The College of Labor & Employment Lawyers

Summer 2004 Newsletter
Vol. 6 No. 2

INSIDE THIS ISSUE:

ANNUAL DINNER SET FOR AUGUST 8th

The plans are being made for this summer's Annual Induction Dinner. Invitations have been mailed and responses are being returned for an evening in the ole South! This year, the ninth celebration of new Fellows will take place in Atlanta at The Biltmore on Sunday, August 8th. Our cocktail reception will take place in the beautiful Imperial Ballroom, followed by dinner in the grand Georgian Ballroom.

The Biltmore

Originally built in 1924 as Atlanta's premier hotel, the eleven-story building emerged via a partnership between Atlanta's William Candler and New York hotel mogul John McEntee Bowman. Candler financed the $6 million development with his share of the $25 million buyout of his father's Coca-Cola empire. The Biltmore Hotel became the focal point of social life in Atlanta, hosting a wide variety of events from galas, wedding receptions and high-society teas to civic meetings and local political fundraisers.

In its heyday, The Biltmore Hotel's clientele included such luminaries as William Randolph Hearst, Charles Lindbergh, Betty Davis, Bob Hope, Vivian Leigh and Presidents Roosevelt and Eisenhower. The Biltmore has also been the backdrop for several feature films including *Driving Miss Daisy* and *Love Potion #9*. The radio towers atop the building were installed in 1925 when WSB Radio, the first commercial broadcast station licensed in the South, made The Biltmore its home.

The Imperial Ballroom

Following changes in ownership and years of steady decline, The Biltmore closed its doors in 1982. After sixteen years of neglect and abandonment, the building underwent a total renovation in 1999, transforming the former hotel into a combination of Class A office space, retail and special event space. With the renovation of The Georgian and Imperial Ballrooms, and now listed on the National Register of Historic Places, The Biltmore has quickly recaptured its standing as one of the social and business epicenters of Atlanta. Featuring original handcrafted plaster relief ceilings, restored crystal chandeliers, Palladian windows and Tennessee marble floors, the elegant ballrooms of The Biltmore are sure to be an elegant backdrop for an evening of grandeur and celebration.

The Georgian Ballroom

REFLECTIONS ON TITLE VII

By Judith A. Lonnquist

Ms. Lonnquist is a plaintiff-side lawyer in Seattle, Washington and was inducted as a Fellow of the College in the Class of 2003.

I graduated from law school the year after Title VII passed the U.S. Congress. Nonetheless, when I interviewed for my first job with labor firms in Chicago, several management firms who had invited me back for several interviews finally told me that the wives of the partners would not want the firm to hire a young female lawyer. One prominent firm told me after an interview with the senior partners that they would hire me except for the fact that I was "young, pretty, and a woman."I responded that time would take care of the first, I supposed I could do something about the second, but I'd be damned if I would do something about the last. I took a job at a union firm where those attributes were viewed as positive rather than negative. My personal experience was the genesis of a plaintiff's practice that has lasted 38 years.

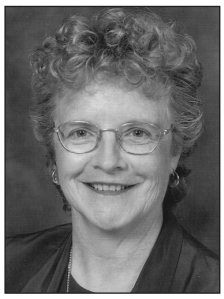
Early agency rulings by the Commission outlawed sex-segregated help want ads, corporate policies requiring discharge of married women, and race-segregated facilities.

As a young lawyer, I visited plants in the South where water fountains and bathrooms were still labeled "White"and "Colored"; confronted newspaper want ads that were segregated between "help wanted male"and help wanted female"; and represented unions challenging race-segregated job categories. Cases that I undertook challenged an airlines' marriage prohibition for flight attendants, pay practices of paying men more than women for similar jobs with different titles, discharges because of pregnancy, and race- and national origin-based job assignments. Such practices were commonplace prior to and for several years following Title VII's enactment.

As the years progressed, more cases were brought and more victories obtained under Title VII. Because, until 1973, the EEOC had no authority to institute its own litigation, the victories of the early years were brought exclusively by private litigants. Early agency rulings by the Commission outlawed sex-segregated help want ads, corporate policies requiring discharge of married women, and race-segregated facilities. At the Newport News Shipbuilding and Drydock Company, an EEOC conciliation agreement resulted in promotion of 3200 African American workers and equal access to apprenticeship programs.

