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Foreword: Equal Employment Law and the Continuing Need for Self-Help

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Title VII of the 1964 Civil Rights Act, during its first dozen years, has spawned more discrimination cases than all the other areas of civil rights combined. Innovative and persistent advocacy has produced a surprising number of supportive judicial precedents, and not an insignificant number of job opportunities for those in the classes protected by its provisions. But the character and scope of these successes raise serious doubt as to the long-term effectiveness and worth of equal employment laws.

Pessimism seems out of place given the widespread agreement that employment decisions should not be based on race, color, religion, sex, or national origin. Indeed, it is difficult to find serious disagreement with the frequently-quoted Fifth Circuit conclusion that job bias is "one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he [or she] qualifies and chooses."[1]

But if the country was really committed to eradicating the social and economic burdens borne by the victims of employment discrimination, it would have fashioned a far more efficacious means of accomplishing this result. At present, the law channels charges of employment discrimination into a burdensome, conciliation-oriented, administrative structure that functions, in the main, on a case-by-case basis, depending on effectively-prosecuted litigation and a sympathetic judiciary for even the hard-won progress thus far achieved. Even the most wildly optimistic among us cannot reasonably hope that reliance on this complex and uncertain process will close the wide gap in income standards and unemployment rates between black and white and male and female employees. For these are the statistical reminders that job discrimination and its effects have diminished little over the last decade.

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1. Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970), *quoted with approval in* Roe v. Gen. Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972), *and* Huff v. N.D. Tass Co. of Ala., 485 F.2d 710, 713 (5th Cir. 1973).

In analyzing the society's choice of so obviously an inadequate means of remedying perhaps its most serious racial problem, Professor Owen Fiss has written that equal employment laws are a limited strategy for conferring benefits on a racial class. In his view, "the limited nature of this legal strategy is not just a function of the circumstances of politics but rather reflects a deep commitment to the values of economic efficiency and individual fairness."[2] For Fiss, the most troublesome question is whether the historical legacy of the class will, or should, moderate that commitment so as to yield through enactment or construction, a more robust strategy for law. Fiss believes the legacy supplies an ethical basis for the desire to improve the relative economic position of blacks, and yet, he fears it also explains why "a law that does no more than prohibit discrimination on the basis of race will leave that desire, in large part, unfulfilled."[3]

In attempting to assess the hundreds of new equal employment decisions that pour from the courts in a steady stream, it is easy to become so involved in the technical complexities increasingly marking litigation in this field that the structural compromises recognized by Professor Fiss are not given the importance they deserve. As a result, there is a tendency to equate activity in the field with progress when, in fact, much of the litigation even when successful, has real significance for very few workers. Careful scrutiny of even favorable decisions reveal conditions and restrictions on relief that limit the holding to overt instances of discrimination seldom resorted to by contemporary employers. The protection provided by such precedents in more difficult issues is tenuous and undependable.

To cite a few examples, it is becoming increasingly clear that the very tight review of employment tests mandated by the Supreme Court in *Griggs v. Duke Power Co.*[4] was intended more for blue collar positions than for those in the higher echelons of the work force. The futile attempt by civil rights lawyers representing minority law graduates to convince courts to apply the *Griggs* standard to bar examinations is all too clear a signal of judicial reluctance to require meaningful validation of tests used for positions of significance.[5] And, after the confusing but clearly unsupportive language

2. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 313 (1971).

3. *Id.* at 314.

4. 401 U.S. at 424 (1971).

5. The decisions, all of which found that Title VII was not intended to apply to bar examinations, are cited and summarized in Woodard v. Va. Bd. of Bar Examiners, 420 F. Supp. 211, 213-14 (E.D. Va. 1976).

in *Washington v. Davis*,[6] there is understandable concern that *Griggs'* "strict scrutiny" of invalidated tests that disproportionately bar minorities and women may have been eroded to an irreparable degree.

As another example, the seniority issue seemed to be settled until the recent recession produced a spurt of litigation generally referred to as the "layoff" cases.[7] Most courts had followed Judge John Minor Wisdom's thoughtful analysis,[8] and ruled that nothing in Title VII prevented setting aside departmental seniority rules in firms where minority employees had been excluded because of discrimination from gaining seniority in all-white departments. When openings became available in such departments, Judge Wisdom found minority workers with greater plant seniority entitled to those openings over whites whose frustrated expectations were based solely on their departmental seniority.

In effect, Judge Wisdom, and those courts which adopted his "rightful place" approach, were granting minority workers "fictional" departmental seniority measured by their plant seniority. But when the economic downturn converted openings into layoffs, courts proved unwilling to disappoint white workers' expectations that discharge would be handled on a "last-hired, first-fired" basis. Even when they decimated the minority work force, courts found that the disproportionate impact on recently hired minorities caused by discharging workers under reverse seniority layoff policies did not violate Title VII. Nor, courts have agreed, may racial balance in the work force be maintained through quota layoffs. The Supreme Court has suggested, albeit in a case not involving layoffs,[9] that victims of job discrimination may be entitled to "fictional" or "constructive" seniority dating to the time they can prove they sought a job or transfer which was refused for reasons violating Title VII. But relatively few workers will be able to supply the necessary proof, and thus the law, as presently interpreted, leaves minority workers without protection against the adverse effects of past discrimination at just those points in the economic cycle when they most need help.

