

said he did not see Matteson's campaign as "at all exclusionary."

Given the nation's history, Mr. Lukehart said, "if we don't have affirmative kinds of approaches to undoing discrimination and segregation, we are kidding ourselves."

"You see all too few communities doing proactive types of things to encourage diversity," he said, "and that is troubling to me."

Don DeMarco, executive director for the Fund for an OPEN Society, a nonprofit, pro-integration group in Philadelphia, said Matteson had probably started its effort to maintain diversity too late. Mr. DeMarco said he had helped prepare a report for Matteson, warning the village that something had to be done "if they were to enjoy stable housing" and avoid resegregation.

That was 16 years ago.

Many of Matteson's residents are refugees from the civil wars of Chicago, one of the most segregated big cities in the country.

Memories of block busting, racial steering, restricted covenants and panic peddling back in the old days, in the old neighborhood are still fresh.

Rosemary Lomax, who is black, remembers those days well and she supports the marketing campaign. She moved here in 1969 for the schools and the smell of the country in the fresh air. She said she has never felt discriminated against in Matteson and does not now.

"They're requesting that more Caucasians come to the area and I don't have a problem with that," Mrs. Lomax said. "It's not about making Matteson lily white. It's about keeping property values up."

So far, property values have not declined in Matteson, where the average home costs about \$117,000 and the average household income is \$55,000, according to village officials. From 1986 to 1994, as the black population grew to close to 50 percent, property values increased an average of 5.3 percent a year.

But the white flight has hardened a division in Matteson. Most of the blacks live in the newer area on the west side and most of the whites live in the older section on the east side, where houses are often sold by word of mouth.

The village itself has to overcome a level of mistrust.

At American Legion Post 474, it was time for the Friday fish fry. Down in the basement, St. Patrick's Day decorations were already up as John Dunham, 33, a white plumber, who grew up in Matteson, explained why he had moved away two years ago because of "the blacks."

"I saw the handwriting on the wall," he said. "They're going to desperate measures to get whites back, but it won't work."

Outside in the sunshine, though, James Randolph, 49, a black postal worker, waited to pick up his son from his integrated elementary school.

"When we came here it was because it was mixed, we have all races," Mr. Randolph said. "I think it's a good thing to move whites back. They'll come back because there really is no place for them to run any more."

Then his son, Trevon, 7, came out, ready to start his weekend with his black and white and Hispanic playmates, oblivious to the adult world of property values and race and fear based on the color of someone's skin.

Mr. Randolph helped Trevon into their car and before driving down the tree-lined streets of Matteson, he said: "The thing that gets me, is the black people who live here are pretty good people. We have jobs, we can afford these neighborhoods."

## Louisiana High Court Finds Minority Set-Asides Illegal

NEW ORLEANS—It is unconstitutional racial discrimination for Louisiana to guarantee a share of public works jobs to minority contractors, the state Supreme Court has ruled.

The 6 to 1 ruling Friday upheld a district judge's decision last year to throw out the 1984 law without a trial.

"I think it bears out sort of what I thought: quotas are illegal," said Gov. Mike Foster, whose first act after taking office in January was to hand down an executive order against state set-aside and affirmative action programs.

Justice Bernette Johnson, the panel's only black person, was the sole dissenter.

The ruling does not affect construction projects funded entirely with federal money. These are governed by federal set-aside rules and regulations. However, the justices said Louisiana's constitution forbids it to impose racial quotas even if that would force the state to withdraw from federal programs that require such preferences.

In a separate ruling, the state's high court lowered the drinking age to 18 when it struck down laws making it illegal for people under 21 to buy or consume alcohol.

The 4 to 3 ruling, which was based on an argument of age discrimination, makes Louisiana

the only state in the nation where the drinking age is under 21.

Word of the change spread quickly. Bourbon Street bars, already full of students in New Orleans for the Southeastern Conference basketball tournament, quickly put up signs saying 18-year-olds could legally buy and drink booze.

PHOTOCOPY  
PRESERVATION

THOMAS SOWELL

## Playing a weasel word game

One of the sure signs of a bad policy is that it is impossible to defend it honestly in plain English. Affirmative action is a classic example.

From the president of Stanford University to the president of the United States, defenders of affirmative action have said they do not mean to accept "unqualified" people. Just what does that mean — if anything?

You can set the qualifications level anywhere you want to. You can set it so high that only Einstein could qualify or so low that Forrest Gump would sail through with flying colors. Saying you will take only "qualified" people is saying nothing — while pretending to say something.

Even if the term had some real meaning, the principle is ridiculous. If you were running a baseball team that was behind in the bottom of the ninth inning, would you be just as willing to send a "qualified" batter up to the plate as to send Mark McGwire?

When you need a new car, are you just as willing to buy any "qualified" car or do you want the best you can get for your money?

What we do in real life is try to get the most bang for the buck. That means you compare one individual with another, not with some will o' the wisp standard in which all "qualified" people are equally eligible. That is not a standard; that is the pretense of a standard, a phony. It is a way of hiding double standards by camouflaging them as a single standard — "qualified."

The other great pretense of affirmative action is that it is somehow making up for the past. Let's talk sense, like adults. Whatever you or I may think about the past, it is gone. Nothing you do is going to make up for it.

Whatever was wrong in the past will remain wrong forever. It will deserve to be condemned a thousand years from now. Nothing you do today is going to change that, though it may create new problems.

If we are going to talk about history, the least we can do is to learn something from it. If discrimination was wrong then, it is wrong now. Repeating the same wrong with a different cast of characters changes nothing about the past and poisons

the present and future.

Then there is the notion that a quota isn't really a quota if it is called a "goal" or "diversity." Someone once asked Abraham Lincoln how many legs a dog has, if you count the tail as a leg. Lincoln said four — because your calling the tail a leg doesn't make it a leg. If it looks like a quota and acts like a quota, it's a quota.

The phrase "affirmative action" itself has become slippery. Some say it is very "complex" concept and includes such things as "outreach" programs to make minority peoples aware of what opportunities are available in institutions from which they may once have been excluded. If this were a serious argument, then there would be no need for the advocates of affirmative action to be going ballistic over such things as the California Civil Rights Initiative, which would just ban preferences and quotas.

You can still do all the "outreach" your heart desires if the California voters enact the Civil Rights Initiative into law. But, whatever validity the "outreach" argument may have had a quarter-century ago, when affirmative action began, it is hard to take seriously the notion that minority peoples don't know today they can now apply for jobs or college anywhere they want to.

All these insults to our intelligence hide the greatest insult of all — that there are some morally anointed people who should be prescribing end-results for all the rest of us. This is the truly dangerous mind-set, which goes beyond affirmative action or any other policies of the moment.

Back in the days of the Woodrow Wilson administration, when blacks were being systematically displaced from whatever modest positions they had once been permitted to reach in the federal bureaucracy, a federal official said that blacks did not belong in postmaster's jobs, they belonged in the cornfields.

The racism of this remark was only part of the dangers it represented. The danger that is still with us today is the notion that some people think it is their anointed role to decide where other people belong, whether that is in the cornfields or in the corporate suites.

Affirmative action is only the latest example of this arrogance. The dishonesty with which it is discussed is only another aspect of that arrogance.

*Thomas Sowell, an economist and a senior fellow at the Hoover Institution, is a nationally syndicated columnist.*

## Agreed with a Bush appointee. Should I be impeached?

Here we go again. Paul Craig Roberts ("Using tactical fright to intimidate," Commentary, Oct. 1) is calling for my impeachment again. He should get his facts straight first.

Mr. Roberts cites complaints by San Diego Mayor Susan Golding about Justice Department cases involving group homes for disabled residents that supposedly have "chilled the exercise of free speech in San Diego." Odd. The Justice Department has brought no group-home cases in San Diego. Not one.

He then turns to a matter in Palatine, Ill., where he alleges that "federal agents have descended on a neighborhood" to investigate charges of housing discrimination. Also odd. Law enforcement is our

job. And in this case, we conducted interviews to find out the facts. That's what we do. By the way, the home is operating quite peacefully today in Palatine, with the city's embrace and full support.

Mr. Roberts' article is misleading in many other respects as well. He also neglects to tell his readers that the Justice Department has an obligation under the Fair Housing Act to protect people with disabilities who have been subjected to discrimination, including illegal efforts to prevent them from moving into their neighborhood. Citizens have every right to express their views or petition their government in opposition — even if their views are discriminatory or odious. But, as the

Supreme Court has recognized, citizens do not have a First Amendment right to file baseless lawsuits that seek illegal objectives.

There is one other fact that Mr. Roberts misses. The Justice Department has been involved in all of four matters that involved the intersection of the Fair Housing Act and the First Amendment, three of which were initiated in the Bush administration. Is a Clinton appointee's willingness to agree with a Bush appointee's decision an impeachable offense?

**DEVAL L. PATRICK**  
Assistant Attorney General  
Civil Rights Division  
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Washington

# Rift Between Blacks, Whites 'Is 1

Following is the address on race relations delivered by President Clinton yesterday at the University of Texas.

**M**y fellow Americans, I want to begin by telling you that I am hopeful about America.

When I looked at Nicole Bell up here introducing me and I shook hands with these other young students, I looked into their eyes. I saw the AmeriCorps button on that gentleman's shirt. I was reminded as I talk about this thorny subject of race today. I was reminded of what Winston Churchill said about the United States when President Roosevelt was trying to pass the Lend Lease Act so that we could help Britain in their war against Nazi Germany before we ourselves were involved. And for a good while the issue was hanging fire, and it was unclear whether the Congress would permit us to help Britain, who at that time was the only bulwark against tyranny in Europe.

And Winston Churchill said, "I have great confidence in the judgment and the common sense of the American people and their leaders. They invariably do the right thing, after they have examined every other alternative."

So I say to you, let me begin by saying that I can see in the eyes of these students and in the spirit of this moment, we will do the right thing.

In recent weeks every one of us has been made aware of a simple truth. White Americans and black Americans often see the same world in drastically different ways. Ways that go beyond and beneath the Simpson trial and its aftermath, which brought these perceptions so starkly into the open.

The rift we see before us—that is tearing at the heart of America—exists in spite of the remarkable progress black Americans have made in the last generation since Martin Luther King swept America up in his dream and President Johnson spoke so powerfully for the dignity of man and the destiny of democracy in demanding that Congress guarantee full voting rights to blacks.

The rift between blacks and whites exists still in a very special way in America, in spite of the fact that we have become much more racially and ethnically diverse. And that Hispanic Americans, themselves no strangers to discrimination, are now almost 10 percent of our national population.

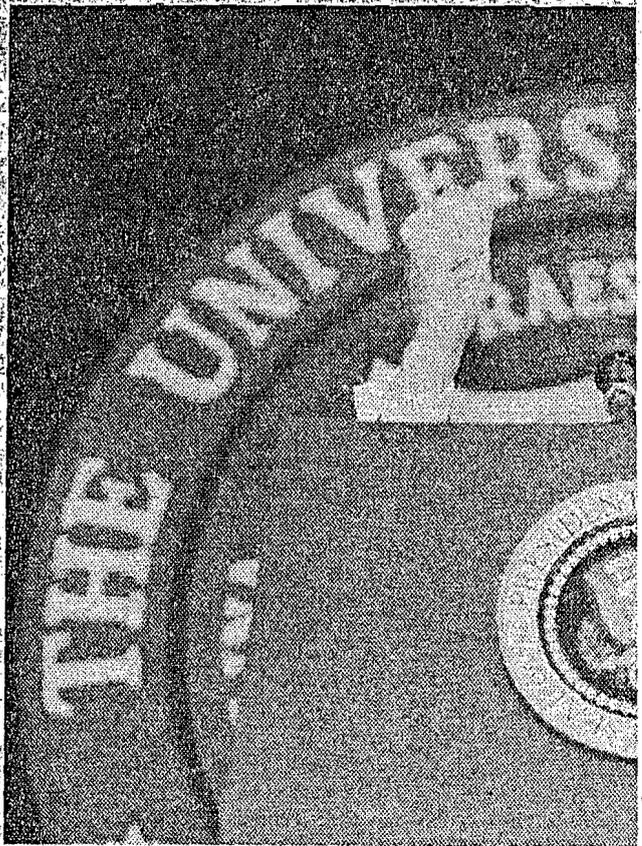
The reasons for this divide are many. Some are rooted in the awful history and stubborn persistence of racism. Some are rooted in the different ways we experience the threats of modern life to personal security, family values and strong communities.

Some are rooted in the fact that we still haven't learned to talk frankly, to listen carefully, and to work together across racial lines.

Almost 30 years ago, Dr. Martin Luther King took his last march with sanitation workers in Memphis. They marched for dignity, equality and economic justice. Many carried placards that read simply, "I am a man." The throngs of men marching in Washington today, almost all of them, are doing so for the same stated reason. But there is a profound difference between this march today and those of 30 years ago.

Thirty years ago, the marchers were demanding the dignity and opportunity they were due because, in the face of terrible discrimination, they had worked hard, raised their children, paid their taxes, obeyed the laws and fought our wars.

Well, today's march is also about...



Attacking racial division, President Clinton told a University of Texas audience...

The record of abuses extends from lynchings and trumped up charges to false arrests and police brutality. The tragedies of Emmett Till and Rodney King are bloody markers on the very same road. Still today, too many of our police officers play by the rules of the bad old days. It is beyond wrong when law-abiding black parents have to tell their law-abiding children to fear the police whose salaries are paid by their own taxes.

And blacks are right to think something is terribly wrong when African American men are many times more likely to be victims of homicide than any other group in this country, when there are more African American men in our correction system than in our colleges, when almost one in three African American men, in their twenties are either in jail, on parole or otherwise under the supervision of the criminal system—nearly one in three.

And that is a disproportionate percentage in comparison to the percentage of blacks who use drugs in our society. Now I would like every white person here and in America to take a moment to think how he or she would feel if one in three white men were in similar circumstances.

And there is still unacceptable economic disparity between blacks and whites. It is so fashionable to talk today about African Americans, as if they had been some sort of protected class. Many whites think blacks are getting more than their fair share, in terms of jobs and promotions. That is not true. That is not true.

The truth is that African Americans still make on average about 60 percent of what white people do.

And more than half of African American children live in poverty. And at the very time our young Americans need access to college more than ever before, black college enrollment is dropping in America.

On the other hand, blacks must understand and acknowledge the roots of white fear in America.

...to be there for... discrimination; they had worked hard, raised their children, paid their taxes, obeyed the laws and fought our wars.

Well, today's march is also about pride and dignity and respect. But after a generation of deepening social problems that disproportionately impact black Americans, it is also about black men taking renewed responsibility for themselves, their families and their communities.

It's about saying "no" to crime and drugs and violence. It's about standing up for atonement and reconciliation. It's about insisting that others do the same and offering to help them. It's about the frank admission that, unless black men shoulder their load, no one else can help them or their brothers, their sisters and their children escape the hard, bleak lives that too many of them still face.

Of course, some of those in the march do have a history that is far from its message of atonement and reconciliation. One million men are right to be standing up for personal responsibility. But one million men do not make right one man's message of malice and division.

No good house was ever built on a bad foundation. Nothing good ever came of hate. So let us pray today that all who march and all who speak will stand for atonement, for reconciliation, for responsibility.

So let us pray that those who have spoken for hatred and division in the past will turn away from that past and give voice to the true message of those ordinary Americans who march.

If that happens, if that happens, the men and the women who are there with them will be marching into better lives for themselves and their families, and they could be marching into a better future for America.

Today, we face a choice. One way leads to further separation and bitterness and more lost futures. The other way—the path of courage and wisdom—leads to unity, to reconciliation, to a rich opportunity for all Americans to make the most of the lives God gave them.

This moment, in which the racial divide is so clearly set out in the open, need not be a setback for us. It presents us with a great opportunity, and we dare not let it pass us by.

In the past, when we've had the courage to face the truth about our failure to live up to our own best ideals, we've grown stronger, moved forward and restored proud American optimism. At such turning points, America moved to preserve the Union and abolish slavery; to embrace women's suffrage; to guarantee basic legal rights to America without regard to race under the leadership of President Johnson.

At each of these moments, we looked in the national mirror and were brave enough to say, this is not who we are. We're better than that.

Abraham Lincoln reminded us that "a house divided against itself cannot stand." When divisions have threatened to bring our house down, somehow we have always moved together to shore it up.

My fellow Americans, our house is the greatest democracy in all human history. And with all its racial and ethnic diversity it has beaten the odds of human history. But we know that divisions remain. And we still have work to do.

The two worlds we see now each contain both truth and distortion. Both black and white Americans must face this; for honesty is the only gateway to the many acts of reconciliation that will unite our worlds at last into one America.

White America must understand and acknowledge the roots of black pain. It began with unequal treatment, first in law, and later in fact. African Americans, indeed, have lived too long with a justice system that in too many cases has been and continues to be, less than just.

black college enrollment is dropping in America.

On the other hand, blacks must understand and acknowledge the roots of white fear in America.

There is a legitimate fear of the violence that is too prevalent in our urban areas. And often, by experience or at least what people see on the news at night, violence for those white people too often has a black face.

It isn't racist for a parent to pull his or her child close when walking through a high-crime neighborhood. Or to wish to stay away from neighborhoods where innocent children can be shot in school or standing at bus stops by thugs driving by with assault weapons or toting handguns like old west desperados.

It isn't racist for parents to recoil in disgust when they read about a national survey of gang members saying that two-thirds of them feel justified in shooting someone simply for showing them disrespect.

It isn't racist for whites to say they don't understand why people put up with gangs on the corner or in the projects or with drugs being sold in the schools or in the open. It's not racist for whites to assert that the culture of welfare dependency, out-of-wedlock pregnancy and absent fatherhood cannot be broken by social programs, unless there is first more personal responsibility.

The great potential for this march today, beyond the black community, is that whites will come to see a larger truth: that blacks share their fears and embrace their convictions; openly assert that, without changes in the black community and within individuals, real change for our society will not come.

This march could remind white people that most black people share their old-fashioned American values. For most black Americans still do work hard, care for their families, pay their taxes and obey the law, often under circumstances which are far more difficult than those their white counterparts face.

