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Discrimination Bans Demonstrate Approaching Maturity of Employment Law

By Theodore J. St. Antoine

The pervasive message of this symposium sponsored by the Labor Relations Law Section, whether or not intended by the individual authors, is that American employment law is moving beyond adolescence and may be approaching maturity.

Early adolescence, at least on a nationwide scale, was ushered in by such New Deal legislation as the Wagner Act, the original National Labor Relations Act¹ which guaranteed workers in most industries the right to organize, and which regulated the activities of unions and employers in dealing with one another.

During the past two decades, however, the spotlight shifted from the institutional relationships of management and organized labor and focused much more on the needs and concerns of the individual employee in the workplace. Title VII of the Civil Rights Act of 1964,² the Age Discrimination in Employment Act,³ the Vocational Rehabilitation Act,⁴ state statutes paralleling and augmenting that federal legislation, and recent, widespread modifications in the common law doctrine of employment at will,⁵ are all manifestations of this sharply heightened sensitivity to individual rights.

No society can claim that it has attained full maturity until it has eradicated all invidious discrimination among its members, including reliance on irrelevant employee characteristics in making job decisions. The articles that follow attest, albeit indirectly, that we have made substantial progress toward that goal.

The primary substantive emphasis in these pieces is not on race, the one quality which bears no functional relation to the capacity to perform a job, but rather on sex, age, and handicapped status — all factors which in certain circumstances may implicate bona fide occupational qualifications. While Sheldon Stark analyzes a number of cases involving alleged racial discrimination, it is for the purpose of demonstrating methods of proof in discrimination cases generally, not for the purpose of conveying any lesson about race as such.

From all this emerges a profound message about the nature of discrimination itself, part of it encouraging and part of it disquieting.

The Congress that passed the Civil Rights Act in 1964 probably believed that the major vice to be remedied was discrimination in its classic sense — a deliberate, calculating, malicious, demeaning exclusion of blacks, women, and other minorities from employment or from preferred positions in employment. Today that problem is well on the way to solution.

A knowledgeable acquaintance who has been close to the EEOC (Equal Employment Opportunity Commission) enforcement operation since its inception estimates that less than ten percent of the Commission's litigation now involves truly intentional discrimination — so-called "disparate treatment." That is good news indeed. Despite all the pessimistic forebodings, law has been able to elevate people's morality — or at least their behavior.

Sadly, there is another, bleaker side to the picture. The dreary statistics are familiar to everyone who works in this field, and I shall not rehearse them at any length. It is enough to observe that after two decades of federally enforced nondiscrimination in employment, racial minorities are still twice as likely as whites not to have jobs. The median family income of blacks as

compared with that of whites has improved negligibly, from 54 percent in 1964 to 56 percent in 1981. Women's earnings during this period have hovered with maddening consistency around the figure of 59 percent of men's earnings.

What Congress and the country failed to reckon with in 1964 were the "built-in headwinds" of age-old educational deprivations, artificial job qualifications, and diverse exclusionary social customs.

In the most important single decision delineating the elements of a Title VII violation, *Griggs v Duke Power Co.*, 401 US 424 (1971), the Supreme Court tackled the problem head-on, and totally transformed the very concept of "discrimination." Speaking for a unanimous Court, Chief Justice Burger declared that Title VII did not merely outlaw intentional discrimination, or "disparate treatment." Also forbidden were facially neutral employment practices that had a "disparate impact," a disproportionately adverse effect on protected groups, unless the practices could be justified as a matter of "business necessity."

Thus a high school diploma or the passing of a certain IQ test could ordinarily not be made a requirement for a janitor's position, if that would disqualify an inordinate percentage of minority applicants. But an employer could still demand that its secretaries know how to type, or that any other employee possess skills that were genuinely "job related."

In theory this new approach would seem unexceptionable. In practice the substitution of an "effects" standard for an "intent" standard has led to over a dozen years of intense litigation and bureaucratic wrangling. For a while it even appeared that one unfortunate casualty of the "disparate impact" doctrine would be the banishment of all job testing from the employment scene.

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Ideally, objective job-related tests should constitute one of the surest safeguards for minorities and women against the subtlest, least discernible forms of discrimination. By 1978, however, EEOC was able to join with the other major federal antidiscrimination agencies in issuing Uniform Guidelines on Employee Selection Procedures,⁶ which included criteria for validating the most common types of employment tests.

