue more often than the others and have conclusively ruled that tax records of an individual are immune from production on the basis of *Boyd*. In the cases of *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969), *In Re Grand Jury Proceedings (McCoy)*, 601 F.2d 162 (5th Cir. 1979), *In Re Oswalt*, 607 F.2d 645 (5th Cir. 1979), *In Re Grand Jury Subpoena (Kent)*, 646 F.2d 963 (5th Cir. 1981), and *United States v. MEEKS*, 642 F.2d 733 (5th Cir. 1981), this principle was upheld. More specifically to the precise issue as the case at bar is *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981), wherein that Court held as follows:

"Their cumulative teaching is that any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, ... and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content," 636 F.2d, at 1043.

The Sixth Circuit does not deviate in any respect from comparable decisions made in other Circuits. In *Patty v. Bordenkircher*, 603 F.2d 587 (6th Cir. 1979), that Court held that the government couldn't compel a criminal defendant to testify concerning his previous criminal convictions where the same was relevant to a habitual offender statute. In *United States v. Hill*, 601 F.2d 253 (6th Cir. 1979), that Court acknowledged that a "taxpayer" could raise issues by refusing to answer specific questions. In *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977), in a case involving an indicted defendant called before a grand jury, that Court stated as follows:

"However, upon the trial of the defendant in a criminal case, it would be a clear violation of a defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged," 563 F.2d, at 275.

In the recent case of *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983), in a case wherein the taxpayer under investigation was compelled to surrender certain of his records which had

previously been in his accountant's possession, the Sixth Circuit stated that the three elements of compulsion, testimonial communication and incrimination by such communication were requisites to a valid assertion of the Fifth Amendment. In so holding, that Court stated as follows:

"Under this focus the key question is whether the compelled production involves compelled testimonial communication. The answer to this question in turn depends on whether the very act of production supplies a necessary link in the evidentiary chain. Does it confirm that which was previously unknown to the government; e.g., the existence or location of the materials? Does it supply assurance of authenticity not available to the government from sources other than the person summonsed? Though the party seeking to avoid compliance does not have to show more than is required to demonstrate that the privilege is properly claimed, he must make some showing that the act of production alone would involve an incriminating testimonial communication," 709 F.2d, at 1084.

The Third Circuit case of *In Re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3rd Cir. 1982), involved the issue of compulsory production of books and records and that Court continued to uphold the principles of *Boyd*. Because of the government defeat on this issue, the government sought and obtained a writ of certiorari with the United States Supreme Court, which granted the writ. On February 28, 1984, the U.S. Supreme Court reversed the above decision in *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984). In this most recent pronouncement from that Court, it reversed its former holding in *Boyd* and held that books and records were no longer protected by the Fifth Amendment. It reasoned that the Fifth Amendment protected only compelled testimony and not books and records; it relied heavily upon its rationale in *Fisher*, supra. But, while the Court decided to withdraw Fifth Amendment protection to books and records, it held that production of such books and records was entitled to such protection. Compulsory production of books and records via subpoena or summons contains communicative, testimonial aspects, reasoned the Court, and these testimonial communicative aspects are entitled to Fifth Amendment protection. The Court quoted *Fisher* as follows:

"Compliance with the subpoena tacitly concedes the existence of the papers by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena," 104 S.Ct., at 1242.

Thus, in *United States v. Doe*, the U.S. Supreme Court has held that the act of producing books and records is entitled to Fifth Amendment protection.

The U.S. Supreme Court, in *Boyd v. United States*, supra, clearly held that compulsory production via subpoena or summons of books, records and other documents in the possession of a witness was not permitted by the Fifth Amendment. This holding, lasting some 98 years, effectively prevented the government from obtaining such written documentation from one having potential criminal liability. In *United States v. Doe*, supra, the Court made a change in emphasis on the construction of the Fifth Amendment and held that the Amendment did not protect such records; and by making this change, a problem not addressed by *Boyd* arose. If the records are not protected from compulsory production by the amendment, what protection by the Fifth Amendment is left to a witness under process to produce documents? In *Doe*, the Court analyzed this situation and found that the mere act of producing such documents via compulsion in effect, non-verbally, provided the following:

- (a) Such production concedes that the requested documentation exists;
- (b) Such production proves that the same are in the witness' possession;
- (c) Such production proves that the witness believes that the documents so produced are those which are sought;
- (d) The act of production authenticates the documents.

Because of these non-verbal but communicative aspects present within any act of production, the Court held that the Fifth Amendment applied to the act of production. Thus, even though there is no longer any protection afforded by the Fifth Amendment for books and records, the Fifth Amendment's protection for the act of production accomplishes virtually the same result as under the *Boyd* doctrine.

This has proven to be the case for various cases decided subsequent to the opinion in *Doe*. In *In re Kave*, 760 F.2d 343 (1st Cir. 1985), an attorney was permitted to plead the protection of the Fifth Amendment because the request to produce certain documentary evidence would have in effect, under the "act of production" rule, forced her to testify against herself. In so holding, this Court held:

"The compelled production of such documents is prohibited only if there are testimonial aspects to the act of production itself. . . . This rule extends to the business records of a sole proprietor . . . In this context, the

rule has three elements: The Fifth Amendment protects against compulsory surrender of (1) personal business records, (2) in the possession of a sole proprietor or practitioner, (3) only with respect to the testimonial act implicit in the surrender itself," 760 F.2d, at 355, 356.