Imagine how you would feel if you were a young parent in your twenties with a young child living in a housing project, working somewhere for \$5 an hour with no health insurance, passing every day, people on the street selling drugs, making one hundred times what you make. Those people are the real heroes of America today, and we should recognize that.

And white people too often forget that they are not immune to the problems black Americans face.

Crime, drugs, domestic abuse and teen pregnancy. They are too prevalent among whites as well, and some of those problems are growing faster in our white population than in our minority population.

So, we all have a stake in solving these common problems together. It is, therefore, wrong for white Americans to do what they have done too often, simply to move further away from the problems and support policies that will only make them worse.

Finally, both sides seem to fear deep down inside that they'll never quite be able to see each other as more than enemy faces, all of whom carry at least a sliver of bigotry in their hearts.

Differences of opinion rooted in different experiences are healthy; indeed essential for democracies. But differences so great and so rooted in race threaten to divide the house Mr. Lincoln gave his life to save. As Dr. King said, we must learn to live together as brothers, or we will perish as fools.

Recognizing one another's real grievances is only the first step. We must all take responsibility for ourselves, our conduct and our attitudes.

America, we must clean our house of racism.

To our white citizens, I say I know most of you every day do your very best by your own lights, to live a life free of discrimination. Nevertheless, too many destructive ideas are gaining currency in our midst. The taped voice of one policeman should fill you with outrage. So I say we must clean the house of white America of racism. Americans who are in the white majority should be proud to stand up and be heard denouncing



dare not tolerate the existence of two Americas. Under my watch, I will do everything I can to see that, as soon as possible, there is only one, one America under the rule of law. One social contract, committed not to winner take all, but to giving all Americans a chance to win together — one America.

Well, how do we get there? First, today I ask every governor, every mayor, every business leader, every church leader, every civic leader, every union steward, every student leader — most important, every citizen — in every work place and learning place and meeting place all across America to take personal responsibility for reaching out to people of different races, for taking time to sit down and talk through this issue, to have the courage to speak honestly and frankly, and then to have the discipline to listen quietly with an open mind and an open heart as others do the same.

This may seem like a simple request, but for tens of millions of Americans this has never been a reality. They have never spoken and they have never listened — not really, not really.

I am convinced, based on a rich lifetime of friendships and common endeavors with people of different races, that the American people will find out they have a lot more in common than they think they do.

The second thing we have to do is to defend and enhance real opportunity. I'm not talking about opportunity for black Americans or opportunity for white Americans. I'm talking about opportunity for all Americans.

Sooner or later, all our speaking, all our listening, all our caring has to lead to constructive action together for our words and our intentions to have meaning.

We can do this first by truly rewarding work and family in government policies, in employment policies, in community practices. We also have to realize that there are some areas of our country — whether in urban areas or poor rural areas like south Texas or eastern Arkansas — where these problems are going to be more prevalent just because there is no opportunity. There is only so much temptation some people can stand when they turn up against a brick wall day after day after day.

And if we can spread the benefits of education and free enterprise to those who have been denied them too long and who are isolated in enclaves in this country, then we have a moral obligation to do it.

It will be good for our country.

Third, and perhaps most important of all, we have to give every child in this country and every adult who still needs it, the opportunity to get a good education.

President Johnson understood that, and now that I am privileged to have this job, and to look back across the whole sweep of American history, I can appreciate how truly historic his commitment to the simple idea that every child in this country ought to have an opportunity to get a good, safe, decent, fulfilling education was.

It was revolutionary then, and it is revolutionary today.

Today that matters more than ever. I am trying to do my part. I am fighting hard against efforts to roll back family security, aid to distressed communities, and support for education. I want it to be easier for poor children to get off to a good start in school. I want it to be easier for everybody to go to college and stay there, not harder.

I want to mend affirmative action, but I do not think America is at a place today where we can end it. The evidence of the last several weeks shows that.

But let us remember, the people marching in Washington today are right about one fundamental thing. At its base, this issue of race is not about government, or political leaders. It is about what is in the heart and minds and life of the American people. There will be

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To those who are neglecting their children, I say it is not too late. Your children still need you.

To those who only send money in the form of child support, I say, keep sending the checks. Your kids count on them. And we'll catch you and enforce the law if you stop. But, the message of this march today — one message — is that your money is no replacement for your guiding, your caring, your loving the children you brought into this world.

We can only build strong families when men and women respect each other, when they have partnerships, when men are as involved in the home place as women have become involved in the workplace. It means, among other things, that we must keep working until we end domestic violence against women and children. I hope those men in Washington today pledge, among other things, to never, never raise their hand in violence against a woman.

So today, my fellow Americans, I honor the black men marching in Washington to demonstrate their commitment to themselves, their families and their communities. I honor the millions of men and women in America, the vast majority of every color, who without fanfare or recognition, do what it takes to be good fathers and good mothers, good workers and good citizens. They all deserve the thanks of America.

But, when we leave here today, what are you going to do? What are you going to do? Let all of us who want to stand up against racism do our part to roll back the divide. Begin by seeking out people in the workplace, the classroom, the community, the neighborhood across town, the places of worship, to actually sit down and have those honest conversations. I talked about conversations where we speak openly and listen and understand how others view this world of ours.

Make no mistake about it, we can bridge this great divide. This is, after all, a very great country and we have become great by what we have overcome. We have the world's strongest economy and it's on the move, but we've really lasted because we have understood that our success could never be measured solely by the size of our gross national product.

I believe the march in Washington today spawned such an outpouring because it is a reflection of something deeper and stronger that is running throughout our American community. I believe that in millions and millions of different ways our entire country is reasserting our commitment to the bedrock values that made our country great and that make life worth living.

The great divides of the past call for and were addressed by legal and legislative changes. They were addressed by leaders like Lyndon Johnson, who passed the Civil Rights Act and the Voting Rights Act.

And, to be sure, this great divide requires a public response by democratically elected leaders, but today we are really dealing and we know it, with problems that grow in large measure out of the way all of us look at the world with our minds and the way we feel about the world with our hearts.

And therefore while leaders and legislation may be important, this is work that has to be done by every single one of you.

And this is the ultimate test of our democracy, for today the house divided exists largely in the minds and hearts of the American people. And it must be united there — in the minds and hearts of our people.

Yes, there are some who would poison our progress by selling short the great character of our people and our enormous capacity to change and grow.

But they will not win the day. We will win the day.

With your help — with your help — that day will come a lot sooner. I will do my part, but you, my fellow citizens, must do yours.

Thank you, and God bless you.

Aff. Action

## A 30-Year Experiment

It has been roughly three decades since the nation began experimenting with special programs known collectively as "affirmative action." The term embraces an array of initiatives, including special recruiting and hiring goals, designed to help racial minorities and women become full participants in the nation's economic life.

The effort came initially from the executive branch.

In 1961, President John F. Kennedy ordered federal contractors to make special efforts to ensure that workers were hired and treated without regard to race or ethnicity. President Lyndon B. Johnson expanded the directive significantly, requiring contractors who do business with the federal government to adopt affirmative action plans for all their operations — including goals and timetables for increased minority hires. He later enlarged federal affirmative action rules to include women.

But it was President Richard M. Nixon who ushered in a markedly more aggressive — and controversial — form of affirmative action. Nixon in 1969 initiated the "Philadelphia plan," which required minimum levels of minority participation on federal construction projects in Philadelphia and three other cities. The next year, similar standards were adopted for virtually all federal contractors.

### The 1964 Civil Rights Act

Congress, meanwhile, had weighed in with the 1964 Civil Rights Act, which marked a huge advance for the principle of non-discrimination in employment. The law did not establish or explicitly require affirmative action programs. In fact, sponsors assured critics that the law would not force employers to use hiring quotas or give preferential treatment to blacks or other groups.

But Title VII of the law did set out principles of employment non-discrimination and a mechanism to redress violations. Courts have since interpreted the law to allow or even require various types of affirmative action. And many private and state employers adopted voluntary affirmative action plans. (*Court rulings, p. 1581*)

These policies continually drew some criticism, but they survived key court challenges and became standard operating procedure.

At the request of Senate Majority Leader Bob Dole, R-Kan., the Congressional Research Service compiled a list this year of more than 100 federal programs that could roughly be categorized as affirmative action — programs as precise as setting aside a fixed percentage of crime assistance grants for minority or female-owned institutions, and as general as urging recipients of federal agriculture or housing assistance to use minority-owned banks.

### Backlash in the Reagan Era

The first major political assault on affirmative action came from the Reagan administration, which vocally opposed most affirmative action programs as examples



Presidents Johnson, left, and Nixon worked to increase minority participation in federal construction projects.

of reverse discrimination and unwarranted preferences. Reagan weakened enforcement of some programs and challenged others in court.

However, advocates and their congressional allies withstood his administration's attempts to undo many affirmative action requirements for federal contractors — a testament to the effort's ongoing support and, perhaps, reluctance to take on the debate's volatile racial politics.

"Nobody wanted to make an issue of it, because you're opening yourself to charges of racism or sexism," said Seymour Martin Lipset, a public policy professor at George Mason University who has written about affirmative action.

### The Fatal Quota Label

As recently as 1991, Congress indirectly endorsed some of the principles of affirmative action when it passed civil rights legislation (PL 102-166) that made it easier for workers to sue for job discrimination. (*1991 Almanac, p. 251*)

Still, an earlier version of the bill was defeated amid bitter arguments over whether it was a "quota bill" that would force employers to hire by the numbers.

Fixed hiring quotas are unlawful in virtually all contexts and were not called for in the 1991 bill. But critics said some aspects of that legislation — for example, requiring employers who are sued for employment discrimination to show why workplace demographics did not roughly track that of the available labor pool — amount to de facto quotas as nervous employers seek to avoid discrimination lawsuits.

Former Sen. John C. Danforth, a Missouri Republican who struggled to pass a version of the bill, recalls the opponents' initial success. "It was very clear at that time that if something could be successfully labeled quota legislation, it wasn't going to go anywhere."

Danforth and other supporters eventually prevailed, but uneasiness about the nation's affirmative action policies has lingered and grown, feeding into the current critical mood.

—Holly Idelson

# Courts Establish Boundaries

Many of the rules for affirmative action have been written not in Congress, but in the federal courts.

The courts have sanctioned, and even required, employers to take race or gender into account to promote equal opportunity. But they have sprinkled this legal path with strong caveats and marked some forays into the world of race and gender preferences as off-limits. A case pending before the Supreme Court could change some of those rules once again.

General axioms have emerged from more than two decades of complex and often closely decided affirmative action rulings by the U.S. Supreme Court and other federal courts. They can be summarized as follows:

- "Preferences maybe, quotas no." Employers can use race or gender as a "plus factor" in certain cases, but are almost always forbidden from employing strict, numerical quotas to fill jobs.

- Affirmative action programs should be temporary efforts to correct past wrongs — specific or general — rather than permanent features of the employment landscape. No one has defined temporary, however, prompting disputes over how much affirmative action is enough.

- Employers must take into account the burden any affirmative action program would place on workers or potential workers outside the plan.



## Current Law

Private employers are governed by rulings on Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination on the basis of race, gender or ethnicity. That language might appear to preclude taking race or gender into account in workplace decisions, and some affirmative action programs have been struck down as violations of Title VII. Overall, however, courts have ruled that affirmative action is consistent with Title VII goals and may even be required to remedy past violations.

Employers can undertake affirmative action programs voluntarily if they aim to erase entrenched racial or gender imbalances in job categories. For example, the Supreme Court in 1979 upheld a steel manufacturer's voluntary program to reserve half of the training slots for skilled craft jobs for African-Americans. At the time, virtually all such jobs were held by whites.

But these programs cannot unduly impinge on other workers or prospective workers: A company's recruiting program would probably pass muster but reserving all job openings in a given category for women or minorities probably would not. Also, a program must be a transitional scheme to break down longstanding barriers rather than a permanent preference or a guarantee of a certain level of minority or female representation.

If an employer is found guilty of discrimination under

Title VII, the courts may order the company to adopt an affirmative action program. Here, however, the court would have to establish that discrimination had taken place, not simply that a pattern of segregation existed.

When the government does the hiring — directly or by contracting work — the legal ground rules for affirmative action are set by the Constitution as well as Title VII. Governments can adopt affirmative action policies through legislative or executive branch action. Ultimately, such programs must square with the Fourteenth Amendment guarantee of "equal protection" under the law to all people.

State or local affirmative action policies must meet "strict scrutiny" by the courts: They must serve a compelling public policy goal and take targeted action to achieve that goal. This has been translated into showing that such plans are making up for past discrimination in a particular field, not for societywide biases.

The Supreme Court has accorded the federal government a little more latitude than the states to undertake affirmative action in the name of broad social goals such as diversity. The high court in 1990 upheld a controversial Federal Communications Commission policy that gives minorities preference for broadcast licenses to promote diverse viewpoints on the airwaves — not specifically to remedy past discrimination.

## On Trial

A case pending before the Supreme Court, *Adarand Constructors Inc. v. Pena*, could alter the rules for affirmative action — at least where the federal government is concerned.

At issue is a Transportation Department policy designed to steer some federal contracts to "socially and economically disadvantaged" businesspeople. The policy gives contractors a bonus if they hire a disadvantaged subcontractor. Minority-owned businesses automatically qualify for "disadvantaged" status (subject to an income cutoff), while others can petition for the designation. A white contractor says the policy is discriminatory. If the high court agrees, it could curtail federal affirmative action in the contracting arena. A ruling is expected in June.

A New Jersey case before a federal appeals court is generating even more political fireworks and could further refine the parameters of affirmative action. Two business education teachers — one black, one white — were hired on the same day by the Piscataway school board. When the board was forced to fire one eight years later, it dismissed the white teacher rather than her black colleague, who was at the time the only black teacher in the 10-member department. In the past, the decision would have been settled by a coin toss.

Sharon Taxman, the white teacher, filed a reverse discrimination suit with the support of the Bush administration Justice Department. But under President Clinton, the department switched sides and argued that the school district could take race into account in this instance.

—Holly Idelson

ers are hostile or at least questioning.

"The difference is the perception in political circles," says Linda Chavez, president of the Center for Equal Opportunity, a conservative think tank, and an opponent of affirmative action. "A lot of politicians seem to have suddenly discovered that these programs are preference programs."

Alternately, some defenders of affirmative action say critics are distorting the facts — falsely equating affirmative action with quotas and overstating the incidence of reverse discrimination — to exploit public apprehension.

Rep. John Conyers Jr., D-Mich., a senior black lawmaker who supports the programs, puts it this way: "It's just people making the most of a sensitive issue that people can get some political mileage out of."

### New Attitude

Some of the current tensions about affirmative action surfaced during congressional debate on the 1991 civil rights legislation (PL 102-166) that made it easier for workers to sue for job discrimination. An early version went down amid criticism that it was a "quota bill" that would force employers to hire women and minorities according to strict ratios. (*1991 Almanac*, p. 251)

The 1994 elections brought a clearer opportunity to challenge affirmative action, simultaneously signaling a more conservative electorate and putting some affirmative action skeptics in charge of key congressional posts. (*Weekly Report*, p. 819)

Presidential politics have helped prod opponents into high gear, as Clinton and the Republican contenders jostle for position on the issue. The controversial ballot proposal to undo affirmative action programs in California — a key electoral state in national politics — ensures that the issue will figure in the 1996 presidential race.

The Republican Party has long included strong critics of affirmative action, so it is not surprising that members' success in the 1994 elections would embolden them to attack. Even Senate Majority Leader Bob Dole, R-Kan., who has supported affirmative action, is now critical and may sponsor legislation to undo most federal efforts.

Many Democrats have been strong supporters of the policy, reflecting its importance to minority and women's groups, which are among the party's most steadfast allies.

Yet elements of the Democratic co-



**"I think the current system cannot stand."**

—Sen. Joseph I. Lieberman,  
D-Conn.

alition, such as working-class whites, have been uncomfortable with affirmative action for years. And now Clinton and other key Democrats seem to be struggling to find a proper stance on the issue.

Clinton has said he still supports affirmative action and is looking to improve rather than abandon it. Even that is considered a betrayal by some within the party, where liberal politicians are bracing to defend the embattled programs. Key Democrats, such as House Minority Leader Richard A. Gephardt of Missouri and Sen. Christopher J. Dodd of Connecticut, while publicly welcoming the review, have pledged ongoing support for affirmative action.

But Lieberman, who chairs the centrist Democratic Leadership Council, said he and some colleagues are increasingly hard put to reconcile the notion of group preferences with the ideal of individual opportunity.

"That inconsistency has become more and more evident over time and has become less and less tenable politically," he says. "I think the current system cannot stand."

### Pressure Points

The term "affirmative action" embraces a range of initiatives, including special recruiting, goals and timetables for hiring or promoting minorities and women, as well as rules to allot a portion of government contracts for minority- or female-owned companies.

There is little dissent over recruiting and outreach programs for women and

minorities, which make up a large portion of affirmative action efforts. On the other end, policy-makers also unite against fixed hiring quotas, which are unlawful in virtually all contexts.

The friction comes over whether race or gender should factor into hiring and firing decisions. For example, is it sometimes appropriate to look beyond pure test scores and give an extra plus to a diversity candidate? What about set-asides in government grants or procurement rules?

Lawmakers' differing responses to such questions reveal large gaps in the way discrimination and affirmative action are perceived.

Studies indicate that affirmative action has helped to move women and minorities into traditionally segregated professions, although these studies differ on the impact of the gains. Yet Chavez and other critics insist that the policies have taken a far greater toll on individual fortunes and societal values than can be set off by any gains they may have provided.

They see affirmative action as a departure from principles of meritocracy and individual striving and as a policy that costs white men who may have had no part in any past or present discrimination.

Hiring quotas are illegal, but critics say managers are nonetheless "hiring by the numbers" to avoid discrimination lawsuits. And over time, such perceived or real abuses have accumulated. "I think more and more people are being impacted by affirmative action," says House Judiciary Committee Chairman Henry J. Hyde, R-Ill.