The continuing significance of the intents-effects distinction is most evident in Robert Vercrusse's paper on "comparable worth." Although the Supreme Court has not squarely addressed the issue, it is increasingly likely that under Title VII an employer may not deliberately pay women at a rate that is out of line with what it pays men, even though the jobs are not substantially identical in content and thus there is no violation of the Equal Pay Act.⁷ The hard question is whether an employer may pay women a substandard wage if it has no intention to disadvantage them because of their sex, but is merely responding to the going market rate.⁸ The economic implications of this are staggering.

Similarly, when Constance Ettinger discusses an employer's duty to accommodate the handicapped employee, or when John Runyan discusses an employer's claim that a handicapped employee may have a greater propensity for injury, what is at stake at bottom is the extent to which an employer must do more than act with innocence of motive.

And one of the knottier issues confronting Kathleen Bogas and Susan Fellman is whether an employer should be held liable for sexual harassment if an employee's conduct or communication "of a sexual nature" has the "purpose or effect" of creating an offensive working environment for a fellow employee.

It may even be that the practical consequences of such technical procedural matters as the role of arbitration in discrimination cases generally, covered by Barry Brown, or the role of the jury in age discrimination suits, covered by Timothy Carroll, will be much affected by the varying attitudes of different decision-makers toward the subjective state of mind of the respondent,

as distinguished from the objective impact upon the alleged victim.

There is one thorny aspect of discrimination that the articles in this symposium do not touch. If we are to secure genuine equality of job opportunity for the races and the sexes within the foreseeable future, something more is plainly needed than the mere prohibition of positive acts of discrimination and the substitution of a policy of passive neutrality. "Affirmative action" of the sort that has been ordered by the federal courts and federal agencies, and occasionally undertaken by private parties on their own, has held out the greatest promise of success and at the same time has aroused the fiercest opposition.

Where a specific statutory violation on the part of an employer or union has been found, the courts have generally been prepared to require "quota" hiring or similar numerically oriented remedial action, disposing rather easily of objections of "reverse discrimination" against whites or males.⁹ Even here, however, the Second Circuit has distinguished between a hiring quota

and a promotion quota and has declined to sustain the latter as a remedy when it would constitute "reverse discrimination" against a relatively small group of readily identifiable individuals.¹⁰

In *United Steelworkers v Weber*, 443 US 192 (1979), the Supreme Court found valid under Title VII a private, voluntary race-conscious affirmative action training program initiated pursuant to a collective bargaining agreement in order to eliminate job segregation in an employer's plants. Affirmative action mandated under Executive Order 11246 as a condition for securing government contracts, or voluntarily adopted by a public employer, raises constitutional questions not present in *Weber*.

In *Fullilove v Klutznick*, 448 US 448 (1980), the Supreme Court upheld (6-3) the constitutionality of the Federal Public Works Employment Act of 1977, which set aside ten percent of each grant under a short-term program for "minority business enterprises." But *Fullilove* emphasized the quite express

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congressional authorization for the challenged program, in direct response to notorious, long-standing abuses in the construction industry, factors not present in the more broadly applicable Executive Order program.

So far only the courts of appeals,¹¹ and not the Supreme Court, have sustained the validity of the latter program against statutory and constitutional attacks.

This past term, in *Firefighters Local 1784 v Stotts*, 52 USLW 4767 (1984),¹² the Supreme Court backed away from its earlier approval of race-conscious affirmative action, at least where it would impair white workers' rights under a bona fide seniority system.

All that was directly at issue in *Stotts* was a trial court's power to modify a consent decree setting minority hiring and promotion goals in a city fire department, so as to limit the layoffs of black firefighters in a subsequent financial crisis. The initial settlement had been reached without a formal judicial finding of discrimination on the part of the city, and layoffs were not mentioned.

Nonetheless, the Court went out of its way to declare that a court would not have the authority to disregard a seniority system even in fashioning a remedy for a proven statutory violation.

The Court reiterated the rule from *Franks v Bowman Transportation Co.*, 424 US 947 (1976), and *Teamsters v United States*, 431 US 324 (1977), that retroactive competitive seniority may only be awarded to the actual, identified victims of discrimination, and that mere membership in the disadvantaged class is insufficient to warrant a seniority award.

