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MISSISSIPPI COLLEGE LAW REVIEW

INTRODUCTION TO LABOR AND EMPLOYMENT LAW SYMPOSIUM

*Alfred W. Blumrosen**

The invitation to introduce this symposium came through the auspices of friend and former colleague J. Allen Smith. It has provided me with an opportunity to reflect on the extraordinary legal radiations from the simple but profound principles of Title VII of the Civil Rights Act of 1964. It also brought backs vivid recollections of the late '60's, when, as the first Chief of Conciliations at EEOC, I tried to conciliate Title VII claims in the South. Now, of course, the principles of Title VII have achieved wide acceptance. It was beyond imagination then that the equal employment opportunity principle would spread so widely that this symposium would have a special focus on the "new frontier" of opportunities under the Americans with Disabilities Act (ADA).[1]

This symposium contains an elegant reminder from Professor Cornelius J. Peck, that courts may limit the scope of workers' rights by adopting erroneous or over simplified assumption about industrial relations.[2] Professor Peck illustrates this point by examining the concept of "employer" under one of our oldest labor laws, the National Labor Relations Act. The issue he examines – the nature of the employer – is central to all statutes which address the employment relationship. The assumption that "the employer" is a small business person struggling in a "mom and pop" environment is, as he points out, often so unrealistic as to distort the interpretation of the law. This tendency to oversimplify the industrial relations

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1. American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1990)) [hereinafter ADA].

2. Peck, *The Meanings of Employer: Consequences for the National Labor Relations Act*, 11 MISS. C. L. REV. 309 (1991) [hereinafter Peck].

system so as to minimize important workers' rights has also appeared in Title VII.[3] This tendency to oversimplify can be addressed by the kind of careful analysis of real economic conditions that Professor Peck has provided.

The Congress has begun to recognize that all employers are not alike, and that larger employers can be expected to bear a heavier burden of social responsibility. This is true not only with respect to the WARN statute which Professor Peck addresses,[4] but also with recent amendments to equal employment laws. In both the ADA and the 1991 Civil Rights Act, Congress has mandated that larger employers be subjected to more intensive legal requirements. Under the ADA, the larger the employer, the more extensive is its obligation to accommodate to the employee's disability.[5] Under the Civil Rights Act of 1991, the extent of liability for punitive and compensatory damages for intentional discrimination is directly related to the number of employees of the employer.[6]

Three articles in this symposium deal with the newest anti-discrimination law, the Americans with Disabilities Act.[7] Their collective analysis demonstrates the range of issues which remain to be addressed on a "case by case" basis, despite the efforts of Congress and the EEOC, to solve as many problems as possible through rulemaking.[8] Congress required the EEOC to adopt rules to interpret the law. This is a desirable feature of modern regulatory legislation. Congress cannot "fine tune" a massive regulatory statute. Therefore, it should require agencies to do so, in order to give guidance to interested parties, rather than leave major issues to the vagaries of "case by case" adjudication.

Nevertheless, as the three articles demonstrate, many issues under the ADA will be litigated over the years. In light of this fact, it is somewhat surprising that employers offered relatively little resistance to the ADA (or to the 1990 amendments to the Age Discrimination Act[9]), as compared to their objections to extension of rights to be free from sex, race or national origin discrimination in the 1991 Civil Rights Act.[10] The wide distribution of disabilities and the inevitability

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3. *See* Blumrosen, *Society In Transition II: Price-Waterhouse and The Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1024-30 (1990) (all Justices of the Supreme Court assume that Title VII must be construed under the presupposition that discrimination is as pervasive as it was in 1965 or that it is now an uncommon phenomena).

4. Peck, *supra* note 2, at 342-43.

5. *See* Gerson & Addison, *Handicapped Discrimination Law and the Americans with Disabilities Act*, 11 MISS. C. L. REV. 233 (1991).

6. *See* § 102(b)(3)(A)-(D) Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified at 42 U.S.C. 1981 (1991)) (caps of $50,000 for employers of 15-100 employees; $100,000 for employers of 101-200 employees; $200,000 for employers of 201-500 employees; and $S300,000 for employers of more than 500 employees).