Critics also charge that many affirmative action programs benefit only a few, privileged minorities or women rather than helping the truly disadvantaged. Early in 1995, Republicans eagerly attacked a tax credit for companies that sell television and cable stations to minorities. The tax break figured in plans by Viacom, a media and entertainment giant, to sell its TV systems to a black-owned company and defer millions in taxes — a scenario many lawmakers decried as far removed from the guiding aspirations of the civil rights movement. (*Weekly Report*, pp. 1016, 602)

These criticisms appear to resonate with voters, white men in particular. Some women and minorities also have voiced ambivalence toward affirmative action, arguing either that it is unneeded or that it is harmful because personal achievements may be attributed to "preferences" rather

than merit.

But some policy-makers are bitter about calls for a meritocracy in which race and gender would play no role. It is precisely because the qualifications of some women and minorities have been slighted, they say, that affirmative action is important. "How do we go back to this colorblind society when we didn't have it in the first place?" asked Rep. Donald M. Payne, D-N.J.

Advocates say affirmative action forces employers to scrutinize the explicit or hidden biases that can close opportunities for women and minorities. They say everyone benefits from this broadening: Employers get a more diverse work force, and white men may have more opportunities when employers go beyond the "old boy network" to hire based on objective factors.

To a great extent, the current fight revolves around whether that kind of hiring has become the norm and would exist without affirmative action.

American Telephone & Telegraph, for example, has been under a consent decree since 1973 to promote more women and minorities. Spokesman Burke Stinson says what began as an exercise in court-ordered compliance has now become a way of doing business. "The concept of including people, no matter their race, creed or color, is now pervasive," he says.

Rep. Harris W. Fawell, R-Ill., who has conducted hearings on affirmative action as chairman of the Economic and Educational Opportunities Subcommittee, says most employers today look for the most qualified worker, regardless of race or gender. He says that while his grandparents undoubtedly discriminated, "my children and my grandchildren don't. . . . They just can't be held accountable for those societal wrongs" of earlier generations.

But Conyers says many critics are too quick to see discrimination as a thing of the past. "It's easy to think things are better than they are."

Deval Patrick, head of the Justice Department's civil rights division, told members of a House panel that they would be "astonished and saddened" by the egregious cases that continue to land on his desk. In 1994, Patrick says, the Equal Employment Opportunity Commission received 91,000 complaints of job discrimination. And a recent study by the Glass Ceiling Commission indicated that white men still hold the vast majority of upper-level jobs.

Supporters do not embrace proposals to recast affirmative action to help those who are economically disad-

vantaged. Civil rights advocates say such efforts should be made in addition to affirmative action, not in place of it.

"Affirmative action was never meant to be an anti-poverty program," says Ralph G. Neas, a veteran civil rights lobbyist who is coordinating a pro-affirmative action campaign for the Leadership Conference on Civil Rights. "It enabled people who were discriminated against to have an equal opportunity."

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**"It's easy to think things are better than they are."**

—Rep. John Conyers Jr.,  
D-Mich.

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#### Muddied Field

During the 1991 legislative debate, civil rights groups had positive momentum as they sought to overturn or restrict the effect of several Supreme Court decisions that were seen as unfairly burdening plaintiffs in job discrimination suits.

This round, they are on the defensive while affirmative action critics appear to have the upper hand. "Clearly the ground has shifted," says Chavez.

Just throwing a spotlight on affirmative action may help generate opposition to the programs.

Seymour Martin Lipset, a public policy professor at George Mason University, says that many politicians in the past avoided the issue for fear of opening themselves to charges of racism or sexism. Now that events like the California ballot initiative have placed affirmative action on the table, political sentiment favors at least some retrenchment. "The politicians now find it hard to resist," Lipset says.

But opponents' newfound momentum does not automatically translate into legislative success.

The simplest action would be to scale back or eliminate federal programs that give special consideration to women and minorities. These include hiring requirements or incentives for federal agencies, grant recipients and federal contractors.

These federal programs affect many jobs and serve as a signal to other employers on affirmative action issues. Many lawmakers and policy analysts consider it likely that Clin-

ton, Congress or both will support some adjustments in this area.

Canady's bill would eliminate such programs and also would seek to restrict programs ordered by the federal courts in response to proven discrimination.

However, Congress cannot alter voluntary affirmative action programs in the private sector or by state and local governments unless lawmakers are prepared to rework the 1964 Civil Rights Act.

Hyde and others say that is a complicated proposition and one that Congress may not have the stomach for — especially absent a strong, organized lobbying effort.

That sort of campaign has yet to materialize. Religious conservatives are more focused on other social issues, such as school prayer and abortion. Nor is the business community clamoring for lawmakers to act.

Women, who arguably have benefited more than minorities from affirmative action, also represent a large political force to block or limit revisions. Many national women's groups have expressed vehement opposition to a rollback of affirmative action, although polls suggest women voters are more equivocal.

Such political uncertainty — and a packed legislative calendar — have raised hurdles for the issue in Congress. However, the issue is heating up in the race for the Republican presidential nomination — a race that includes Dole, Sen. Phil Gramm of Texas and Sen. Richard G. Lugar of Indiana — and could easily spill over into the Senate. Jesse Helms, R-N.C., has introduced bills to outlaw preferential treatment on the basis of race or gender. Canady's legislation should help focus attention on the matter in the House.

Clint Bolick, a conservative activist who has been working with lawmakers on the issue, predicts that legislation to end federally sponsored affirmative action will pass both chambers.

For their part, affirmative action supporters acknowledge that they have plenty of work ahead to bolster political and popular support for their cause, but remain optimistic their position will improve as the focus shifts from the abstract to the specific.

"I am confident that a bipartisan majority will defeat efforts to undo affirmative action," says Neas.

Chavez, from a different viewpoint, says Neas may be right. "I've spent too many years in this to think it's an easy battle," she says. "This is a long haul."

# President Leans Toward Bipartisan Panel to Examine Affirmative Action

**ACTION, From A1**

Commission in the 1960s, which studied how racial discrimination was dividing the country. He said the commission would look not just at federal affirmative action but also at programs that are run at the state and local levels.

In an interview with the Los Angeles Times published today, Clinton noted that previous bipartisan panels, such as one that studied Social Security in 1983, have succeeded at defusing politically explosive issues.

"These commissions are capable of doing very good work and helping to resolve contentious issues," Clinton told the paper.

But Vice President Gore, appearing on NBC's "Meet the Press," said no final decision about a commission has been made. "There are good arguments for it," he said, "and some arguments against it."

Administration aides said a commission might be criticized as an example of presidential timidity—unwillingness to tackle a volatile issue head-on.

Moreover, they acknowledged, unlike with Social Security, on which both parties were anxious to duck political fire, many Republicans are eager to exploit resentment against affirmative action programs and are not likely to reserve their comments and legislation on the issue until after the commission completes its work.

Finally, a commission probably would take many months or even a year to do its work, which would defer the controversy to the middle of an election year.

For all these reasons, administration advisers said, Clinton is unlikely

programs deserve sharper scrutiny. Then he would turn the commission loose to make, as Panetta put it, a "comprehensive judgment about where we go."

Administration aides did not speak with one voice about when the internal administration review would be completed. Panetta this morning said he expects it, "hopefully, in a few days."

This afternoon, White House press secretary Michael McCurry and senior adviser George Stephanopoulos said Panetta was being overly optimistic and that a few weeks is more like it.

Clinton has already signaled, including several times on his two-day California trip, that he intends to support the bulk of affirmative action programs. But he warned on Saturday that if Democrats are viewed as blind adherents to all preference programs, they will hand Republicans "a cheap political victory." Today, a convention of California Democrats ignored that warning and voted unanimous opposi-

tion to repealing state affirmative action programs.

"We are opposed to quotas. We are opposed to ever giving a job to somebody who is unqualified for that job," Gore said on the television program. "We are in favor of moving forward to assert diversity as a national value in the interests of the entire country."

House Speaker Newt Gingrich (R-Ga.) said he supports helping individuals. "I want to help people who work hard, who come out of poor neighborhoods, who come out of poor backgrounds, who go to schools in poor counties. I want to see us find ways to reach out and help individuals, but I am against any kind of quota structure or set-aside structure that is based purely and simply on some kind of background, genetic definition."

On CBS's "Face the Nation," Gingrich said he would "rather talk about how do we replace group affirmative action with effective help for individuals, rather than just talk about wiping out affirmative action by itself."

On another issue, Gingrich said that if Clinton vetoes tax cuts and welfare reform, he and Senate Republican leaders may attach them as amendments to bills the president supports or is locked into signing, such as raising the debt ceiling. Without the debt legislation, the government would be forced to shut down.

Democrats on yesterday's talk shows foresaw the same prospect, but with a sense of dismay.

"Clearly that's high-stakes politics and legislating at its worst. It could happen," said Senate Minority Leader Thomas A. Daschle (D-S.D.).

Panetta, who along with Daschle appeared on ABC's "This Week With David Brinkley," said neither party would benefit from such polarized positions. "What we ought to do is roll up our sleeves now and try to prevent that from happening," Panetta said.

*Staff writer Susan Schmidt in Washington contributed to this report.*



BY RAY LUSTIG—THE WASHINGTON POST  
White House Chief of Staff Leon E. Panetta says commission would look not just at federal affirmative action but also programs at state and local levels.

at an election year.  
For all these reasons, administration advisers said, Clinton is unlikely to simply hand off the issue to a commission without comment. Instead, he probably will make a statement outlining his general principles about what kinds of affirmative action work well and what types of

# **EEOC News Clips**

*for*

*March 1 - 3, 1997*



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# After the Talk or the Touching Gets Too Personal, Where to Turn?

By BARBARA B. BUCHHOLZ

**B**EING the victim of sexual harassment is bad enough. But what do you do when the offender is a member of senior management? Will your complaint end your career? And is there really anyone in your company to whom you can realistically complain?

Sgt. Maj. Brenda L. Hoster asserts that she was harassed last year by her boss, Gene C. McKinney, the Sergeant Major of the Army who was named last fall to a commission charged with reviewing the Army's sexual harassment policies. Sergeant Major Hoster said that when her complaint was ignored, she felt compelled to retire. The Army suspended Sergeant Major McKinney last month.

Mary Dixon also quit her job, after contending that she was harassed by Dan K. Wassong, the chief executive and president of Del Laboratories, a cosmetics company in Farmingdale, L.I.

"When I complained to my boss, he said, 'Find another job,'" said Ms. Dixon, a former executive assistant who sued the company and eventually shared a \$1.19 million settlement with 14 colleagues. "There were so many incidents over the 19 months I worked there that I was in absolute terror, but I needed the job. I was newly married and had a mortgage. I finally quit after he grabbed my buttocks."

Howard Rubenstein, a spokesman for Del Laboratories, said Mr. Wassong and the company deny wrongdoing and the company settled "only to avoid protracted litigation and extraordinary publicity." He said the company had also changed its policies on sexual harassment to make it easier for employees to seek help.

**L**AWYERS say the corporate environment for women has improved since Anita Hill accused Clarence Thomas of sexual harassment in 1991, but the process of filing charges is still daunting, especially if the accused offender is the chief executive. Still, there are smart steps that workers can take to win a claim.

The Equal Employment Opportunity Commission, the Federal agency responsible for enforcing discrimination laws, said that since the Civil Rights Act of 1991 allowed plaintiffs in these cases to sue for compensatory and punitive damages, the number of charges filed with the agency had more than doubled, to about 15,000 last year.

Trisha Brinkman, of Brinkman & Chersky, a consulting firm in San Francisco, said companies tended to settle quickly and quietly in quid pro quo claims — involving supervisors who seek sexual favors in return for job benefits — because they fear the liability and adverse publicity.

More difficult to prove, but more commonplace, are complaints of a hostile work

environment. These often involve unwelcome, repetitive and subtle harassment, said Pauline T. Kim, an associate professor at the Washington University School of Law in St. Louis.

"Your boss might call you a slut once or 10 times, but a court might not consider it harassment because it doesn't affect your ability to perform your job," said Laurel Bellows, a Chicago lawyer and the president of the American Bar Association's Commission on Women in the Profession. "But if the person brushes up against you several times, that may be viewed differently because it's not what's considered reasonable behavior."

In its suit against Del Laboratories on behalf of Ms. Dixon and her co-workers, the Equal Employment Opportunity Commission contended that Mr. Wassong had sexually harassed employees by blatantly seeking sexual favors in return for job benefits and by more subtly creating an intimidating or hostile work environment.

Ms. Dixon now works from her home in Commack, L.I., filing medical billing claims

for doctors and consulting for supermarkets. She said she would never feel safe working again outside her home.

Many who have filed harassment claims concur with Ms. Dixon that even when they win, they lose, because of the emotional and financial toll of the process. Because those who complain may be labeled troublemakers, they often decide to find another job.

**S**UCH is the case of a 36-year-old former professional at a Fortune 500 company who quit her job two months ago after what she described as a year of enduring remarks like "How is your sex life going?" harassing calls to her home and an inability to obtain a transfer because her harasser was protected by upper management. The company settled out of court.

Single and unemployed, she vacillates between feeling good about speaking up and feeling terrible. "It's not like my life is ruined, but depending on your work life and community, you can be perceived as a pariah and a woman who wants to shake down an organization," she said. "There's a lot of guilt by association." The terms of her settlement prevent her from revealing her name, her employer or the industry in which she worked for a decade.

Lawyers say the burden rests on the worker to prove a claim, which requires following a long list of steps that differ by company, but that often involve going to a human resources supervisor, who investigates the complaint.

And therein lies the problem. "It's an oxymoron to think that an H.R. person can keep a complaint confidential when investigating," said Freada Klein, a consultant in Boston who advises companies on their sexual-harassment policies. "When the harass-

er heads a company or is in management, follow-up and action become less likely."

Jeffrey Liddle, a lawyer with Liddle & Robison in New York, said: "H.R. personnel represent management, not employees.

Even when they say, 'Yes, this is awful,' you may find the harasser in your face the next day, or subtler discrimination, such as your work criticized."

What do you do if you have been harassed? Here are experts' recommendations:

- **Read your company's policy.** "Know what procedures it offers to voice complaints," said Marcia L. Worthing, senior vice president for human resources and corporate affairs at Avon Products. "Know how it defines sexual harassment and understand what such behaviors are."

- **Speak directly to the harasser.** Immediately tell him or her that a comment or action is unacceptable and you want it stopped. "Be specific rather than general," said Joann Keyton, an associate professor of communication at the University of Memphis. "Say, 'I feel uncomfortable when you touch me unprofessionally,' rather than say, 'I don't like the way you treat me.'"

- **Document all actions and comments.** If words and actions persist beyond a few incidents, keep notes of what was said, how you responded, who was present, where the conversation or incident took place and how you felt, Ms. Bellows advised. Some states permit tape-recording of conversations in which you are a participant, though some companies prohibit taping, said Bradley Kafka, a lawyer with Gallop, Johnson & Neuman in St. Louis.

- **Speak up to company management.** Tell the appropriate supervisor about the harassment and follow up the conversation with a memo. If he or she isn't responsive, go to others until you get a response.

If the company has a harassment policy and fails to investigate, it may be liable. Conversely, if you don't give the company a chance to investigate your complaint, you risk losing in a lawsuit. Even though the human resources department represents management, you may have no choice but to file your first complaint there.

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- *Get emotional and legal support.* Because those who complain often feel — and sometimes are — ostracized, tell someone you trust at work. Also have a confidant outside of work. Consider hiring an employment lawyer to walk you through the process, read documents you may be asked to sign and weigh any company offers.

- *Refrain from the urge to sue.* A lawsuit should be a last resort because of the time, money and emotional distress involved, said Nina Stillman, a lawyer with Vedder Price Kaufman & Kammholz in Chicago.

Before suing, be sure to file a charge within the equal employment commission's statute of limitations — 180 days, unless the agency has contracts with a state or local agency, which extends the period to 300 days, said Michael Widomski, a spokesman for the agency. A commission employee will investigate and issue a letter of determination to the company. If conciliation fails, the agency may file a suit.

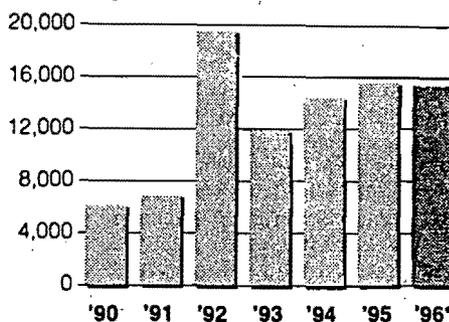
- *Move on.* If you file a complaint and the company begins passing you over for promotions or plum assignments, lawyers say it is difficult to prove that this is retaliation. Dale Winston, chairman and chief executive of Battalia Winston International, an executive recruiting firm in Manhattan, says it is better to simply leave the company and start over someplace else. And the quicker the better. "Put your résumé on the market and get out of there," Ms. Winston said. By moving quickly, she said, there will be no gap in your résumé that will have to be explained during job interviews. But if you are asked about why you left, don't lie.

- *Don't bank on a big monetary award.* The Civil Rights Act of 1991 capped punitive and compensatory damages based on the number of employees at the company. A company with 500 workers would have to pay a maximum of \$300,000; one with 100 or fewer would pay up to \$50,000, said Mary Stowell of the Chicago law firm of Lang Stowell Friedman & Veron. □

## Fewer Cases, More Money

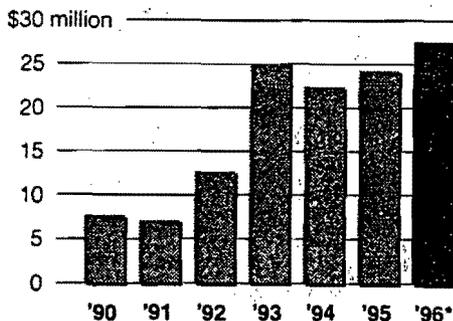
### FILINGS ARE LEVELING OFF ...

Number of sexual harassment complaints filed each year.



### ... WHILE SETTLEMENTS KEEP RISING

Total settlements from sexual harassment cases brought by the Equal Employment Opportunity Commission.



\*Estimated.