There is no gainsaying the reality that affirmative action and preferential treatment in favor of one race or sex raise grave moral questions, as well as questions going to the core of American traditions of individual merit and group neutrality. The essence of affirmative action is an effort to achieve justice among groups; in ordinary circumstances the essence of morality and law alike is justice among individuals.¹³

The Appalachian white or the white ethnic from a ghetto may person-

ally be far more disadvantaged by his/her background than the third-generation offspring of a professional black family, and yet it is the latter who will be favored under the usual affirmative action plan. I justify this, not without misgivings, on the ground that we are dealing with no ordinary situation but with a national problem of stunning dimensions. A group wrong has been perpetrated for generation upon generation, and the wounds are deep, pervasive, and persistent. Heroic measures are called for in the treatment, specifically, a group remedy to cure this group wrong.

Even as we indulge in this strong medicine, however, we must try to maintain a clear head. For the sake of all of us, black and white, male and female alike, we must not allow the drug of race-conscious and sex-conscious behavior to become habit-forming. Affirmative action must cease when its goals have been substantially accomplished.

Termination of these programs may not be as difficult as some might imagine. The common sense, not to mention self-interest, of society at large will make itself felt in due course. The pride of the beneficiaries themselves will call for an end to favored treatment when it is no longer needed. Certain special admissions programs for Oriental students have now been phased out on the West Coast.

Discrimination lawyers, like dentists and cancer researchers, seek the demise of their own specialties. I am told by practitioners around the country that there has already been a marked decline in class actions involving race. In a few more decades anti-discrimination legislation should be as anachronistic as the Sunday blue laws. And some happy successor of mine will be penning a foreword to a symposium on the mature employment law of that day, which will doubtless embrace such subjects as legislation ensuring still greater economic security and environmental protections for workers, and an even larger role for them in the governance of industrial enterprises.




Footnotes

1. 49 Stat 449 (1935), as amended, 29 USC §151.
2. 78 Stat 241, 253 (1964), as amended, 42 USC §2000e.
3. 81 Stat 602 (1967), as amended, 29 USC §621.
4. 87 Stat 357 (1973), as amended, 29 USC §701.
5. See, e.g., C. Bakaly & J. Grossman, *Modern Law of Employment Contracts* (1983); H. Peritt, *The Law of Wrongful Dismissal* (1984); Symposium, "Individual Rights in the Workplace," 16 *U Mich J L Ref* 199 (Winter 1983).
6. 43 Fed Reg 38290 (1978).
7. See, e.g., *IUE v Westinghouse Elec Corp*, 631 F2d 1094 (3d Cir 1980), cert denied, 101 S Ct 3121 (1981).
8. One might ask, of course, whether an employer who comes to realize that applying the going market rate will invariably disadvantage his female workers is truly free of an intent to discriminate.
9. E.g., *Carter v Gallagher*, 452 F2d 315 (8th Cir 1971), cert denied, 406 US 950 (1972); *NAACP v Allen*, 493 F2d 614 (5th Cir 1974); *Rios v Steamfitters Local 638*, 501 F2d 622 (2d Cir 1974).
10. *Kirkland v New York State Dep't of Correctional Serv.*, 520 F2d 420 (2d Cir 1975), cert denied, 429 US 823 (1976).
11. *Contractors Ass'n of Eastern Pennsylvania v Shultz*, 442 F2d 159 (3d Cir 1971), cert denied, 404 US 854 (1971); *Associated General Contractors v Altschuler*, 490 F2d 9 (1st Cir 1973), cert denied, 416 US 957 (1974).
12. *Cf. Bratton v City of Detroit*, 704 F2d 878 (6th Cir 1983), cert. denied, 104 S Ct 703 (1984) (voluntary quota promotion program in city police department).
13. See, e.g., *McDonald v Santa Fe Trail Transp Co*, 427 US 273 (1976) (any individual, whether white or black, is protected under Title VII and 42 USC §1981). See also *City of Los Angeles v Manhart*, 435 US 702 (1978) (female annuitants must be treated as individuals instead of components of a sexual class for Title VII purposes).

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