Among early court victories were: *Lorena Weeks v. Southern Bell* (invalidating discrimination based on state "protective"laws);[1] *Phillips v. Martin Marietta* (discrimination against women with small children is "sex-plus"discrimination);[2] and *Griggs v. Duke Power* (employer using "neutral" rule which disparately impacts protected class must prove business necessity).[3]

In 1973, Congress greatly expanded Title VII, lowering the threshold number from 25 to 15 employees, adding coverage of federal, state and local governments, lengthening the filing deadlines, and vesting EEOC with litigation authority, among other changes. Also in 1973, the Supreme Court decided *McDonnell Douglas v. Green* (shifting burdens of proof)[4] and *Espinoza v. Farah Mfg. Co.* (holding that non-citizens working for American companies are protected by Title VII).[5] The ensuing decade saw further legal milestones: *Alexander v. Gardner-Denver* (union grievance does not preclude Title VII claim);[6] *Albemarle Paper v. Moody* (discriminatee is presumed to be entitled to back pay);[7] *TWA v. Hardison* (employers must accommodate religious beliefs of employees);[8] *Los Angeles Dep't. of Water v. Manhart* (fact that women live longer than men does not justify disparate fringe benefits);[9] and *United Steel Workers v. Weber* (private sector employers may adopt affirmative action plans).[10]



Judith Lonnquist

From 1985 to 1994, advancement of Title VII through the EEOC and the courts continued. Court decisions included *Meritor Savings Bank v. Vinson* (establishing sexual harassment as a violation of the Act);[11] *UAW v. Johnson Controls* (barring childbearing-age women from "hazardous"jobs violates Title VII);[12] and *Harris v. Forklift Systems* (plaintiff in sexual harassment case need not prove psychological damages to establish of violation of the Act).[13] Some retrenchment occurred as well: *Wards Cove Packing v. Antonio* (must show specific practices rather than cumulative effect in disparate impact case, employer need only show business necessity in response);[14] *St. Mary's Honor Center v. Hicks* (pretext plus);[15] *Johnson v. Transportation Agency, Santa*

(cont'd. on pg. 8)

(cont'd. from pg. 7)

Clara County (making it more difficult to justify an affirmative action plan);[16] and *Gilmer v. Interstate/Johnson Lane* (barring access to court where employee has agreed to arbitrate).[17]

The last decade has also witnessed advancement of Title VII rights. For example: *McKennon v. Nashville Banner Publishing* (rejecting the "after acquired evidence"doctrine);[18] *Robinson v. Shell Oil* (retaliation provision covers current and former employees);[19] *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* (establishing standards for sexual harassment cases);[20] *Oncale v. Sundowner Offshore Services* (same-sex harassment is actionable);[21] and *Reeves v. Sanderson Plumbing Products* (pretext sufficient to establish claim – need not show discrimination was real reason).[22]

Despite these strides towards equality, discrimination is still very much a factor in today's workplace. Although women and minorities appear throughout our workforce and in token numbers at the highest echelon, glass ceilings excluding women and minorities from advancement remain a modern reality. While the wage gap has narrowed from 1963 when women earned 59% of what men earned, it still exists: in 2002, women earned 76% of what men earned. Many older women work in jobs still subject to attitudes and conditions of the past. Thus, older women earn 74% of what men earn, whereas younger women (under 25) earn 92%. There is also a wage gap between white males, minorities and women that still exists:[23]

Although women and minorities appear throughout our workforce and in token numbers at the highest echelon, glass ceilings excluding women and minorities from advancement remain a modern reality.

Year	White Men	Black Men	Hispanic Men	White Women	Black Women	Hispanic Women
2000	100	78.2	63.4	72.2	64.6	52.8

Women and minorities still remain disproportionately concentrated in our nation's lowest paying, most menial jobs, and represent the largest percentage of the working poor. Racial bias and sex stereotyping have not been obliterated or even sufficiently discouraged. Until those in the corporate boardrooms disdain racial slurs and demeaning comments about women, until supervisors and managers are evaluated on their demonstrated commitment to workplace equality, until CEOs announce and reaffirm their intolerance for discrimination, the promise inherent in Title VII will remain unfulfilled.