Source: Equal Employment Opportunity Commission

# Opening Doors by Enabling the Disabled

*Entrepreneurs Find a Niche in Providing Services to Meet the Demands of the Disabilities Act*

By Jay Mathews

Washington Post Staff Writer

**D**avid S. Birnbaum, deaf since birth, was doing computer consulting in Silver Spring when he noticed how much his deaf friends and clients were paying for sign language interpreters—\$40 to \$60 a hour, often with a two-hour minimum. "I thought they were being ripped off," he said.

Americans with disabilities are accustomed to such frustrations and often have to live with them. But Birnbaum, 48, is a natural entrepreneur who had been dreaming up business ideas for years. He saw ways to cut the inconvenience and cost of interpreting and make money for himself. Two years ago he opened Birnbaum Interpreting Services to do just that.

His pursuit of the dream is an emblem of a new approach to widening job opportunities for the disabled.

Since the Americans With Disabilities Act was signed in 1990, disability rights activists have sought to use the law to make more jobs available to disabled people, with some success. The Census Bureau says the percentage of severely disabled people in the work force grew to 26.1 percent in 1994 from 23.3 percent in 1991, although employers continue to adjust to the law's provisions and disabled job seekers still are learning how to exercise their new rights.

Now several organizations are trying to help the disabled not just to work for businesses, but to run them, as Birnbaum has, in many cases using the services and meeting the needs created by the disabilities act. They say opportunities are abundant despite downsizing. Entrepreneurs are

more likely to benefit people with disabilities, they say, if the business owners themselves have similar perspectives and life experiences.

The President's Committee on Employment of People With Disabilities, a 50-year-old federal agency based in Washington, has begun to recognize pioneering business owners who are disabled. Last summer it presented the first Evan Kemp Entrepreneurship Award to Heidi Van Arnhem, a Birmingham, Mich., travel agency owner who uses a wheelchair. The committee also gave the Justin Dart Achievement Award to William J. Malleris, a Naperville, Ill., housing developer who has a neuromuscular disorder and gets around on a motorized scooter.

Starting a business is a frightening prospect for most people. It is not something that family, friends or service agencies usually encourage disabled people to do. But Malleris says it is worth exploring. An entrepreneur, he said, "can pick and choose what he wants to do. You are entirely in the area where you want to be."

Urban Miyares, president of the San Diego-based Disabled Businesspersons Association, said "finding a good job is often difficult, so self-employment may be a good option for some."

Federally funded, state-managed vocational rehabilitation programs have money to help people who want to run their own businesses, said Randee Chafkin, a program manager for the president's committee, "but the counselors for whatever reason have never really pushed it as an option."

Chafkin estimated that nearly 3 million disabled Americans work for themselves, many running very small businesses from their homes. Morris Tranen, president of the Columbia-based Partnership Develop-

ment Group, which promotes entrepreneurship for people with disabilities, said self-employment offers flexibility, such as the freedom to work all night on a project if necessary. He cited a man who makes dental appliances in his basement and is delighted to make a living without ever having to leave home.

Van Arnhem, 30, said she started her travel business after she had difficulty finding anyone who would hire her. She was paralyzed below the neck in a shooting accident when she was 16. After college and a bit of law school, she was not sure what she wanted to do, and found many potential employers uninterested.

She enjoyed travel and noticed the arrangements made by professional agents often were disappointing. She tried to arrange some trips herself and found she could find better bargains than the agents had. A business was born.

It was difficult, she said, to run a company when she was totally dependent on others for transportation, but her firm, Travel Headquarters Inc., now has six employees, with one other disabled person besides herself. The secret, she said, "was sticking with my priorities and working hard."

Malleris, 41, said he wore out four tires on his scooter while overseeing construction of his first 48-unit apartment building, designed to attract both disabled and non-disabled tenants. He completed the project in nine months and filled the building with tenants in 35 days. "My banker was very pleased," he said.

Birnbaum's company grew out of his efforts to expand his computer services business. He had long been accustomed to taking the initiative in his career. He was, he said, the first deaf taxi cab driver in New York and one of the first deaf people to set

See **DISABLED**, page 6

The Washington Post

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# Enabling the Disabled Entrepreneur

DISABLED, from page 5

up his own company. The Silver Spring interpreting company he founded in early 1995 now has a staff of 30, two others deaf like himself, and annual sales of \$1.5 million.

He is placing much of his expansion hopes on a new concept: video remote interpreting. Along with a few other entrepreneurs in the field, he is developing a system that would allow a deaf person to call up a sign language interpreter on a computer screen at a moment's notice. People using the system would be charged by the minute, not the hour, perhaps less than \$2 a minute, a rate that would save both money and time, Birnbaum said. He said he plans a demonstration of the system later this month.

To communicate with people who do not know sign language, deaf people often must write things down. Telephone systems mandated by the Americans With Disabilities Act relay conversations through special operators who read what the deaf person has typed on a teletypewriter

(TTY) to the hearing person on the other end, and then type the hearing person's words back to the deaf person.

Harvey Goodstein, professor of mathematics and computer science at Gallaudet University and vice president of the National Association of the Deaf, said TTY conversations poke along at no more than 50 words a minute while an American Sign Language chat, conveyed over a computer screen using camera and special telephone line, could breeze along at 200 words a minute.

Birnbaum said that entrepreneurs with disabilities not only have a chance to provide extra services to people with disabilities, but can understand the subtleties of deaf and disabled culture that sometimes elude others. A sign language interpreter working for a company that is not managed by a deaf person may leave a school board meeting after 20 minutes if there is no one sitting in the seats normally reserved for deaf people who want to be near an interpreter or close enough to read lips, Birnbaum said. He trains his in-

terpreters to recognize that many deaf people prefer to sit in the general section, and may, like any other busy citizen, arrive late.

Chafkin said the president's committee is working with the departments of education, treasury and commerce, the Small Business Administration and some banks and loan companies to arrange more opportunities for businesses run by people with disabilities. Howard Moses, deputy assistant secretary of special education and rehabilitative services for the Education Department, said officials there want to make "micro-loans" of a few hundred dollars each available to help start such enterprises.

"I know some folks with disabilities who are as totally clueless about running a business as I would be," Chafkin said. "But we want the information out there. What persons with disabilities need is what everyone else needs—technical assistance regarding development and implementation of a business plan, access to capital and information on resources." ■

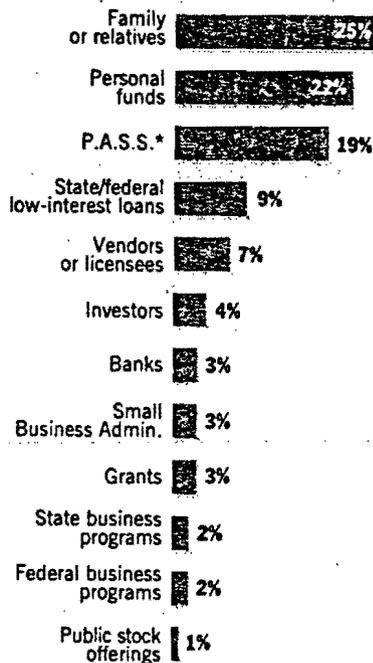


## A HELPING HAND

*The Americans With Disabilities Act, which became law in 1990, is designed to end discrimination against disabled Americans in jobs, public accommodations, transportation, telecommunications, and state and local government services. It requires private businesses and public agencies to make their offices, goods and services accessible to disabled people. Employers must make reasonable accommodations to allow disabled employees to do their jobs and cannot deny employment to otherwise qualified people with disabilities.*

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### Their start-up capital comes from:



### And they are entering many different fields:

Services	22.88%
Retail trade	14.10
Finance, insurance, real estate	13.34
Construction	12.66
Manufacturing	11.21
Wholesale trade	10.14
Transportation/public utilities	5.95
Agriculture, forestry and fishing	3.90
Nonprofits	3.70
Mining	2.12

\*Program for Achieving Self-Support, funded by Social Security to provide seed money to disability recipients who want to start a business.

NOTE: Of the entrepreneurs surveyed, 18 percent said they had more than one source of capital.

SOURCE: Disabled Businesspersons Association database, compiled over the past 10 years.

# USDA Moves Against Agency Discrimination

*Glickman Launches Initiatives to Address Complaints of Widespread Racial Hostility*

By Michael A. Fletcher  
Washington Post Staff Writer

Responding to complaints of widespread racial bias, Agriculture Secretary Dan Glickman yesterday moved to strengthen USDA's civil rights enforcement procedures to "change the culture" of an agency plagued for decades by charges of discrimination.

The complaints were summarized in a report by a task force of top USDA officials who traveled the country listening to employees describe a climate of racial hostility in many of the nation's 2,500 USDA offices. The group also heard from farmers who charged the agency has "participated in a conspiracy" to foreclose on their land.

Black farmers, in particular, say their numbers have been dwindling because of discrimination by local USDA officials. For years, black farmers across the country have charged that USDA officials unfairly discouraged, delayed or rejected applications for federal loans, or subjected them to stifling standards when loans were approved. Blacks now make up fewer than 1 percent of the nation's 1.9 million farmers and their ranks have been declining at three times the rate of white farmers.

"Our actions today are meant to address both the problems and perceptions that are out there," Glick-

man said. "For far too long USDA has been ignoring serious, pervasive problems within our civil rights system."

Glickman said he would begin to address the problem through initiatives designed to better respond to discrimination complaints. Also, he said he would attempt to fire employees found participating in reprisals against those who make discrimination complaints.

*Black farmers say their numbers have dwindled because of local officials' actions.*

In an effort to clear what the report called blurry lines of authority on civil rights issues, Glickman also named long-time USDA administrator Pearlie S. Reed acting assistant secretary for administration. In that job, Reed becomes the agency's top civil rights enforcer and has been charged with resolving hundreds of discrimination complaints, many of which have languished for years. Reed, who headed the civil rights task force, said he hoped to clear the backlog within 120 days. For years,

employees and minority farmers have complained about the ineffectiveness of USDA's anti-discrimination efforts. Even in instances where internal investigations have upheld farmer or employee complaints of discrimination, no compensation was awarded to complainants and no punitive action was taken against perpetrators.

"Too many managers . . . are not committed to and are not being held accountable for their actions on civil rights," the report said.

The report also found farmers frequently complain that local USDA staff members who make loan decisions operate in a bigoted fashion. But, the report said, the estimated 12,000 local staff members often are not held accountable because, technically, they are not federal employees or under control of top USDA officials. Instead, they report to their county committees.

Glickman said he plans to offer federal legislation to make all local USDA employees directly accountable to him. He will also seek congressional authority to appoint minorities and women to local USDA loan committees, which are now staffed overwhelmingly by white men. Similar legislation failed in Congress in recent years.

"For the county committee process to work, the members have to reflect the communities they serve," Glickman said. Glickman also said he

plans to appoint a committee to look into the problems of small farmers struggling to compete with large growers across the country.

Glickman's actions were applauded by lawmakers and activists who have been attempting to draw attention to what they call the poisoned racial atmosphere in the 90,000-employee USDA. Besides the hundreds of pending discrimination complaints, the agency for years has been saddled by several class-action lawsuits charging racial or sexual discrimination and retribution.

"The expression of these concerns no longer seems like a cry into the wind," said Lorette Picciano, executive director of the Rural Coalition, a farmer advocacy group. "The department itself has issued a plain-spoken, clearly written, honest and highly critical report."

Black members of the House Agriculture Committee said in a statement that the report underlined the need for fundamental change at USDA, and they promised speedy congressional hearings on Glickman's legislative initiatives.

Lawrence C. Lucas, president of the USDA Coalition of Minority Employees, was cautious concerning Glickman's action. "Secretary Glickman has uttered the right words," he said. "Now he must follow up with deeds that make a difference."

## Civil Rights

### Glickman Releases Action Team Report With Promise to Clear Up EEO Backlog

**D**epartment of Agriculture Secretary Dan Glickman Feb. 28 announced a series of actions "meant to address both the problems and perceptions" of discrimination and civil rights abuse against customers and employees within USDA.

The remarks were broadcast to USDA employees across the country via satellite. The speech was followed by a press conference where Glickman released copies of a report, *Civil Rights at the United States Department of Agriculture*, submitted by the agency's Civil Rights Action Team.

Glickman announced the appointment of Pearlie S. Reed, leader of the CRAT, to the position of acting assistant secretary for administration. Reed, a 27-year career employee at USDA, was associate chief of the Natural Resources Conservation Service.

In accordance with the CRAT report's recommendations, Glickman said, Reed's new position "has been beefed up and vested with all authority and responsibility for civil rights programs throughout the department." He added that "The buck will always stop with me, but Pearlie will be my full-time enforcer."

Glickman also said he would issue a "new mission statement" that makes it "a condition of employment for every USDA employee to treat every customer and co-worker fairly and equitably, with dignity and respect."

"We also start today with a zero-tolerance policy for reprisals," he said. "Those who choose retaliation should be more concerned about keeping their own jobs."

**Eliminating EEO Backlog.** The CRAT report contains 92 recommendations for change, Glickman said. "Most are feasible; some may need further review. I've set a deadline of six months from now for implementation of those recommendations that can move forward immediately." In cases where congressional approval is needed, it may take longer, he said.

Specifically, the CRAT report calls for "elimination of the backlog of discrimination and equal employment opportunity complaints at USDA within 120 days," according to Glickman. Although the plan is "ambitious," Glickman said, he would give Reed "the resources necessary to go for it."

To help resolve complaints, Glickman also said he would make all EEO complaints filed before Jan. 1, 1997, eligible for alternative dispute resolution and would ask Reed to develop a process for resolving disputes in a "more timely, respectful, and fair manner."

Other CRAT recommendations to be implemented, Glickman said, include:

- annual civil rights training for all USDA employees;
- a department-wide workforce planning and recruitment effort; and

■ creation of an outreach office to ensure "that we reach all the people who need or can benefit from our service."

The most dramatic change at USDA will come from efforts to "deal with and reign in authority," which is "the only way to ensure accountability," Glickman said.

Specifically, Glickman said he would ask Congress for authority to convert about 12,000 nonfederal county positions in the Farm Services Agency to federal employee status. "This action will put us in a better position to bring uniform civil rights accountability to these jobs, while preserving what's good about our county field office structure, which is a strong, local USDA presence," he said. The change would apply only to positions currently paid for by the federal government, he added.

The secretary also promised to revise the performance review process to make civil rights a high priority. As assistant secretary, Reed will have the authority "to review the civil rights records of agency heads and sub-Cabinet officials to make sure they are held fully accountable for their operations," he said.

**'Don't Know of Anyone Penalized.'** Lawrence Lucas, president of the USDA Coalition of Minority Employees, told BNA after the press conference that "we've seen these reports before."

The pressure is on Glickman to take action against those individuals who have been found guilty of discrimination at USDA, he said. The zero-tolerance policy has been in place for a year, Lucas said, but "we don't know of anyone who has been penalized under that policy to date."

Lucas also called for more structural changes. Specifically, he said, his group "would like to see an assistant secretary or director of civil rights that reports directly to the secretary and is independent of personnel."

"People who administer EEO at USDA have been part of the problem," he added, pointing to a 1996 report by the U.S. Commission on Civil Rights that "made it clear that mixing civil rights and personnel is not good for civil rights and is not working."

By JOAN M. FLYNN

*The 122-page report, Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team, is available on the Internet at <http://www.usda.gov>.*

# 3 Women Sue Monumental Insurance Alleging Harassment

By Kirstin Downey Grimsley  
Washington Post Staff Writer

Three women recruited into an insurance company's management training program have filed a lawsuit alleging they were sexually harassed by male supervisors and co-workers at the firm's Ellicott City office.

The women, hired in 1995 by the Baltimore-based Monumental Life Insurance Co.'s Top Gun training program, allege they were subjected to obscene language, touched, rubbed, grabbed and threatened by male supervisors and co-workers—treatment that one of the plaintiffs called “by far the most traumatic experience” of her life.

Monumental, in court papers, has denied the allegations. Company executives said

they could not discuss the complaints, because of the litigation. They also said the company strictly enforces its policy forbidding sexual harassment. Attorneys for the two male employees named as co-defendants said their clients deny all the allegations.

In their lawsuit, filed in December in federal court in Baltimore, the three women—Wanda Molinary, 30, La-Von Lopez, 28, and Jackie DeGuzman, 28—describe being frightened and humiliated by some of their male co-workers and supervisors.

Lopez, of Pikesville, alleges she was dragged across the floor by a rope that had been tied around her hands. DeGuzman, of Columbia, alleges that once she was hoisted into the air by two male co-workers, and that at another time, two male sales agents

pulled her into an office and demanded that she strip for them.

Molinary, now of Clifton, N.J., alleges that once when she entered a male colleague's office where three men were talking, a male supervisor suggested the four of them could engage in group sex. Molinary alleges that when she tried to run out of the room, the supervisor pushed her into one man's lap, and that she had to punch and push her way out of the office.

The women said they were recruited into the \$45,000-a-year jobs by Monumental while they were completing their MBA degrees. They allege that after joining the training program, they entered a workplace where they were questioned about their sexual preferences and propositioned frequently and publicly.

Lopez said she felt she had been treated “like a subhuman.” She said, “This will always be a part of me. I will never forget it.”

In their lawsuit, the women say that after they complained, they were fired, demoted or pushed out of the company. They say the company “knew or should have known” what was happening at the Ellicott City office, because of complaints by five different women, including the plaintiffs, but chose to do nothing. The three who filed the lawsuit are no longer employed at Monumental.

Monumental executives said company policy prevents them from discussing pending litigation. Monumental's attorney, Emmett F. McGee Jr., said the insurance company “is firmly committed to a policy of equal opportunity and does not tolerate sex-

See MONUMENTAL, D7, Col. 3

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# Monumental Insurance Faces Sexual Harassment Suit

MONUMENTAL, From D1

ual harassment or any other form of discrimination."

The lawsuit names as co-defendants two Monumental employees: David Cox, of Columbia, then the district sales manager who headed the Top Gun training program, and Nicholas J. Disipio III, of Mount Airy, then a manager in the same office, but no longer employed at Monumental.