In the case of *In Re Grand Jury Matter*, 768 F.2d 525 (3rd Cir. 1985), the issue of the compulsory production of corporate records was in issue. While in the past such records have not been immune from production, here the Court held that the "act of production" rule applied and thus prevented the witness from being compelled to authenticate the corporate records by such production. In *United States v. (Under Seal)*, 745 F.2d 834 (4th Cir. 1984), a case decided some seven (7) months after *Doe*, the Fourth Circuit specifically held that personal and individual records can't be forcibly produced by any process, over a Fifth Amendment objection; see also *United States v. Cates*, 686 F.Supp. 1185 (D.Md. 1988). The *Doe* "act of production" rule was followed in *In Re Grand Jury Proceedings*, 747 F.2d 1098 (6th Cir. 1984), to prevent the compulsory production of corporate and partnership records. In *United States v. G & G Advertising Company*, 762 F.2d 632 (8th Cir. 1985), that Court held that corporate records could be compelled from a witness by means of a summons, but personal records could not; see also *United States v. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991). And finally, in *In Re Grand Jury Proceedings* on Feb. 4, 1982, 759 F.2d 1418 (9th Cir. 1985), it was determined that records of a party under investigation in the hand's of his attorney were entitled to the *Doe* "act of production" rule. Thus, according to the rationale of these cases, the compulsory production of private personal records cannot be obtained in view of a valid Fifth Amendment objection. Therefore, it is clear that the decision in *Boyd* still produces a legal result, even if from its "grave."

#### CONCLUSION

A summons or subpoena for individual books and records, either personal or business, can't be enforced over a Fifth Amendment objection because of the *Doe* "act of production" rule.

#### THE CIVIL PROCEEDING

The rule that a party or a witness can plead the right against self-incrimination in civil proceedings has been well established by an abundance of authority. In *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 (1973), the U.S. Supreme Court stated the rule as follows:

"The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings."

And subsequent decisions, examples of which are *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584 (1975), and *Pillsbury Company v. Conboy*, 459 U.S. 248, 103 S.Ct. 608 (1983), serve only to buttress this basic principle and apply it to specific situations. And this rule is followed by the federal appellate courts; see *In re Kave*, 760 F.2d 343 (1st Cir. 1985); *National Life Ins. Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595 (3rd Cir. 1980); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979); *In Re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086 (5th Cir. 1980); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983); and *United States v. Jones*, 703 F.2d 473 (10th Cir. 1983).

Decisions on this point by various state courts reveal that this rule is not a modern one. In *Morris v. McClellan*, 154 Ala. 639, 45 So. 641, 645 (1908), that Alabama court acknowledged that a party in a civil case could claim the right against self-incrimination. And in *International Brotherhood of Teamsters v. Hatas*, 287 Ala. 344, 252 So.2d 7, 21 (1971), the Court stated this principle as follows:

"The privilege against self-incrimination afforded by section 6 of the 1901 Constitution of Alabama has been held available to a party in a civil action."

Similar decisions have been made by courts in other States in the Union. In *State ex rel. Hudson v. Webber*, 600 S.W.2d 691, 692 (Mo. App., 1980), the facts involved were virtually identical to the facts of this case. There, a judgment debtor pleaded his right against self-incrimination in answer to questions posed to him regarding his financial affairs, his fear of incrimination likewise being related to federal taxes. The court sanctioned the answers of this party stating as follows:

"This privilege is available to a judgment debtor in proceedings pursuant to sections 513.380-513.390, RSMO 1978."

And it clearly seems that the great weight of other State authorities holds that the right applies in civil cases; see *Carson v. Jackson*, 466 So.2d 1188 (Fla.App. 1985); *Lewis v. First American*

Bank of Palm Beach, 405 So.2d 300 (Fla.App. 1981); Travis Meat & Seafood Co. v. Ashworth, 127 Ga. App. 284, 193 S.E.2d 166 (1972); In re Zisook, 88 Ill.2d 321, 430 N.E.2d 1037 (1982); Martincich v. City of Hammond, 419 N.E.2d 240 (Ind. App. 1981); Whippany Paper Board Co. v. Alfano, 176 N.J.S. 363, 423 A.2d 648 (1980); Banca v. Town of Phillipsburg, 181 N.J.S. 109, 436 A.2d 944 (1981); People ex rel. Anonymous v. Saribeyoglu, 131 Misc. 2d 647, 501 N.Y.S.2d 286 (1986); Byrd v. Hodges, 44 N.C.App. 509, 261 S.E.2d 269 (1980); Ohio Civil Rights Commission v. Parklawn Manor, Inc., 41 Ohio St.2d 47, 322 N.E.2d 642 (1975); Rey v. Means, 575 P.2d 116 (Okla. 1978); Caloric Corp. v. Unemployment Compensation Board of Review, 452 A.2d 907 (Pa. Comwlth. 1982); Ex Parte Stringer, 546 S.W.2d 837 (Tex.App. 1985); Smith v. White, 695 S.W.2d 295 (Tex.App. 1985); Affleck v. Third Judicial District Court of Salt Lake County, 655 P.2d 665 (Utah 1982); Eastham v. Arndt, 28 Wash. App. 524, 624 P.2d 1159 (1981); and In re Grant, 83 Wis.2d 77, 264 N.W.2d 587 (1978).