The 40-year experience with Title VII has taught us that discrimination is plainly bad for business. It creates low morale in the workforce, decreases productivity, aggravates employee-turnover, and, of course, embroils management in complaints, grievances, investigations, and often expensive litigation. When it occurs on a systemic basis, it creates a public relations nightmare, decreases market share, and impacts the bottom line. Discrimination imposes grievous harm on the victim, with often devastating financial and emotional harm. Since 1964, Title VII has held out the promise of ending employment discrimination. Its lofty goal is to ensure that each employee is judged on her or his own merits, without stereotypical presumptions about each one's ability to perform. We have come a long way towards fulfilling that dream in the 40 years of Title VII. Our work is not completed; much more needs to be done.

1 408 F.2d 462 (5th Cir. 1969).
2 400 U.S. 542, 91 S.Ct. 496 (1971).
3 401 U.S. 424, 91 S.Ct. 849 (1971).
4 411 U.S. 792, 93 S.Ct. 1817 (1973).
5 414 U.S. 86, 94 S.Ct. 334 (1973).
6 415 U.S. 36, 94 S.Ct. 1011 (1974).
7 422 U.S. 405, 95 S.Ct. 2362 (1975).
8 432 U.S. 63, 97 S.Ct. 2264(1977).
9 435 U.S. 702, 98 S.Ct. 1370 (1978)
10 443 U.S. 193, 99 S.Ct. 2721 (1979).
11 447 U.S. 57, 106 S.Ct. 2399 (1986).
12 449 U.S. 187, 111 S.Ct. 1196 (1991).
13 510 U.S. 17, 114 S.Ct. 367 (1993).
14 490 U.S. 462, 109 S.Ct. 2115 (1989).
15 509 U.S. 502, 113 S.Ct. 2742 (1993).
16 480 U.S. 616, 107 S.Ct. 1442 (1987).
17 500 U.S. 20, 111 S.Ct. 1647 (1991).
18 513 U.S. 352, 115 S.Ct. 879 (1995).
19 519 U.S. 337, 117 S.Ct. 843 (1997).
20 524 U.S. 775, 118 S.Ct. 2275; 524 U.S. 742, 118 S.Ct. 2257 (1998).
21 523 U.S. 75, 118 S.Ct. 998 (1998).
22 530 U.S. 133, 120 S.Ct. 2097 (2000).
23 Source: National Committee on Pay Equity.

(cont'd. from pg. 9)

a three-step minuet in McDonnell Douglas, later refined in 1981 in Burdine. The plaintiff goes first and makes out a prima facie case by nodding in four directions; this, we were assured, was "not onerous." The defendant then responds with a bow and a song, articulating a plausible reason for doing whatever the plaintiff has complained about. And for the rest of the dance the plaintiff tries to bump the defendant off the floor, by showing that the supposed reason is really a pretext for bias.

For a decade after Burdine, plaintiffs' lawyers accustomed to bench trials argued, with some success, that discrediting the defendant's reason meant the plaintiff must prevail. The Supreme Court appeared to rebuff this effort in 1993 in St. Mary's Honor Center v. Hicks, by ruling that "rejection of the defendant's proffered reasons will permit" – but not compel – "the trier of fact to infer the ultimate fact of intentional discrimination."

Employers saw the resulting Price Waterhouse *framework as benefiting plaintiffs, and defense counsel persuaded many courts that direct evidence of discrimination was needed to invoke "mixed-motive" analysis.*

Hicks was widely viewed as a setback for plaintiffs, and perhaps it was in the context of bench trials, where the goal was to lead a judge inexorably down a path and to lock in a finding for the plaintiff. But in the new era, where the objective is simply to survive summary judgment and to get to a jury, Hicks proved enormously helpful. If a jury may infer discrimination from the discrediting of the employer's explanation, and if the plaintiff has adduced evidence that might persuade the jury not to believe the employer, then summary judgment should be denied, since the evidence is supposed to be viewed in the plaintiff's favor. Of course, not all judges adhere to the summary judgment rules. But many do, and cases get tried or, more likely, settle.