Cox's attorneys said he would not comment. But in a statement, one of Cox's attorneys, Joseph S. Crociata, said Cox has "categorically denied the allegations of personal misconduct on his part," though he has been "distressed at the allegations made as to the conduct of others in his department."

Crociata said that Cox's attorneys are investigating the allegations "to determine the extent to which they have any merit." He said Cox "looks forward to the opportunity to clear himself of the allegations against him in a court of law."

Disipio referred requests for comment to his attorney, Daniel J. Bartolini, who said his client denies all the allegations in the lawsuit, and intends to fight it vigorously in court. "He's got a right to defend himself, and he'll come out swinging hard," Bartolini said.

Bartolini also said the women's allegations that Disipio taunted them in sexual terms in Spanish were implausible because Disipio does not speak Spanish.

McGee said Cox still works at Monumental, but Disipio does not. According to a Maryland unemployment compensation appeals hearing report issued in July, Disipio was fired by Monumental last April, but his termination letter did not specify why.

Two former co-workers contacted separately by

The Washington Post corroborated the women's accounts. Mike Balderson, of Arnold, Md., also was a Top Gun management trainee, and started work there in August 1995. He said he witnessed numerous acts of sexual harassment at the insurance office in Ellicott City, particularly verbal abuse of women.

"It was just incredible," Balderson said. "... What I observed there was totally out of line and overlooked at all [management] levels."

He said he observed the incident in which several men dragged DeGuzman into an office, and

*Monumental's attorney said the insurance company "does not tolerate sexual harassment."*

he recalled that the men graphically described what they intended to do to her sexually as they pulled her inside.

"It was awful, awful," Balderson said.

Rose Henry, an administrative assistant in the same office, declined to discuss the other women's allegations in detail, but said she had records that would back up many of their claims. Henry filed a lengthy and detailed sexual harassment complaint with the U.S. Equal Employment Opportunity Commission in September.

Henry said she attended a meeting in January

1996 in which four women, including the three plaintiffs, told Cox of the sexual harassment they were facing on the job.

"Mr. Cox came out of the meeting and told me he wanted discharge papers on all of them, because he didn't like what they said, regarding their complaints about the Top Gun program, training, unprofessionalism, etc.," Henry told the EEOC.

Monumental, founded in 1858, has more than \$3 billion in assets and employs 2,100 people. Monumental is a subsidiary of Aegon USA Inc., the U.S. branch of a Dutch conglomerate.

Monumental first established the Top Gun management training program in 1994, as a way to build and professionalize its staff. It recruited MBA students around the Northeast, offering them an intensive instruction program and promising to promote them to sales manager within six months and to district manager within a year.

Molinary said she stayed in the job for 17 months, despite the harassment, because it was her first job, and she hoped to succeed, and because the company kept delaying its reimbursement of her travel expenses and she wanted to be repaid.

Lopez said she stuck it out for 17 months because she kept believing they would eventually recognize her good work, and that if she left, she would have been defeated by the harassers in the office.

"In some twisted way, I didn't want to give them the satisfaction that they could dismiss us so easily," Lopez said.

# Tenant Paid Harassment Settlement

## Clause in Housing Act Allowed Federal Claim

By Judith Evans  
Washington Post Staff Writer

For four years, Lisa Williams hasn't been able to shake the fear that has overcome her since the night she says that her building's superintendent allegedly sexually harassed her. But Williams believes her future is brighter now that she has settled a federal complaint against the building's manager and owner that forced them to pay her \$200,000 in damages and fire the employee.

"I'm very pleased with the settlement because I actually got what I wanted and that was for him [the superintendent] to be fired," Williams said. "It sends a message to management that this was going on and you can't not do anything about it."

Williams sued Poretzky Management and its owners, Lester and Selma Poretzky, for sex discrimination under the Fair Housing Act when she lived in Chevet Manor Apartments in Oxon Hill for the last eight months of 1993. She alleges that firm's superintendent, Harry Little, grabbed her in the building's elevator and later in the same evening pinned her against a table in the basement laundry room and rubbed himself against her while attempting to kiss her.

Poretzky agreed to the Jan. 31 settlement, but denied any wrongdoing. Little also denied that the harassment incident ever occurred.

But the case brought attention to a little-known provision under the Fair Housing Act that allows complaints to be filed in cases where individuals believe they have been a victim of sexual harassment. Only six other federal courts nationwide have heard similar cases, including two that resulted in rulings favoring women who had alleged harassment, housing advocates said.

Williams claimed that Poretzky Management created a hostile living environment at the building when the company failed to fire or reprimand Little after she reported her account of events that occurred July 23, 1993. Lawyers for Poretzky and Little un-

successfully sought to have the case dismissed, arguing that Williams suffered no discrimination under the federal housing law because she was never denied housing. U.S. District Judge Catherine C. Blake in Baltimore ruled last October that the case should proceed.

The settlement and court decision "makes an important statement that this type of discrimination not only is a clear violation of law, as the court held, but it's expensive," said John Relman, a lawyer who worked on the case for the Washington Lawyers Committee for Civil Rights and Urban Affairs.

Poretzky's lawyer, Norman Schneider, said his clients settled the case to avoid the costs of further litigation. His clients, Schneider said, weren't willing to risk having to pay

Williams's legal costs in the event that a jury awarded her damages.

"It was a clear business decision," Schneider said. "We felt, although she didn't have a very strong case for damages, she might get something. Then, we would be on the hook for her attorney's fees, which could be 12 times what she might receive."

Relman declined to say how the lawyers and Williams would split the award. She declined as well, but said she would use part of the money for a down payment on a house and part for her 9-year-old son's education and has given her mother some money to buy a truck.

Schneider continues to argue that Williams's case didn't meet the requirements of sexual harassment under the law. Williams wasn't denied

*"It sends a message to management that this was going on and you can't not do anything about it."*

—Lisa Williams,  
plaintiff in sexual harassment suit

the right to rent her apartment and she even used the building's party room to throw herself a birthday party after the incident occurred. He said Williams never filed a police complaint about the incidents.

The Poretzky's were "reluctant to fire him [Little] because it's an unproven charge," Schneider said. "We feel very sorry for him." He said if the owners failed to terminate Little, they would be left open to extortion from possible future claims.

"If they thought the [court] decision were wrong, they were free to appeal it," Relman said. Blake's decision "followed the majority view that creation of a hostile living environment does constitute a denial of housing."

Williams, a pre-kindergarten schoolteacher, said after the incident she was afraid to leave her apartment and ride in the elevator. She alleged in the suit that Little, or friends of his, harassed and threatened her after she reported him to management.

The experience "changed everything for me, period," said Williams, who now lives in Forestville with her son. "I'm constantly watching over my shoulder all the time. When it happened I was devastated. It was completely unexpected."

The 32-year-old woman said she used to smile and greet strangers, but will never do that again. "I couldn't smile at people because I was very uncomfortable with myself. I gave him [Little] no suggestions at all, and this happened because I smiled and spoke."

But Williams said she wants other women to know that it pays to fight. "If it's happened to me, I'm sure it's happened to other women. I can see why a lot of women don't come forward. But it's worth it when you can make a difference."

SATURDAY

# New Attention to Women in Military

By JAMES BROOKE

DENVER, March 2 — In a one-room law office in a converted house here, the scourge of male traditionalists in America's military sits in a green wicker chair on a flowered cushion.

As complaints of sexual harassment and rape rock Army bases from Alabama to Maryland to Germany, much of the legal and public relations advice for female soldiers can be traced to a group headed by Susan G. Barnes, Women Active in Our Nation's Defense, their Advocates and Supporters, or Wandas.

Since founding the group four years ago, Ms. Barnes has kept a low profile for her loose network of military women, partly out of fear of jeopardizing their careers, partly to avoid being swamped by calls about sexual harassment.

"The women don't want their names on any membership list," said Ms. Barnes, a former criminal court judge in Denver. "So we took their names off the computer, put it on a floppy, and put the diskette in an underwear drawer or somewhere." But she said there were hundreds of members.

Until recently, military women, largely officers, circulated the telephone number for Wandas by word of mouth. But three weeks ago, the discreet profile was compromised when Ms. Barnes emerged as the lawyer for Brenda L. Hoster, a retired Army sergeant major who said a superior officer sexually assaulted her last year while she was on duty.

In response, the Army suspended the accused man, Sgt. Maj. Gene C. McKinney, its highest-ranking enlisted soldier.

"The calls have gone crazy," said Ms. Barnes, who is also president of the Wandas Fund, the group's legal services arm, which is run by volunteers. "It's taken over my life in the last three weeks. We are going to have to take Wandas professional."

Without a budget for lawyers, lobbyists or counselors, the organiza-

tion has usually worked behind the scenes. Volunteer lawyers have provided legal advice to women in cases against the military and advised the Pentagon on writing regulations for handling complaints about sexual harassment. The lobbying arm, Wandas Watch, has provided military witnesses for Congressional hearings and has helped Congress draft bills to speed the processing of harassment complaints.

"We have been information brokers," Ms. Barnes said of her work arranging television appearances and newspaper interviews for military women who are willing to talk about sexual harassment.

Virtually unknown to the general public, Wandas is well-known to conservative groups. They say Wandas wants to push American female sol-

## A discreet source of legal and public relations help for female soldiers.

diers into all combat roles and is promoting witch hunts against male officers who stand in the way.

"It is bad for national defense to have some outside group swooping in and saying the woman is always right," said Elaine Donnelly, president of the Center for Military Readiness, a conservative policy group in Michigan.

Wandas members "scare the brass to death," Ms. Donnelly said. "They have a practice of going after people in the military who don't support the feminist agenda sufficiently."

Wandas grew out of the ashes of Tailhook, the 1991 convention of naval aviators where women ran a gantlet of drunken officers in the

corridor of a hotel in Las Vegas, Nev. Simmering over conservative attacks on the women who made complaints, Ms. Barnes met here with former Representative Patricia Schroeder, who represented Denver and was a member of the House Armed Services Committee.

"Pat said there weren't any advocates out there for the military women," Ms. Barnes said. "The second we put the word out, they were calling us from all over."

"Loss of career and retaliation are constant themes among the women who call," she said. "We are often a last resort," a reference to a military tradition of squelching whistle-blowers. "Some have had a career derailed by a rape or by a sexual come-on that was turned down and then resented," she added.

"What we are seeing now is the tip of the iceberg. The Army has traditionally handled these cases with administrative punishments that don't cost anybody their career."

Contending that a quarter of the 870 Army soldiers convicted in military courts of rape and other sexual assaults from 1990 to 1996 received sentences of less than a year in jail, she said. "If I had a sentencing record like that when I was judge, the good citizens of Denver would have run me off the bench."

Women account for 13 percent of the nearly 1.5 million soldiers, sailors, marines and fliers. But women now account for 20 percent of the recruits who enter military service.

Often overlooked in the debate over men's and women's roles is the fact that many military women seem to like their work. In two surveys in the early 1990's, 47 percent of black female soldiers said they were satisfied with their work, compared with 25 percent of black women polled in civilian jobs.

Black women account for almost half of female soldiers. Among white women, the military edge was smaller: 46 percent expressed satisfaction, compared with 41 percent in

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Kevin Moloney for The New York Times

Susan G. Barnes heads Women Active in Our Nation's Defense, their Advocates and Supporters, or Wandas, which helps military women.

civilian life.

More than half of the 47,000 military women surveyed by the Pentagon last year said they had been subjected to some form of sexual harassment in the previous year.

"Why don't women report these incidents in a more timely fashion?" asked Charles Moskos, a military sociologist at Northwestern University. "The military has to consider a distinct female chain of complaint."

To Ms. Barnes, that smacks of "separate but equal."

"Army women do not want a special chain of command," she said, because they think male officers and judges should be able to handle such complaints.

Mrs. Donnelly contends that sexual harassment in the military will decline when the Pentagon declares that "the social experiment is not working" and withdraws women from joint training and joint housing with men.

"The coed tents started in Haiti," she said of the new housing policy. "We have 18- and 19-year-olds far away from home, thrown together in coed tents, and then wonder what happens? Well, in Bosnia, we now

have a soldier getting pregnant every three days."

Wandas, Mrs. Donnelly said, fosters a "P.C. mentality in the military" that seeks to ban Playboy magazines from bases, that puts black marks in the personnel files of officers who attend strip shows and that considers accused soldiers guilty of sexual harassment until proven not guilty.

"What really bothers the Army wives about the coed-tent situation is not that their husbands are going to be fooling around, but that a woman soldier may lodge a false allegation," Mrs. Donnelly said. "In the military, the ultimate dangerous thing now is a sexual harassment charge. You can have your career blown away in an instant."

To Ms. Barnes, those statements are red herrings intended to divert attention from the real harassment and abuse of women and from a "brass ceiling" that blocks the entry of women into the highest echelons.

"My military women couldn't care less about strip parties or girlie magazines," she said. "They just want a fair shot at a career."

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**Harassment fallout: Americans pessimistic, still would let daughter serve**

AP POLL MILITARY SEX

By HOWARD GOLDBERG

Associated Press Writer

NEW YORK (AP) - After a series of sex scandals, Americans are not afraid to have their young women serve in the military even though 55 percent say sexual harassment is ingrained there, according to an Associated Press poll.

The number who think the armed forces could root out sexual harassment, 42 percent, shows less confidence than for doing away with sexual assault, at 53 percent, or hazing, at 50 percent.

Since several drill sergeants were charged with rape and harassment of young trainees at Aberdeen Proving Grounds in Maryland, the Army has come under pressure to reconsider its policy of training men and women together.

Defense Secretary William Cohen is examining the issue this week during his first base visits since joining the Cabinet last month.

At Lackland Air Force Base in San Antonio, Cohen said Thursday that he has yet to see strong evidence for changing the current gender makeup of military training.

"I frankly think the services, at least initially, should make the determination as to what works best for their service," Cohen said, noting that the Marines and certain Army combat units do not train men and women together.

In the poll, 53 percent support the joint training, to 39 percent for separate training. Some groups are more evenly split: veterans, Republicans and women. Age is an even bigger factor, with Americans born before World War II tending to favor separate training.

The poll of 1,010 adults was taken by phone Friday through Tuesday by ICR of Media, Pa. Results have a margin of sampling error of plus or minus 3 percentage points.

A pollster who has been tracking public confidence in U.S. institutions for many years said the military often tops the list, compared with organized religion, medicine, the media and various branches of government. But the public's confidence in the military is volatile and is being hurt by sex scandals, said Humphrey Taylor, chairman of Louis Harris and Associates.

"It is important to the military leaders themselves," Taylor said. "It affects their standing in the world, how they are treated by Congress, how they are treated by the media and the difficulty they have in trying to recruit good people."

The AP poll asked people how they would react if they or a friend had a daughter who was thinking of joining the military. By 65 percent to 31 percent, they said the allegations of sexual misconduct would not be sufficient reason to tell her to stay out of the military.

ASSOCIATED PRESS -- PAGE TWO OF TWO

The number who think sexual harassment will always be present in the military runs at the same 55 percent whether the respondent served in the armed forces or not, or had a family member in the service.

Cohen has repeatedly promised "zero tolerance for sexual harassment." A Pentagon spokesman said Thursday that the poll reflects the public's confidence in the military's ability to deal quickly with its problems.

"I also believe they know in their hearts that no matter what, we take our obligation to their sons and daughters serving in uniform very, very seriously," Col. Dick Bridges said.

[sexual&harassment]

PHOTOCOPY  
PRESERVATION

## Sexual Harassment

### **Claim Against Spurned Girlfriend Can Go to Trial, District Judge Decides**

**A** Colorado man can proceed to trial with a sexual harassment claim against his employer over the actions of his second-line supervisor—a former girlfriend of his who began taking increasingly hostile actions and eventually fired him after he ended their romantic relationship.

Rejecting a motion by E.G.&G. Rocky Flats Inc. to summarily dismiss the case, Judge Lewis Babcock of the U.S. District Court for the District of Colorado determined that plaintiff Michael Schrader submitted enough evidence of a "causal connection" between his discharge and his spurned girlfriend's alleged harassment to bring the case to trial (*Schrader v. E.G.&G. Rocky Flats, Inc.*, DC Colo,95-B-870, 2/7/97).

The court also found that Schrader's evidence regarding the woman's conduct and treatment of him resulted in a work environment that "could reasonably be perceived and was perceived by plaintiff as abusive or hostile." The fact that Schrader had not filed a formal, internal equal employment opportunity complaint over the situation was not enough to dismiss the claim at the summary judgment stage, the judge concluded.

**Rocky Romance at Rocky Flats.** Schrader, who had worked in the communications department of Rocky Flats for 10 years, began a romantic relationship with Janine Wilson, his second-line supervisor, in the fall of 1991. When he broke up with Wilson a year later, Schrader testified, she began visiting his office on a regular basis, discussing the relationship and how difficult it was to move on with her life—often becoming both emotional and angry.

Wilson's hostility increased when Schrader began dating another co-worker in early 1993 and, he charged, she glared at him at the office, radiating hostility and refusing to speak to him. She left an obscene message on his answering machine at home, and at one point, she told Schrader "it wasn't going to be her that left Rocky Flats."

Schrader's immediate supervisor said that he noticed Wilson's continuing hostility and told Schrader that he believed she was harassing him. However, the two decided not to file a grievance because of concern that she would retaliate against her former boyfriend.

Schrader was terminated in April 1994 for falsifying a time card the previous August, for failing to accomplish goals during a week the previous October, and for failing to disclose private enterprises in compliance

with company policy. Wilson initiated the investigation culminating in the discharge and was a member of the management group who decided to fire him. Schrader sued, charging his employer and Wilson with sex discrimination and sexual harassment in violation of Title VII of the 1964 Civil Rights Act. He also brought a claim for outrageous conduct. While the court granted the defendants' motion to dismiss the sex discrimination and outrageous conduct claims, it allowed the harassment claims to proceed to trial.

**Hostile Environment, Quid Pro Quo.** Judge Babcock determined that Schrader submitted sufficient evidence of both hostile environment and *quid pro quo* sexual harassment by his spurned girlfriend.