7. *See* Gerson & Addison, *Handicapped Discrimination Law and the Americans with Disabilities Act*, 11 MISS. C. L. REV. 233 (1991); Irby, *The ADA: The Employer's Perspective*, 11 MISS. C. L. REV. 263 (1991); Mikochik, *Employment Discrimination Against Americans with Disabilities*, 11 MISS. C. L. REV. 255 (1991).

8. *See* ADA § 106 requiring the EEOC to issue substantive regulations which would have the force of law.

9. The Age Discrimination Act was amended in 1990 to reverse the decision in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989). *See also* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (codified at 29 U.S.C. §§ 621-623 (1990)).

10. Employer resistance to the Civil Rights Act of 1990 contributed to President Bush's veto, which was sustained in the Senate.

of aging made it easier for white males to empathize with the disabled and the aged, than with women or minorities. The irony, of course, is that anti-discrimination laws benefiting older and disabled workers emerged only after race, national origin and sex discrimination laws were understood to be necessary.

We still seem hesitant to recognize that race, national origin and sex discrimination are matters of universal conern. Despite this hesitancy, the national effort to establish equal employment opportunity has had remarkable success, in both the economic and legal spheres. The improvement in occupational distribution of both minorities and women between 1965 and 1990 has been most impressive.[11] The 1991 Civil Rights Act was passed with the largest majorities of any Civil Rights Act in our history.[12] That statute repudiates the 1989 Supreme Court decisions which had narrowed both Title VII and the post civil war Civil Rights Act.[13] In addition, the 1991 Act provides for compensatory and puntive damages for intentional discrimination under Title VII and the ADA.[14] It leaves in place the affirmative action opinions of the Court, and makes it more difficult to challenge affirmative action provisions in court decrees.[15] Title II, the "Glass Ceiling" Act, adopts the methodology which has been basic to affirmative action programs for twenty years.[16]

The 1991 Civil Rights Act addresses a problem which has been of special concern in the South. That problem relates to the definition of "intent" to discriminate. Is the concept limited to a deliberate conscious desire to subordinate an individual because of race or sex, which was characteristic of the economic and social system in the South before the civil rights era? Or does it encompass the subtle subconscious assumption of the inferiority of minorities or women which may influence "subjective judgments" which affect employment decisions?[17] This issue was not important in the early years of the Civil Rights Act in the South because of the background of overt discrimination. The primary question at that time was whether employers' actions perpetuated the effects of prior deliberate discrimination.[18] As the era of overt racial segregation faded, and evidence of such deliberate

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11. Blumrosen, *Society in Transition I: A Broader Congressional Agenda for Equal Employment – The Peace Dividend, Leapfrogging, and Other Matters*, 8 YALE L. & POL'Y REV. 257, 260-62 (1990).

12. The vote was 93-5 in the Senate, 137 CONG. REC. S15503 (daily ed. Oct. 30, 1991); the vote in the House was 381-384, 137 CONG. REC. H9557-58 (daily ed. Nov. 7, 1991).

13. *See* Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Gold Mine for Their Lawyers*, 15 EMPLOYEE RELATIONS L.J. 175 (1989).

14. *See supra* note 5.

15. Civil Rights Act §§ 108, 116.

16. Civil Rights Act § 202(a). That methodology involves (1) identifying "underrepresentation" of minorities or women in a particular job category and (2) seeking to eliminate "artificial barriers" which have contributed to that underutilization.

§ 202 in its entirety revives the issue of the relationship between appropriate affirmative action and inappropriate use of "quotas." *See* Blumrosen, *Society in Transition III; Justice O'Connor and the Destablization of the Griggs Principle of Employment Discrimination*, 13 WOMEN'S RTS L. REP. _____ (1991).

17. Welch, *Removing Discriminatory Barriers; Basing Disparate Treatment Analysis On Motive Rather Than Intent*, 60 S. CAL. L. REV. 733 (1987).