As a final example, there are indications that the Supreme Court

6. 424 U.S. 940 (1976).

7. Chance v. Bd. of Examiners, 534 F.2d 993 (2d Cir. 1976); Watkins v. United Steel Workers, Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Cen. Power & Light Co. v. IBEW, 508 F.2d 687 (3d Cir. 1975); Waters v. Wis. Steel Works, 502 F.2d 1309 (7th Cir. 1974).

8. Local 189, United Paper Makers & Paper Workers v. United States, 416 F.2d 980 (5th Cir. 1969).

9. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

is losing its earlier sensitivity to the special scrutiny appropriate when minorities complained of discrimination by labor unions.[10] The Court's willingness[11] to recognize Title VII as a separate remedy available even to those workers who have taken their discrimination charges to a grievance procedure authorized by a collective bargaining agreement is praiseworthy, but either approach requires long months (and often years) of litigation, and neither remedy is likely to be as quick and effective as protests and other direct action techniques intended both to end biased practices, and gain affirmative programs of minority hiring and upgrading that are often opposed by both company and union.

Presented with this conflict in *Emporium Capwell Co. v. Western Addition Community Organization,*[12] the Court opted for limiting minority workers to the existing employment discrimination remedies, on the basis that those remedies are adequate, and that a contrary result would prove unnecessarily disruptive of the collective bargaining process. The Court rejected the District of Columbia Circuit's view that employees' protest activities against racial discrimination were entitled to unique status under the National Labor Relations Act (NLRA) and Title VII. Unless the National Labor Relations Board was to find that the union was actually remedying the discrimination to the fullest extent possible by the most expeditious and efficacious means, the court would have found employees engaged in such activity were protected from discharge by section 7 of the NLRA.[13]

One member of the appellate court, Judge Wyzanski, dissented because it was clear to him that, given the clear conflict of interest between the interests of the union's white majority and the black minority, the union could not meet the high standard of representation set by the court majority.[14] Judge Wyzanski saw this situation as only superficially analogous to labor decisions where a minority within an appropriate bargaining unit seeks, without consent of the representative selected by the majority, to obtain different wages or a different agreement.

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10. *See, e.g.,* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969). *See also* Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).

11. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

12. 420 U.S. 50 (1975).

13. Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973), *rev'd sub nom.* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975).

14. *Id.* at 932 (Wyzanski, J., dissenting).

Suggesting that the failure to construe the NLRA as permitting minorities to bargain for themselves on issues of racial discrimination might raise issues as to the constitutionality of the NLRA, Judge Wyzanski cut through legal presumptions of what should happen in union representation to reach what, in so many cases, is what actually happens. "When," he explained, "the minority consists of non-whites who seek for themselves what they regard as equality of opportunity, it is to be expected that the position is, if not hostile to, or at least uncongenial to, certainly not fully shared by, a majority of whites in the same unit."[15] Judge Wyzanski was willing to assume that whites might be tolerant, or even generous, but that their short-term interests would not be well served by the affirmative action policies sought by the non-whites. He concluded that "it is essentially a denial of justice to allow the white majority to have the power to preclude the non-whites from dealing directly with the employer on racial issues, whether or not this is in disparagement of the rights of the union representative."[16]

The implications of Judge Wyzanski's statement are much broader than perhaps he intended. He recognizes the limitations, based on majority self-interest, imposed on the expression of minority concerns in the collective bargaining process. But similar restraints are present and functioning whenever real relief for minority workers in the job market would require more than nominal sacrifice of majority interests—deemed valid because so long enjoyed. The failure of courts to follow their own logic in the testing and seniority cases when presented with the bar exam and layoff cases illustrate that what Professor Fiss sees as the limited strategy adopted by society for remedying employment discrimination may, in fact, prove of little value to minorities in other than those most blatant situations where the community conscience will not permit a particular form of racial exploitation to continue, at least not in its most unabashed form.

Minority workers' understanding that meaningful gains in their economic status will not likely be obtained without resort to pressures and protests aimed specifically at that goal is not rendered less accurate because the courts generally have refused, as in the *Emporium* case, to recognize self-help rights.[17] The challenge for those concerned about equal employment is to recognize the inadequacies in existing remedies, acknowledge the serious barriers to

15. *Id.* at 938.
16. *Id.* at 938-39.
17. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

strengthening these remedies, and design techniques for better protecting those workers who are committed to effecting their own emancipation from the still-pervasive job servitude rooted in the continuing impact of past discriminatory policies.

Self-representation is a critical key to self-help efforts. The black workers in the *Emporium* case phrased it well:

> To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy. Suppression, intentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society even if, which is probably at least the short-term consequence, the result is that industrial peace is temporarily adversely affected. In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over.[18]

18. 485 F.2d at 940.