"Wilson made it clear that she wanted to continue her intimate relationship with [Schrader]," the court said, "and that 'it wasn't going to be her [who] left Rocky Flats,'" the court said. "A reasonable fact finder could infer from this evidence that Wilson thereby threatened to have plaintiff fired if he did not resume their relationship. Plaintiff resisted Wilson's advances, and he was fired."

The court rejected the company's arguments that Wilson had nothing to do with the termination, noting that she had signed both his suspension and discharge papers and was part of the team that investigated his discharge. Schrader "presented sufficient evidence that a reasonable juror could find a causal connection between his discharge and Wilson's alleged harassment," the court said. The court cited statements from Schrader's supervisor that employees were routinely allowed to take compensatory time off and that Schrader had never falsified his time card, and that Schrader was the subject of a "witch hunt" and was fired because he did not want to continue his relationship with Wilson.

The court also found evidence of a hostile work environment when Wilson came to Schrader's office, called his house and left an "obscene and angry message" on his answering machine, and either ignored or was rude to Schrader at work. "Looking at the totality of the circumstances, a reasonable juror could find that plaintiff's work environment could reasonably be perceived and was perceived by [Schrader] as abusive or hostile," the court said.

The fact that Schrader did not file a formal grievance did not preclude him from bringing the hostile work environment claim, the court said, since "many factors," including concern over retaliation, could have contributed to his decision. Fact finding of that sort, the court said, must be determined at trial.

## Discrimination

### **New Chairman of Massachusetts Commission Outlines Plans for Handling Bias Charges**

**B**OSTON—Citing a record number of discrimination cases filed in 1996, the new chairman of the Massachusetts Commission Against Discrimination says that he is committed to ordering remedial measures in awards issued by the agency.

In a Feb. 25 interview with BNA, Charles E. Walker Jr. said that two other goals he will pursue are resolving more cases than the agency takes in each year and expanding the role of municipal human rights agencies throughout the state in conducting hearings and resolving charges of discrimination.

Walker, an MCAD commissioner since 1994, became chairman last November after Michael Duffy was appointed by Gov. William Weld (R) to a Cabinet position

as head of Consumer Affairs. Walker previously served as an assistant attorney general and general counsel at the Office of Elder Affairs.

In its annual report for 1996, released Feb. 27, MCAD said that case filings rose to a record 5,200 and that 4,900 cases were resolved last year. Monetary settlements obtained by complainants rose to a record \$14 million from \$12 million the year before.

**Training High on Agenda.** Walker said he is in the process of assembling a task force of consultants, chief executive officers, in-house investigators and compliance officers, and attorneys to assist MCAD in becoming a "clearinghouse" for developing methods of "discrimination prevention training." Walker said the group would focus on training employers on how to treat their workers, not just on hiring and firing.

The team will also assist in "helping craft more remedial measures to be included in my decisions," Walker said. He cited a recent decision requiring a town's entire police force to go through training on race relations and a model anti-sexual harassment policy issued by MCAD last year (209 DLR A-3, 10/29/96) as examples of remedial steps. He said he wants more monitoring of compliance with these types of measures.

Walker also supports the agency's ground-breaking program of alternative dispute resolution announced a year ago (33 DLR A-1, 2/20/96). "I'm really pushing arbitration hard," he commented.

Administered by the American Arbitration Association, the program offers voluntary mediation or arbitration of employment discrimination disputes after the agency has issued a probable cause finding. So far, Walker said, 29 cases have been referred to AAA. Some have been completed and some still are pending, he said. Walker said eventually he would like to see "100 percent" of cases resolved in this manner.

**Use of Testers Will Continue.** MCAD will continue its program of using agency testers to root out discrimination. The agency has tested for age and race bias in hiring by retail businesses and last month released results of a test that found subtle race bias but no violations in mortgage application procedures in Boston area banks.

Some test results have surprised MCAD staff, Walker said. Employment testers who applied for jobs at area car dealerships discovered that employers were eager to hire women, he noted. The agency is currently "fine-tuning" results of one test that has produced evidence of discrimination, while another test that is near conclusion demonstrated "no problems whatsoever," he said. Testing is "extremely effective in broadening the awareness of the public," said Walker.

Major classes of complaints in 1996 were nearly equally divided among sex (21 percent), disability (21 percent) and race (20 percent), according to the MCAD report. Age accounted for 13 percent of complaints, while ancestry and retaliation each accounted for 10 percent. Ninety percent of the agency's case load involved allegations of employment discrimination, while housing accounted for 6 percent and public accommodations for 4 percent.

**Ruling Against Attorney.** On Feb. 25, Walker also issued a controversial decision assessing \$5,000 in punitive damages against a female attorney on grounds she had violated the law against sex discrimination in pub-

1/2

lic accommodations. The attorney had refused to represent a man in a divorce case (*Stropnick v. Nathanson; MCAD, 2/25/97*).

Walker told BNA he believed that while an attorney has discretion in deciding which cases to take, it is unlawful to flatly refuse to represent a person based on gender.

Walker's elevation to MCAD chairman left a vacancy on the three-member commission that has gone unfilled for three months. One reason for the delay in filling the post, he said, is that 17 people have applied for the position.

BY RICK VALLIERE

## Discrimination

### **Former Station Manager Loses Bias Claims Regarding Texaco's Refusal to Transfer Her**

**S**T. LOUIS—A federal appeals panel Feb. 21 rejected a former Texaco service station manager's claims that she was passed over for promotion to high-volume stations because of her age and race.

In affirming summary judgment for Texaco, the Eighth Circuit found that plaintiff Denova Candies produced no evidence of discrimination based on race or age. "Because no reasonable jury could find Texaco discriminated against Candies on the basis of age or race, we affirm," wrote Judge George G. Fagg in an opinion joined by Judges Floyd R. Gibson and James B. Loken (*Candies v. Texaco Refining and Marketing Inc., CA 8, No. 96-1604EM, 2/21/97*).

Candies, a 47-year-old African American gas station manager, sued Texaco in the U.S. District Court for the Eastern District of Missouri in September 1995, claiming that Texaco denied her transfer requests because of her age and race. She had been hired by Texaco as a manager in 1986. Texaco managers are paid a salary and are eligible for quarterly bonuses of up to \$1,500 based primarily on sales, according to the Eighth Circuit.

The court said that Candies was "given a second chance" by Texaco management after filing false payroll reports in 1986 for her son who was away at college so that a second son, who was working at the station, could continue to collect unemployment compensation. She was transferred in 1987 and 1989 after stations she managed were closed because of poor performance. At Candies' request, she was transferred to a higher volume station in 1992 where she could—and did—generate higher bonuses.

Station managers consider being transferred to a high-volume store a promotion even though the job description remains the same, according to the court. In late 1993, Candies lost her job when Texaco exited the St. Louis retail market, selling out to Western Oil. At the time, she was earning the second-highest salary of all Texaco station managers in St. Louis, according to the court.

**Plaintiff Lacked Needed Skills.** In her suit against Texaco under Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and Missouri state law, Candies claimed that Texaco discriminated against

her when it chose younger and white employees to manage high-volume stations in 1992 and 1993.

However, in an affidavit, Candies' former supervisor, Joe Gummersbach, said: "[Candies] was generally competent to manage the stations to which she was assigned; however, management believed that Ms. Candies did not have management skills comparable to the individuals we assigned to manage large volume stations with car washes." Her stations had shortages of thousands of dollars and cashier scheduling problems, according to Gummersbach. Candies worked too few hours and her stations were cluttered, he said.

"Gummersbach thought the people selected instead of Candies would do a better job of handling the additional personnel, inventory, and cash involved with a larger station," the court wrote. "Candies has no experience [with stations open for 24 hours or which had car washes], and the people chosen did."

**Lawyer Will Seek Rehearing.** "The Eighth Circuit ignored some very significant issues, including the fact that Texaco has never promoted an African-American to manager of a high-volume station," said attorney Jerome Dobson, who represented Candies. He told BNA that it was not uncommon for Texaco to transfer a white manager with only one year of experience to a high-volume store.

"The court failed to analyze whether Texaco's practice of selecting less-qualified, less-experienced white employees to manage high-volume stations constitutes a genuine issue of material fact for consideration by a jury," said Dobson, a partner with Weinhaus & Dobson in St. Louis. "The court should not usurp the role of the jury," he said, contending that Candies would have had a 90 percent chance of winning had the case been heard by a jury.

Dobson said he plans to file a motion for rehearing on behalf of Candies.

Mark G. Arnold of Husch & Eppenberger in St. Louis represented Texaco on appeal.

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## Disabilities Discrimination

### **Peace Corps Unlawfully Deferred Clearance To Applicant With History of Depression**

**T**he Peace Corps discriminated against a volunteer applicant by deferring her medical clearance and telling her she could not serve as an overseas volunteer until she showed she was not at risk of depression, the U.S. District Court for the Northern District of California has ruled.

Judge Thelton E. Henderson found the Peace Corps violated the Rehabilitation Act of 1973 by deferring Leslie Mendez's medical clearance because she has dysthymia, a chronic form of mild depression (*Mendez v. Gearan*, DC NCalif, No. C 95-4075, 2/13/97).

Henderson ordered the Peace Corps to re-evaluate its decision to defer Mendez' application, including an individualized examination of her qualifications based on her medical and work history but declined to halt the Peace Corps from using dysthymia in its screening guidelines for medical eligibility.

"The record clearly demonstrates that the Peace Corps failed to meet its duty to make a thorough investigation into the reasonable probability of substantial harm if plaintiff were placed in a position overseas," Henderson concluded. "The evidence further reveals that the Peace Corps made no effort to examine whether the plaintiff could be protected from a reasonable probability of harm by some reasonable accommodation," he wrote.

Mendez applied to the Peace Corps in 1994 and was tentatively offered a position as an environmental educator in Panama, contingent upon a final medical and legal clearance, the court wrote.

**Applicant Asks for Medication.** She filled out a medical history form and said she had no history of psychiatric treatment, but later, Mendez asked a Peace Corps medical screening nurse for the antidepressant, Zoloft, Henderson said. A subsequent evaluation by a Peace Corps mental health consultant said that Mendez had dysthymia, had taken Zoloft in the past, and had been in therapy for depression.

A Peace Corps nurse and mental health consultant decided to defer Mendez' medical clearance and told her "she would not be able to serve as a Peace Corps Volunteer until she could demonstrate that there was no risk of her experiencing depression." Mendez was given the name and address of the Peace Corps medical director, to whom she was told she could appeal her decision, but she did not contact him, and instead filed suit.

The Rehabilitation Act bars the exclusion of otherwise qualified individuals with disabilities from positions that exist as part of a program that receives federal funding.

The court concluded that dysthymia and recurrent depression are mental impairments under the Rehabilitation Act but declined to find that Mendez's depression substantially limited one or more of her major life activities.

Henderson noted that although she had suffered from periods of depression when she had difficulty waking up, studying, and concentrating, Mendez excelled academically, speaks three languages, and successfully lived and studied abroad. According to the Legal Aid Society of San Francisco, which represented Mendez, she recently graduated from Brown University.

**Peace Corps Fails to Accommodate.** Therefore, Henderson ruled Mendez was not an individual with a disability recognized by the Rehabilitation Act, but found she was "regarded as" having a disability, and therefore still came under the law.

Noting that the Peace Corps decided Mendez was not qualified to serve because positioning her overseas would expose her to an unreasonable risk of harm, Henderson concluded that "the Peace Corps made little effort to gather all the relevant information regarding

the plaintiff's history and no effort to determine what accommodations were necessary to allow the plaintiff to perform her job safely."

The court ruled that the psychological assessment of Mendez's condition was "sparse" and that no effort was made to evaluate her work history and capacity to function.

Finding a Rehabilitation Act violation, the court ordered the Peace Corps to reconsider Mendez' medical eligibility, but denied Mendez's request to enjoin the Peace Corps from using dysthymia under its screening guideline to decide medical eligibility.

Henderson wrote that he was "troubled" that the Peace Corps does not make a professional's individualized review of an applicant's impairment and possible accommodation mandatory after a nurse discovers, by applying guidelines, that an applicant is not medically eligible for service. Nonetheless, the judge declined to find that the Peace Corps' medical screening process violates the Rehabilitation Act "whenever it evaluates an applicant with dysthymia."

# NEWS

FOR IMMEDIATE RELEASE  
February 24, 1997

CONTACT: Richard R. Trujillo  
Regional Attorney  
Phoenix District Office  
Telephone: (602) 640-5041

EEOC SETTLES LAWSUIT AGAINST  
SHAMROCK TOWING, INC.

Phoenix, Arizona -- The Phoenix Office of the Equal Employment Opportunity Commission (EEOC) and Arizona Professional Towing and Recovery, Inc., whose trade name is Shamrock Towing, have resolved an Americans with Disabilities Act (ADA) lawsuit in the United States District Court of Arizona. The federal lawsuit alleged Shamrock Towing terminated the employment of one of its tow truck operators, Donald Lorimor, because of his back impairment.

Under the terms of the consent decree, Shamrock Towing will pay Donald Lorimor in the amount of \$6,066.00 in lost wages.

Shamrock Towing is enjoined from engaging in any employment policy or practice that discriminates on the basis of disability and retaliating against any employee who exercises his or her rights under the ADA.

In addition, Shamrock Towing is required to provide training to its employees on the ADA and other employment discrimination laws and will post a notice to all employees regarding their rights under the ADA. It will also report in writing any changes in policies and procedures that concern employment discrimination.

The EEOC enforces Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector; Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, race, color, religion, or national origin. The Commission also enforces the Age Discrimination in Employment Act of 1967; the Equal Pay Act; and the provisions of the Rehabilitation Act of 1973 which prohibit discrimination affecting people with disabilities in the federal sector.

# # #



# NEWS

## EEOC PRESS RELEASE

### EEOC WINS \$157,500 AWARD AGAINST WAL-MART STORES, INC.

FOR IMMEDIATE RELEASE

DATE: February 25, 1997

ALBUQUERQUE, NEW MEXICO -- The San Antonio District Office of the U.S. Equal Employment Opportunity Commission ("EEOC") announced a federal court jury has awarded an Alamogordo, New Mexico man \$157,500 in an employment discrimination case against Wal-Mart Stores, Inc. brought by the EEOC. On Friday, February 21, 1997, a jury empaneled in the court of U.S. District Judge James A. Parker of the District of New Mexico, found that a Wal-Mart Store in Las Cruces, New Mexico, intentionally discriminated against an applicant for employment by refusing to hire him because of his disability, a missing right arm. In addition, the judge granted summary judgment that Wal-Mart asked an unlawful preemployment medical inquiry in violation of the Americans with Disabilities Act of 1990. The jury awarded \$7,500 in compensatory damages and \$50,000 in punitive damages for discriminatory failure to hire. The jury also awarded \$100,000 in punitive damages for the unlawful inquiry, finding that the inquiry was made with reckless indifference to the applicant's federally protected rights.

The trial was remarkable in a number of respects. First, by accepting the EEOC guidance on unlawful inquiries as authoritative, the judge created new law in ADA jurisprudence. In addition, the \$100,000 punitive damage award is believed to be the largest award in history for an unlawful medical question. Second, this case represents the second EEOC San Antonio District Office victory against Wal-Mart for employment discrimination in recent months. In September 1996, a jury awarded \$117,000 in damages to a woman in Brownsville, Texas who was not rehired because of her race and in retaliation for an earlier complaint of race discrimination, in a case brought by the EEOC. In addition, the instant case follows on the heels of a sexual harassment trial against Wal-Mart in Santa Fe, New Mexico in December 1996 brought by two private plaintiffs, where the jury awarded nearly \$2 million to the plaintiffs. The common thread in all three cases was evidence that Wal-Mart made little or no attempts to train its managerial employees in compliance with the anti-discrimination laws. In the instant case, Wal-Mart produced evidence that it drafted an ADA Manual in March 1992. However, the evidence showed that, to this date, no manager at Wal-Mart's Las Cruces, New Mexico store had read it, and Wal-Mart made no efforts to implement any ADA training at that store. Wal-Mart did not inform the interviewer that the law prohibited disability-related inquiries during job interviews. Ironically,

# HOUSE Future Listings

## **FY98 COMMERCE-JUSTICE-STATE ■ APPROPS**

Commerce, Justice, State and Judiciary Subcommittee (Chairman Rogers, R-Ky.) of House Appropriations Committee will hold hearings on FY98 appropriations for programs under its jurisdiction.

2pm 2226 Rayburn Bldg. **March 4**

10am & 2pm 2358 Rayburn Bldg. **March 5**

10am & 2pm H-310 Capitol Bldg. **March 6**

### **Witnesses scheduled:**

**March 4** Janet Reno - attorney general; Doris Meissner - commissioner, Immigration and Naturalization Service

**NOTE:** Reno and Meissner will be asked to answer "serious allegations regarding the activities of the INS, including attempts to deceive Congress, grant citizenship to criminals and fabricate data."

### **March 5**

10am: Madeleine K. Albright - secretary of State

2pm: Louis Freeh - director, Federal Bureau of Investigations

### **March 6**

10am: Bill Reinsch - under secretary, Bureau of Export Administration; representative from Department of Commerce

2pm: Representatives from Federal Judiciary

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## Trouble With Nepotism

By Mike Causey  
Washington Post Staff Writer

If rules against hiring family members were strictly enforced in Washington, lots of people would be out of work.

If near nepotism (hire my daughter; I'll hire your husband) were illegal, unemployment in Washington—especially on Capitol Hill—would jump. Connections help everywhere. Government is not the only place where connections count. But it is one of the few places where using them improperly can get you in a heap of trouble.

Nevertheless, this is a town where the kin of VIPs often get very preferential treatment, even if they don't ask. That's true whether the applicant is the relative of a senator or simply born into a clan headed by a government supervisor.

For the record, nepotism is against the law. So are murder and jaywalking, but both happen. Public officials can't "appoint, employ, promote or advance, or advocate the appointment, employment, promotion or advancement of a relative in the agency in which the official is serving or over which he or she exercises jurisdiction." Relatives include the usual suspects: parents, spouses, siblings and children—plus nieces and nephews, stepbrothers and stepsisters and half brothers and half sisters. Cousins you can hire!