18. *See* BAZEMORE V. FRIDAY, 478 U.S. 385 (1986); SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 3-26 (2d ed. 1983).

discrimination faded with it, the question became whether subjective attitudes associated with the previous era were also encompassed within the concept of "intent" to discriminate.

Two recent cases suggest that "subjective judgments" which incorporated unconscious bias are embraced within the concept of illegal discrimination under Title VII. In *Watson v. Fort Worth Bank and Trust,*[19] the Court held that such subjective judgments were subject to the "disparate impact" branch of Title VII law.[20] The 1991 Civil Rights Act supports these conclusions.

First, it validates the disparate impact doctrine of Title VII, as it was understood prior to the 1989 Supreme Court decision in *Wards Cove Packing Co. v. Antonio.*[21] This would include the *Watson* case applying disparate impact law to subjective judgments which was decided in 1988.

Secondly, it reversed the aspect of the *Price Waterhouse* case which absolved the employer of Title VII liability in "mixed motive" cases if the employer could show that it would have made the "same decision" against the employee in the absence of discrimination.[22] Congress adopted the view that Title VII liability was "established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[23]

This provision recognizes the possibility of multiple motivations for an employment decision. It does not suggest that each of the "motivating factors" had to be "conscious" or "rational." The 1991 Act, together with *Watson* and *Price Waterhouse* establish that subjective judgments which harbor unconscious bias are subject to both disparate impact and disparate treatment branches of Title VII law. This is a realistic conclusion. While the era of deliberate subordination is over, changes in deeply held attitudes are most difficult to achieve, and long held and often subconscious assumptions of inferiority fade slowly.[24]

The 1991 Civil Rights Act did impact directly on one of the papers in this symposium. Professor Monique C. Lillard critiqued the "Flimsy Canon" which justified denying extraterritorial effect to Title VII.[25] She called for an amendment to alter the decision. The amendment has been adopted as part of the Civil Rights Act

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19. 487 U.S. 977 (1988).

20. *Id.* at 999-1000.

21. 490 U.S. 642 (1989); *see* Civil Rights Act § 2(2) (*Wards Cove* weakened the scope and effectiveness of civil rights laws); § 3(3) (confirming statutory authority for disparate impact suits); § 3(4) (to respond to recent Supreme Court decisions by expanding scope of relevant civil rights statutes).

22. The "same decision" doctrine had been criticized. *See* Blumrosen, *Society In Transition II: Price Waterhouse and The Individual Employment Discrimination Case,* 42 RUTGERS L. REV. 1023, 1033-42 (1990).

23. Civil Rights Act § 107(a). § 107(b) provides for tailored relief if the employer demonstrates it would have made the same decision absent discrimination.

24. The collapse of the Soviet Union demonstrated that regional differences which had been suppressed for 73 years under a totalitarian regime, reemerged with vigor as soon as the control of the central government was relaxed.

25. Lillard, *Flimsy Precedent and Narrow Vision: A Call for Congressional Amendment of Title VII and the ADA in Response to* Bourselan, 11 MISS. C. L. REV. 271 (1991).

of 1991.[26] Under this amendment, employers may defend against extraterritorial discrimination claims on the grounds that the law of the foreign country required discrimination. Is "law" to be defined as including customary policies, "common law," or only legislation? Labor law now embraces both the political and commercial aspects of international law. Professor Lillard's article, written to advocate a view which Congress has now adopted, has become a useful examination of reasons for the adoption of this new law.

Labor and employment law is in no danger of becoming obsolete. While organized labor and collective bargaining have declined in influence, the past quarter century has seen an extraordinary growth in the statutory rights of workers. Workers' rights have become more central to the political/legislative process than ever before. The range of statutory matters addressed in these essays attest to the continuing vitality of the field and to the high quality of its scholarship.

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26. Civil Rights Act § 109(a) expands the definition of employee in both Title VII and the ADA to include: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." § 109(b) provides an exemption with respect to an employee in a workplace in a foreign country, "if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located."