Defense lawyers recognized that Hicks gave a boost to plaintiffs, and they convinced many courts that – despite the decision's unambiguous language – the plaintiff needed at least a whiff of smoke to get to a jury. Demolishing the employer's justification – alone – was insufficient. Ultimately, seven years later, the Supreme Court in Reeves simply affirmed that it had meant what it said in Hicks, and plaintiffs' groups (many of whom had initially been mournful about Hicks) claimed a big victory.

Burdine assumes that an employer is animated by a single motive, which is either lawful or discriminatory. This model, while useful in many cases, is overly simplistic, and in Price Waterhouse v. Hopkins the Supreme Court dealt with a situation in which both lawful and unlawful motives stood out. Employers saw the resulting Price Waterhouse framework as benefiting plaintiffs, and defense counsel persuaded many courts that direct evidence of discrimination was needed to invoke "mixed-motive" analysis.

A year ago, the Supreme Court ruled otherwise in Desert Palace. It is still too early to say if mixed-motive cases will continue to be exceptional in litigation (if not in life), but there is no mistaking the Court's ringing endorsement of circumstantial proof: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."

Title VII, like the rest of the Civil Rights Act of 1964, was passed only because of race, and charges alleging racial discrimination still dominate EEOC's caseload, account- ing for some 35 percent of all filings. But complaints of gender bias run a close second, accounting for about 30 percent, and it may be that white women are Title VII's biggest beneficiaries. Unburdened by a legacy of institutionalized bondage or by systematic educational deprivation, they have been better positioned than African Americans to take full advantage of the promise of equality in employment. It was no accident that the plaintiff contesting partnership denial in Price Waterhouse was a white woman.

Women have even managed to persuade courts that mistreatment of a sexual nature is unlawful if it happens on the job. This was not what "Judge" Howard Smith of Virginia, Chairman of the House Rules Committee, had in mind in February 1964 when he offered an amendment to H.R. 7152, proposing to add "sex" to the types of discrimination banned by Title VII. Judge Smith, an ardent segregationist, hoped to make a mockery of the bill, and Emmanuel Celler of Brooklyn, the Democratic floor manager, spoke against the proposal. But the small, bipartisan band of women then serving in the House seized the opportunity and shamed their male colleagues into voting for Smith's amendment. And once in, it never came out, either in the House or the Senate. There is certainly irony here, and it is delicious.

The Civil Rights Act of 1964 exemplified politics of the highest order. The 1964 Act was passed by a bipartisan coalition, with Southern Democrats opposed. After the House passed a comprehensive bill, the Senate avoided committees chaired by Southerners and wrote its bill on the floor, in the process finally breaking the Southern filibuster, and the House simply passed the Senate bill without conference. In the end,

(cont'd. on pg. 11)

(cont'd. from pg. 10)

higher percentages of Republicans than Democrats voted for the bill in both Houses, and Republicans on occasion stiffened the backbone of Democrats tempted to placate their brethren from the South.

By the time the Civil Rights Act of 1991 was taking shape, Congress retained bipartisan support for civil rights, but the President had jumped ship, the first President Bush having vetoed a predecessor bill in 1990. Once again Senators, now led by Republicans Danforth and Dole, "deliberated without the benefit of the normal committee process," but this time they were "attempting to fashion a proposal that would command the support of a veto-proof bipartisan majority of Senators."[1] They succeeded, and again the House passed the Senate bill without conference. Knowing a veto would be overridden, the President signed.

Today, it is not clear whether a major EEO initiative would command bipartisan support in Congress.

Today, it is not clear whether a major EEO initiative would command bipartisan support in Congress. Members from both parties support civil rights tax relief, and that is encouraging. It may not be a true test, however, since this is one of the rare occasions when business groups and employees are lined up on the same side of a legislative proposal. The reality is that prominent Republican supporters of civil rights have left the Congress, and the Republicans who remain do not appear to possess the same degree of commitment.

We are left with a final irony. Jurors in "Red America" (and speaking of irony, lawyers of a certain age remember when red meant left) are voting for fair play, even if their tribunes may not.

[1] *Gersman v. Group Health Association, Inc.*, 975 F.2d 886, 891 (D.C. Cir. 1992) (Sentelle, J.).