Nepotism rules don't apply to couples living without benefit of clergy or couples who got their jobs before the wedding.

Many long-term federal personnel people have horror stories about being asked to find a place for the relative of a boss or official of another agency. Not all of the candidates are dogs. But such requests can cause problems for the middleman (or woman) being used for an end run around nepotism rules. Example:

Two years ago, a Postal Service employee with 14 years as a "human resources associate" was demoted for a while (the penalty was reduced on appeal) to a less desirable job as a part-time "flexible clerk." That means awful hours, at lower pay.

Her crime: giving priority handling to the job application of the daughter of a woman who was a district operations manager in

central Florida. Nepotism was the cause of the situation but not the reason she was turned into a flexible clerk. The case was reported by the UpDate newsletter, published by FPMI Communications, Huntsville, Ala.

It started when the personnel office got the job application. Because of family ties, the application wasn't carefully reviewed. Had it been, it would have shown an "unexplained" conviction that might have delayed or scuttled the hiring.

When the situation became known to higher authorities, the personnel officer was demoted because of "improper conduct." Upon appeal, the demotion was reduced to a 30-day suspension because of her long service and clean record. The manager and her daughter, who sought to dodge nepotism rules, weren't punished.

### NTEU Rally

You know it is springtime (almost) in Washington when federal and postal unions organize rallies here so rank-and-file members can lobby Congress. Tomorrow through Wednesday, members of the National Treasury Employees Union will be in town to talk with key legislators. NTEU President Robert Tobias is upset by the president's proposed 2.8 percent pay raise for 1998 and about administration plans to delay cost-of-living adjustments for retirees.

### NFFE Protest

James Cunningham, president of the National Federation of Federal Employees, says the White House plan to increase employee contributions to their retirement plan is nothing more than a new, one-half percent payroll tax on government workers. He also says that plans for a 1.5 percent increase in agency contributions to the retirement plan will make workers more expensive and probably force agencies to fire employees simply to save money and not in response to any justified strategic plan.

Sunday, March 2, 1997

### FOR MORE INFORMATION

To read two weeks of the Federal Diary, click on the above symbol on the front page of The Post's Web site at [www.washingtonpost.com](http://www.washingtonpost.com)

## Consent for Advice?

By Mike Causey  
Washington Post Staff Writer

Federal workers have taken to tax-deferred payroll investing in a big way. Most are investing in the stock, bond or Treasury funds of their 401(k) plans. But a few, such as today's first Monday Morning Quarterback, would appreciate more aggressive investment advice from Uncle Sam.

Pat Murphy says "the agency refuses to give advice on investment options. I think this is a disservice. Why should anyone have to get outside financial advice on a government-backed program . . . that should be part of pre-retirement counseling? Any comments?"

First some background: Over the life of the thrift savings plan (TSP), the C-fund (stocks) has had an annual rate of return of 15.9 percent. The F-fund (bonds) has returned 8.4 percent, and the G-fund (Treasury securities) has returned 7.7 percent. That's where the funds have been, not necessarily where they are going.

No federal benefits officer in his or her right mind would give specific investment advice. Most are too smart to risk angering employees by advising them to pick what could turn out to be the "wrong" fund. Choices depend on an investor's age, goals and tolerance of risk.

Unions representing postal workers have been the most aggressive in encouraging investments in thrift savings plans. When it comes to fund risks, this is how the magazine Postal Supervisors explains the choices:

"Your savings in the G-fund (Treasury securities) are secure. There is no credit risk (risk of non-payment of principal or interest) . . . and market risk (the risk that investments may fluctuate in value) is eliminated by the TSP board's current policy of investing the G-fund in short-term, rather than longer-term, securities.

"The C-fund (common stock index) is invested in the S&P 500 stock index . . . made up of all the companies represented in the S&P index. This fund gives you the opportunity to diversify your investments and earn

relatively high investment returns that stocks sometimes provide while lessening the effect that the poor performance of an individual stock or industry will have. . . . The risk of investing in the C-fund is that the value of the stocks can decline sharply, and the total return . . . could be negative, resulting in a loss."

"The F-fund . . . tracks the Lehman Brothers Aggregate bond index . . . high quality fixed-income securities representing the government, corporate and mortgage-backed securities sectors of the U.S. bond market. The F-fund offers the opportunity for increased rates of returns in periods of generally declining interest rates. At such times the values of longer-term bonds held in the F-fund should increase, unlike those of the short-term securities held in the G-fund . . . The F-fund carries credit risk and market risk. Like the C-fund it has the potential for negative returns, which would result in losses."

Robert Gardner asks: "With RIFs [reductions in force] possible, we have been debating the merits of severance pay over buyouts. Someone said severance is a better deal. Any thoughts?"

Buyouts, when available, are the lesser of the employee's severance entitlement or \$25,000. Buyouts are paid in a lump sum. After taxes, the typical employee taking a \$25,000 buyout would receive \$14,000 to \$16,000.

Severance is for people who have been fired, except for cause. It is one week's pay for each of the first 10 years of service, then two week's pay for each year of service thereafter. There is a 10 percent age allowance add-on for each year the employee is over age 40.

Severance is paid in biweekly increments, like salary. Severance, for a long-service, high-income employee, would be worth much more than a \$25,000 buyout.

Monday, March 3, 1997

### FOR MORE INFORMATION

To read two weeks' worth of Federal Diary columns, click on the above symbol on the front page of The Post's Web site at [www.washingtonpost.com](http://www.washingtonpost.com)

# EEOC News Clips

*for*

*February 22 - 24, 1997*



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## Judge won't reopen Texaco bias lawsuit to add plaintiffs

Associated Press

A federal judge refused Friday to reopen the Texaco race-discrimination case to hear from lesser-paid, black hourly employees who thought they should have been included in the \$176 million settlement.

Judge Charles Brieant denied a motion from six black employees who said they were led to believe their interests were being represented in the class-action lawsuit. Not until a settlement was reached, they said, did they learn that only certain black employees would be receiving money from Texaco.

The judge said it was impractical at this point to renegotiate the settlement to add people. "They can simply bring their own lawsuit," Brieant said.

Texaco settled the discrimination lawsuit in November, soon after the disclosure of embarrassing secret tape recordings on which executives were heard demeaning black employees and discussing tampering with evidence sought by the plaintiffs.

Texaco, one of the nation's biggest oil companies, endured a boycott, revamped its workplace procedures, fired one executive and punished three others. A criminal investigation continues.

The proposed settlement limits the class to "African-Americans employed in a salaried position subject to the Texaco Merit Salary Program" between 1991 and 1996. If approved by Brieant, it would include a payout of \$115 million — less lawyers' fees and expenses — to 1,342 people. They could get average payments of about \$60,000. A final hearing on the settlement is scheduled for March 18.

**The Washington Post**

SATURDAY, FEBRUARY 22, 1997

**DIGEST**

**A federal judge** refused to reopen the Texaco race discrimination case to hear from lesser-paid black employees who thought they should have been included in the \$176 million settlement. The judge said the contention that the class was defined too narrowly is no reason to hold up "hard-fought benefits" to the original plaintiffs. Texaco settled the suit in November, soon after the disclosure of secret tape recordings on which executives demeaned black employees and discussed tampering with evidence sought by the plaintiffs.

PHOTOCOPY  
PRESERVATION

## Civil Rights

### **Court Reinstates Title VII Suit For Alleged Breach of EEOC Settlement**

**A**n employee who alleged that her former employer retaliated against her and breached a predetermination settlement of a prior discrimination charge by contacting her subsequent employer may proceed with both retaliation and breach-of-settlement claims under Title VII of the 1964 Civil Rights Act, the U.S. Court of Appeals for the Seventh Circuit has ruled.

Allegations of retaliatory acts that impinge on "future employment prospects or otherwise have a nexus to employment" may be pursued under Title VII, the Seventh Circuit said. It also held that a predetermination settlement of a charge filed with the Equal Employment Opportunity Commission is enforceable in the same manner as conciliation agreements reached after EEOC has investigated the charge and found cause to believe a Title VII violation has occurred (*Ruedlinger v. Jarrett*, CA 7, No. 96-2098, 2/5/97).

The appeals panel reversed a ruling by the U.S. District Court for the Southern District of Indiana, which had dismissed both claims.

**Confidentiality Breached.** Plaintiff Mary Gossman Ruedlinger alleged that her former employer retaliated against her by contacting her subsequent employer in violation of the settlement of her EEOC charge. She claimed that as a result of the contact, she was fired by the second employer.

Ruedlinger and Robert L. Jarrett d/b/a Jarrett Management Co. had entered into a predetermination settlement agreement that resolved a discrimination charge against Jarrett brought on her behalf by EEOC. As part of the settlement, both parties agreed to keep confidential all information relating to the EEOC charge. However, Ruedlinger alleged that Jarrett contacted her subsequent employer and discussed matters that were supposed to remain confidential. As a result, the plaintiff alleged that she was fired by the second employer.

**Covers Post-Termination Events.** On appeal, Jarrett argued that Ruedlinger's retaliation claim should fail because the alleged actions took place after her employment had ended. However, the Seventh Circuit cited its 1996 decision in *Veprinsky v. Fluor Daniel Inc.*, which held that Title VII covers alleged retaliation that occurs after employment has ended. The U.S. Supreme Court recently reached the same conclusion in *Robinson v. Shell Oil Co.* (33 DLR AA-1, E-1, 2/19/97).

Ruedlinger "has alleged retaliatory acts that impinge on her 'future employment prospects or otherwise have a nexus to employment' within the meaning of *Veprinsky*, and, as a result, plaintiff's allegations regarding defendant's contact with her subsequent employer may be pursued" under Title VII, Judge Walter J. Cummings wrote for the Seventh Circuit.

**Enforcing Title VII.** Ruling on an issue of first impression for the circuit, the court also held that private plaintiffs can sue under Title VII to enforce a predetermination settlement agreement of an EEOC charge. The court cited with approval the Eleventh Circuit's 1982 opinion in *Eatmon v. Bristol Steel & Iron Works*, 769 F.2d 1503, 38 FEP Cases 1364, in which that court said: "All the reasons that support Title VII jurisdiction over such actions when brought by the EEOC apply with equal force to actions brought by the aggrieved employees to enforce conciliation agreements entered into by the EEOC, their employers, and themselves.

"The congressional goal of enforcing Title VII through conciliation and voluntary compliance would be hampered if employees could not seek to enforce in federal courts conciliation agreements between themselves, their employees and the EEOC."

In a 1982 decision holding that EEOC could sue to enforce a predetermination settlement under Title VII, the Seventh Circuit had said it saw no relevant distinction between conciliation agreements and predetermination settlement agreements when it comes to jurisdiction under Title VII (*EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 30 FEP Cases 884).

Judges Michael S. Kanne and Thomas E. Fairchild joined in the opinion.

S. Anthony Long of Boonville, Ind., represented the plaintiff.

David E. Gray of Bowers, Harrison, Kent & Miller of Evansville, Ind., represented the defendant.

NADYA ASWAD

## Discrimination

### **Court Denies Employer's Request for Data On All EEOC Charges Mailed in One Month**

**A**n employer that fired an employee allegedly on the same day it received a notice from the Equal Employment Opportunity Commission that he had filed a discrimination charge cannot force EEOC to produce all notices of charges mailed from the same district office over a four-week period, a federal district court in Pennsylvania has ruled.

PMA Group, the employer, wanted the information to support its contention that EEOC did not even mail the notice until at least the day after plaintiff Donald Hillgen was fired. It argued that comparing the date on the charge notices with the date of their receipt by other employers would show that EEOC's district office routinely mailed notices several days after the date appearing on the notice.

However, the court observed that EEOC, which acknowledged that the date on a given notice is not a reliable indicator of when it was mailed, does not have a regular record-keeping procedure that could establish when a notice was mailed. Given EEOC's inability to state when any notice was mailed, the parties would have to investigate the circumstances surrounding the mailing and receipt of each notice, expanding this subsidiary issue into multiple mini-trials, Judge Eduardo C. Robreno wrote (*Hillgen v. PMA Group*, DC EPA, No. 96-147, 2/3/97; 72 FEP Cases 1808).

**Not Admissible Evidence.** In his suit under Title VII of the 1964 Civil Rights Act, Hillgen alleged in part that he was fired in retaliation for filing a discrimination charge against the company. According to Hillgen, PMA fired him on June 6, 1994, the same day it received a notice of his charge from EEOC, which was dated June 2.

In defending against the retaliation claim, PMA contended that EEOC did not even mail the notice of the charge until at least June 7. In an effort to prove its defense, PMA sought access to all notices of charges mailed from EEOC's Philadelphia district office and dated from May 19, 1994, through June 16, 1994. PMA asserted that by comparing the date on its notice to the dates on notices received by other charged employers, it would be able to establish that EEOC routinely mailed such notices several days after the date stamped on them.

Robreno denied PMA access under Rule 26(b)(1) of the Federal Rules of Civil Procedure on the grounds that it would not lead to the discovery of admissible evidence. He found it unnecessary to address EEOC's argument that forced disclosure of other notices of charges would violate the Privacy Act.

"Even assuming that [PMA's] hypothesis will yield some probative evidence, the Court finds that the information sought by [PMA] will neither be admissible at trial, nor does it appear reasonably calculated to lead to the discovery of admissible evidence," Robreno wrote. He noted that under Rule 403 of the Federal Rules of Evidence, the court can exclude relevant evidence if its probative value is "substantially outweighed by the likelihood that it would confuse or mislead the jury, or waste time."

Observing that both sides admit that EEOC lacks a regular record-keeping procedure that could establish when a given notice was mailed, the court said that to make the showings proposed by PMA would require investigation of the circumstances surrounding the mailing of dozens of charges peripheral to this case. "This exercise would expand this subsidiary issue into veritable multiple mini-trials," said Robreno in ruling that PMA's request failed to meet the criteria of FRCP Rule 26(b)(1) because FRE Rule 403 would preclude the introduction of such evidence.

Bruce J. Kasten and Robert J. Bohner of Duane, Morris & Heckscher in Philadelphia represented PMA Group.

Judith A. O'Boyle of EEOC's district office in Philadelphia represented the commission.

William B. Hildebrand of Feldman & Hildebrand in Cherry Hill, N.J., represented Hillgen.

## Openly Gay Marine Gains Retirement Benefits After Long Fight

By The New York Times

JACKSONVILLE, N.C., Feb. 21 — The first openly gay marine to challenge the military's policy on homosexuals has won his four-year court battle and is being discharged with a \$30,000 early retirement bonus.

A relieved Justin Elzie, a medical supply clerk stationed at Camp Lejeune here, received his retirement papers on Thursday, four years after announcing he was gay and challenging the military on his right to retirement benefits.

Calling it a matter of dignity and personal integrity, Sergeant Elzie declared his homosexuality on the

ABC nightly news on Jan. 29, 1993 — the day that President Clinton ordered the military to stop asking recruits about their sexual orientation.

Sergeant Elzie had been accepted into an early retirement program, but the Marine Corps removed him from that program and discharged him after his announcement. A Federal District Court judge later declared it unconstitutional for the Marine Corps to discharge him and ordered the corps to keep him on active duty while the case was litigated.

The case worked its way through the courts while President Clinton

later backed off his stand under public pressure, and compromised with the "don't ask, don't tell" policy, which allowed homosexual men and women to serve in the military if they kept their sexual orientation to themselves. Last month the Marine Corps agreed to give Sergeant Elzie his retirement benefits before the case could go to court for a final judgment. On Thursday, the paperwork was finished.

Lieut. Charles Campfield, public affairs officer for Camp Lejeune, said the matter had been settled "in order to come to a mutual agreement that avoided any further delay, ex-

pense and inconvenience for all parties involved."

While waiting for the case to reach an end, the 15-year-veteran has served for four years as an openly gay Marine.

"At times over the last four years it's been basically a feeling of being in limbo, of knowing I was at a glass ceiling, that I was never going to go anywhere else in the Marine Corps, but still keeping a positive attitude," Sergeant Elzie, 34, said.

Sergeant Elzie's announcement fueled the debate over President Clinton's early proposal to lift the military's ban on homosexuals, and

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set off anti-gay talk among his co-workers, making it difficult at times to show his face in public, he said. Still, his declaration gave him a new-found freedom and a life that didn't require him to look over his shoulder, he added. He said he hoped other homosexuals in the military would come forward and take up where he left off.

"I think that's one of the frustrations I've had," Sergeant Elzie said in an interview in Jacksonville, where he still lives, "is coming to realize that I couldn't alone change the organization. I can't do that alone. I'm just one cog in the wheel."

Sergeant Elzie's lawyer, Christopher Sipes of the Washington firm Covington & Burling, believes his cli-

ent's last four years of service have helped prove their point — that sexual orientation does not affect a person's ability to serve in the military. During that time he has received praise from his commanders and glowing fitness reports. He also was awarded an official commendation for service and was recommended for promotion three times.

"At a minimum what Justin's case should show is that you can fight back, that you can stay in the military, you can remain on active duty while you litigate your case and that at the end of the day you can win," Mr. Sipes said. "Sadly there is no shortage of outstanding service members who are being discharged because of their sexual orientation."

## Gay Marine Settles Lawsuit

■ A Marine who announced he was gay on national television the same day President Clinton announced his "don't ask, don't tell" policy was given an honorable discharge and retirement benefits to settle his lawsuit over the rule.

"I think what we've proved is that a Marine who happens to be gay can serve just as well as a Marine who's straight with no detriment to morale or lack of mission operation," said Sgt. Justin C. Elzie, a medical supply clerk at Camp Lejeune in Jacksonville, N.C.

Elzie, who received his walking papers Thursday, said he got a \$30,000 check as part of his retirement benefits.

Elzie, 34, had already been accepted into an early retirement program when he declared on ABC's "World News Tonight" that he is gay. His announcement came on Jan. 29, 1993, the same day President Clinton agreed to the policy on gays in the military.

The next month, the Marine Corps placed Elzie on standby reserve and tried to deny him early retirement and discharge him without benefits. He sued the military in September 1993 and, a month later, a federal judge ordered him placed back on active duty.

Elzie's lawyer, Christopher Sipes, said the honorable discharge after 15 years of service is part of last month's settlement of the lawsuit.

— Associated Press

# Discrimination Claims Grow

## Four Join Complaint Against Forest Service

By Meg Walker  
Federal Times Staff Writer

Four employees in Mississippi have joined a complaint claiming the Forest Service's Southeast region bypasses blacks for promotions, awards and training.

Three men and one woman from the Forest Service office in Jackson filed a complaint last September with the Equal Employment Opportunity office alleging discrimination.

About a month ago, the complaint was merged with one filed by four black women at the Francis Marion-Sumter National Forests in South Carolina.

"They have got very similar issues," said Gary Brown, the lawyer for the complainants.

The employees hope to get the complaint certified as a class-action lawsuit representing more than 300 black employees in the Southeast region. An administrative judge will consider the matter at the end of February.

Brown said a key impetus for the Mississippi claim was a surplus list that would have eliminated a large number of positions held by blacks.

Jobs that will be eliminated at some future date are placed on a surplus list, and the agency tries to find another vacant position for the employees who hold them.

In the past, "they have seen so much retaliation and laid low. But when it looked like their jobs were on the line, they started speaking out," Brown said.

The Mississippi claim also alleges:

- Bias in the decisions hiring and retaining minority employees in the national forests in Mississippi, particularly in the supervisor's office.

- A hostile work environment for black employees.
- Discrepancies in selecting award recipients, particularly in the supervisor's office.
- Discrepancies in the number of jobs held by minorities in natural resource areas.

The employees, their representatives and management were scheduled to meet at a mediation session in mid-February. The two sides were to have tried to settle some of the issues in the complaint.

After a mediation session last fall with the employees in South Carolina, Forest Service representatives agreed to provide more training for black employees.

But the second session, scheduled to last three days, was canceled after an official in the Agriculture Department's general counsel office decided not to proceed until it is known whether the complaint will be certified as a class action.

"This was an opportunity to resolve things early on," Brown said. "Just sitting down at the table shows a mentality that is different for USDA. This would have sent the right message, but now it is back to the normal USDA stonewalling."

Gina Jones, a class agent in the South Carolina complaint, said: "It sounds like the agency just wants to work this through the system. We wanted to work toward a mutual agreement," to avoid going through the long, drawn-out discrimination complaint process.

A Forest Service spokeswoman in Atlanta said management still plans to meet with the complaint members individually to see how to improve working conditions.

"We are committed to doing what we can to address these issues," the spokeswoman said.

# Court Delays RIF For Employee With Bias Suit

By Christy Harris  
Federal Times Staff Writer

A 40-year Smithsonian Institution employee succeeded in getting a court temporarily to stop the agency from letting her go during a reduction in force.

She says the RIF was in retaliation for her pending discrimination lawsuit against the agency.

But the case also will make it more difficult for many other employees trying to do the same thing.

Under a 1974 Supreme Court decision, federal employees asking a court to intervene when their agency has taken action against them must meet a higher standard of proof than private-sector workers that they would be irreparably harmed if the court did not step in.

Now a district court has decided the higher standard for federal employees applies even in civil rights cases.

"Injunctive relief is by its very nature an extreme invasion of an employer's prerogatives, and must be considered carefully," U.S. District Judge Royce Lamberth said.

"The need to root out invidious discrimination from the workplace is clearly as important in the public workplace as it is in the private sector," the judge said. "But this does not mean that courts should be as willing to exercise their equitable powers to accomplish this on an interim basis."

Patricia Bonds, 58, who is black, had sought promotion to a GS-14 program analyst position. The Smithsonian filled the job with a younger, white male.

Bonds did not have a chance to compete.

The court decided Bonds, now GS-14 assistant director for finance and administration at the National Postal Museum, met the higher standard by showing "extraordinary irreparable injury," and so it granted her request to temporarily stop the RIF, pending the outcome of a trial. No trial date has been set.

Bonds has no college education, but worked her way up from a typist to a program analyst. If she lost her job, it would be unlikely she could find similar work, the court said.

True, she could retire and receive almost as much income as she does now — nearly 80 percent of her "high-three" salary average — plus continued health and life benefits, the court said.

But she does not want to retire now.

"The fact that she could retire, and be nearly as well off financially without having to lift a finger, shows just how much of her life is tied into her career," Lamberth said.

The Smithsonian argued it should not be forced to keep Bonds on because her position was eliminated and there is no work for her to do. The government should not have to pay Bonds to do nothing, the Smithsonian said, and the court should not stand in the way of agencies' reorganizations.

The court said it doubted the agency had absolutely no use for Bonds because it could detail her elsewhere. But the court would not order the Smithsonian to use Bonds' skills, saying it is the agency's prerogative to waste money.

Bonds has been on paid administrative leave since November 1996, when the same

court issued a temporary restraining order, stopping her from being laid off.

"The public interest does not favor courts forcing the government to retain dead-weight employees, nor does it favor having employees sit at home watching 'Oprah' and munching Cheetos at public expense," Lamberth said.

But neither extreme is the case here, the judge said.

"It is surprising . . . that the Smithsonian has gone to such lengths to terminate an employee who actually has shown a willingness to work and to do so competently — perhaps an unusual combination in the federal bureaucracy," Lamberth said.

Two other people were affected by the RIF, but they were moved into other positions, according to the decision.

*Patricia Bonds vs. Ira Michael Heyman, Smithsonian Institution, 95-0044, U.S. District Court, District of Columbia, Jan. 14, 1997.*

PHOTOCOPY  
PRESERVATION

# Harassment Complaints and Cutbacks Trouble Washington's Libraries

By PETER T. KILBORN

WASHINGTON, Feb. 22 — Grace M. Kelly reveres the Martin Luther King Memorial Library, the biggest of the 27 in the District of Columbia's system. "You can learn anything you want just reading a book in the library," she said as she struck the "F1" key on one of the electronic card catalogue's computer terminals so she could start her search.

"I've been coming here since I was in kindergarten," said Ms. Kelly, who is 36. She struck the key again, and again, trying to clear the screen. "It's the greatest university on earth," she said, now pounding the key like a jackhammer.

"These machines aren't working," she said and went to try another and then another. The last one worked.

Unlike most of the public institutions in this cash-strapped city, the library has worked well enough to retain the affections of patrons like Ms. Kelly. With 404,000 card holders and 2.7 million books, records and videotapes, and with Friends of the Library groups supporting each of the branches, the District's public libraries have long compared favorably with those of many other cities.

But the library system, established 101 years ago, is now reeling along with the rest of the District's public services. Sexual-harassment charges against the former director have stunned the system, and decades of frugality — reduced hours and staffing, improvements postponed for years, the new constraints imposed by the District's Financial Control Board — are taking a toll.

Four of the branches had to be closed during the January chill because of broken furnaces, and the roofs over at least three branches leak. One branch is infested with rats, and another with mice and birds. A tiny kiosk branch has been shut because the toilet is broken and there is no money to fix it. Technology has passed the branches by: Most still use rotary telephones.

Purchases have stalled for even little things: tape to repair books, ribbons for printers and typewriters,

toner for copiers, rubber stamps. And because of foul-ups and delays by the procurement office, the libraries even had to return \$899,000 that they could not spend by the legal cutoff date at the end of the last fiscal year.

The staff is in turmoil. The head of procurement resigned in December. The library director, Hardy R. Franklin, 67, retired unexpectedly at the end of January. Three weeks later, Dr. Franklin's deputy and heir apparent, Andrew A. Venable Jr., left to become deputy director of the Cleveland public library.

The president of the libraries' board, Joyce Clements-Smith, said Dr. Franklin had left because of failing health. And now the public has learned of accusations that Dr. Franklin had been sexually harassing senior female employees throughout his nearly 22 years as director. Two women have filed formal complaints and also say that he denied them promotions because they had denied him sex. They could not complain earlier, said their lawyer, Sharyn Danch, "because he controlled their jobs."

These charges trouble many people more than last winter's unplowed snow. "Libraries are places that touch everybody, regardless of age, race, sex, income," said Philip Pannell, a community leader and former District human rights commissioner who joined the system's nine-member board in September. "To see this happening is so heart-breaking. It's another glowing example of how dysfunctional things have gotten in this city."

Still, the Martin Luther King main library, near the convention center, is a serene and pleasant place where Washingtonians seem to suspend their rage over the city's deteriorating services. Like Ms. Kelly, patrons say they can read in comfort and, with the help of the professional staff, find most of what they want.

"The service is terrific here," said Edward Hurwitz, a recently retired Foreign Service officer. "The staff in the individual sections really know

A beloved but  
timeworn  
institution is falling  
behind.

their stuff." But Mr. Hurwitz is also a patient man. He asks the card catalogue terminal for Katharine Graham's memoir, "A Personal History," a roaring best seller in Washington. The computer shows six copies. Alas, it lies. The books have been keyed into the computer, but Mr. Hurwitz finds that they still have not

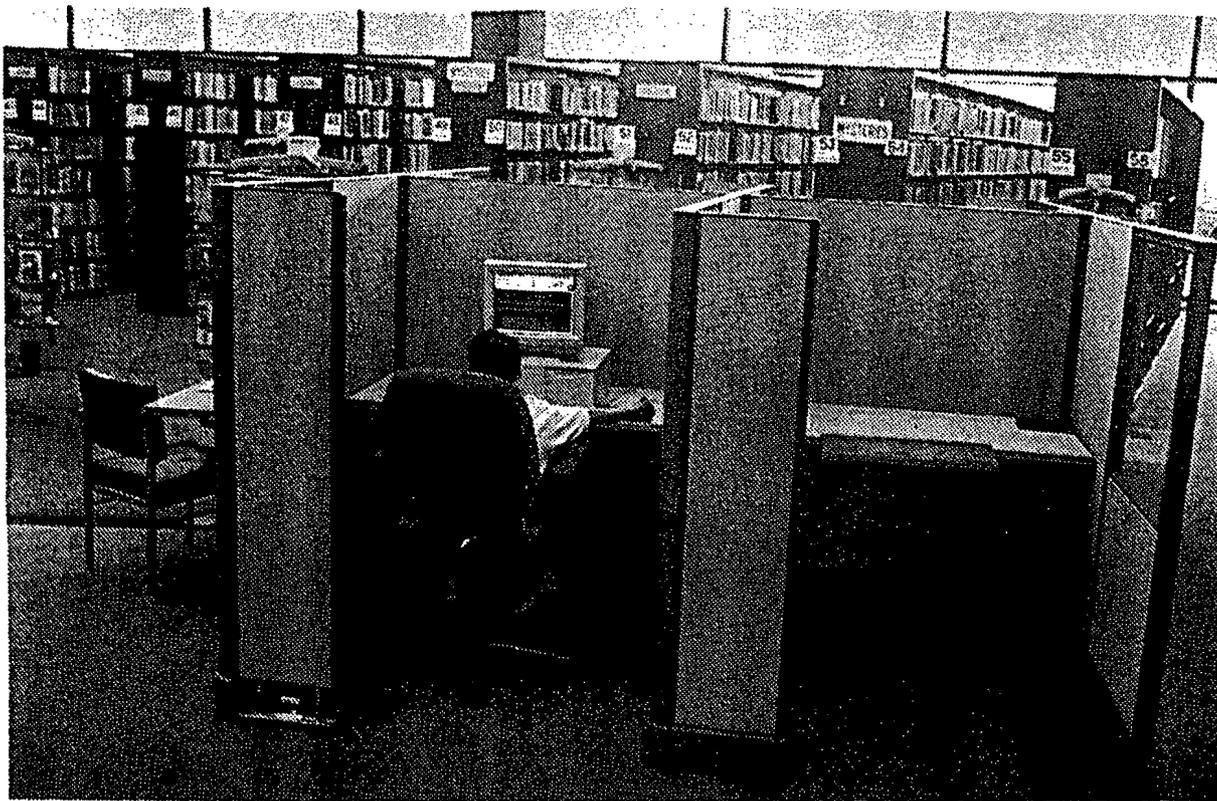
been put on the shelves.

In addition, when these terminals fail, recently published books cannot be found because six years ago, management stopped making catalogue cards for new acquisitions.

Like libraries everywhere, this one is plugging into the Internet. But it has only four terminals, and none is connected to a printer. And these machines, too, often fail. "We have four terminals, but we don't have four working at the moment," said Kathleen A. Wood, the head librarian. "We have one that's working and one that's partially working."

The sexual harassment accusations have rattled the library more than the money problems. The women who brought the complaints —

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Amy Thompson for The New York Times

Unlike most public institutions in Washington, the libraries have worked well. But they are breaking down. Dat Phan, 12, explored the Internet at one of two working computers at the Martin Luther King public library.

## The New York Times

SUNDAY, FEBRUARY 23, 1997

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Brenda V. Johnson, assistant director for library services, and June Sweeny, head of branch services — gave the city's Department of Human Rights long lists of unpleasant encounters with Dr. Franklin, starting in the 1970's, and named at least eight supporting witnesses.

Ms. Johnson listed 10 episodes. She said Dr. Franklin had grabbed her breast, asked her to take hotel rooms with him, grabbed her and kissed her on an elevator and given a lewd suggestion for how she could thank him for a promotion. Ms. Johnson said she wanted the libraries to adopt a firm anti-harassment policy and to pay her and Ms. Sweeny compensatory damages.

Dr. Franklin's lawyer, Gregory L.

lawyer, said he had advised the former director not to discuss the accusations. But Mr. Lattimer called them "unadulterated nonsense."

But the city's Department of Human Rights investigation found the complaints credible enough to warrant a conciliation procedure.

"The sheer number of additional, similar complaints submitted by sworn witnesses leads the department to suspect mendacity on the part of the respondent," the letter said of Dr. Franklin. "It is significant that many of the sworn witnesses clearly do not appear to have any motive to fabricate evidence against Dr. Franklin."

The women said in interviews that they had coped by creating a network of women who would warn one another when Dr. Franklin was headed for their offices so they could be assured that he would not catch one of them alone. "We had a kind of a code," Ms. Sweeny said.

The Human Rights Department sent its findings to the women and the library in August, but nothing was made public until January. Evidently, only Dr. Franklin, Mr. Venable, a few other senior library officials and Ms. Clements-Smith knew of them. Mr. Pannell, though a member of the board, said he had learned of them in the newspaper.

The women went public, however, when Ms. Johnson, the third-ranking officer after Dr. Franklin and Mr. Venable, learned that she had been passed over for promotion to acting director in favor of the fourth-ranking officer, Mary E. Raphael, assistant director for program and support services. Ms. Johnson said she had been passed over in retaliation for the complaint. But Ms. Clements-Smith said Ms. Raphael was the most qualified.

Financial and other problems aside, the library still attracts erudite Washingtonians. "In a previous life," begins one of the few graffiti messages on the wall around the library's long-defunct fountains, "I was a jigsaw puzzle made of ivory."

## Sexual Harassment

### **Court Holds That Same-Sex Harassment Unlawful Discrimination Under State Law**

**B**OSTON—A divided Massachusetts Supreme Judicial Court has ruled that sexual harassment by a male supervisor of other male employees violates the state's fair employment practices law, even if all the parties involved are heterosexual males.

In a case of first impression, the state Supreme Court upheld a 1994 superior court ruling that held 84 Lumber Co. liable for sexual harassment based on the conduct of a male supervisor who engaged in unwanted verbal and physical conduct of a sexual nature against three male employees. In a 5-2 ruling, the Supreme Court upheld damages of \$144,000 against the lumber store in West Springfield, Mass., plus interest, costs, and attorneys' fees (*Melnychenko v. 84 Lumber Co.*, Mass SupJudCt, No. SJC-07029, 2/18/97).

The superior court had found that supervisor Richard Raab engaged in "revolting and positively outrageous" conduct against the three male plaintiffs, which included grabbing their genitals, exposing himself to them, pretending to have anal intercourse with them, and telling other employees he had had sex with the plaintiffs. Raab's behavior was hostile environment sexual harassment prohibited by state law, the superior court decided, even though all of the parties involved are male.

**Orientation Not Dispositive.** Springfield attorney Jay Presser, who represented 84 Lumber, had argued that sexual harassment is only actionable as a form of sex discrimination and that alleged same-sex harassment, therefore, is not actionable unless the alleged harasser is homosexual.

Writing for the state Supreme Court, however, Chief Justice Herbert P. Wilkins said that the lower court properly found that same-sex harassment is prohibited by state law regardless of sexual orientation.

He noted that in this respect, state law differs significantly from Title VII of the 1964 Civil Rights Act. Sexual

harassment as defined under Massachusetts law is "not limited to the conduct of a supervisor aimed at a subordinate of the opposite sex, nor is it limited to same-sex conduct only where the harasser is a homosexual," Wilkins wrote. "Rather, any physical or verbal conduct of a sexual nature which is found to interfere unreasonably with an employee's work performance through the creation of a humiliating or sexually offensive work environment can be sexual harassment" under the state statute.

The court added that sexual harassment under the state law, as defined by the legislature, is a form of sex discrimination: "Nowhere is discrimination because of a victim's sex made an essential element of a sexual harassment claim in Massachusetts," Wilkins pointed out.

**Not Motivated by Gender.** In dissent, Justice Francis O'Connor argued that the plaintiffs had failed to prove they were sexually harassed because of their gender and, therefore, they did not establish sex discrimination as required under the state statute.

O'Connor said that the Massachusetts law is patterned after Title VII and that it is intended to eliminate workplace discrimination based on race, color, creed, national origin, sex, sexual orientation, or ancestry. "It is significant in this case, therefore, that the trial judge found the defendant's agent's conduct to have been intended sometimes as 'horseplay' and sometimes 'to degrade and humiliate' the plaintiffs, but not to have been motivated by the plaintiffs' gender," O'Connor wrote.

Both Presser and plaintiff's attorney Tim Ryan told BNA that the ruling is not expected to have an impact outside of Massachusetts because it simply provides the state Supreme Court's view on the meaning of Massachusetts law. However, it does notify employers in the state that gender does not matter when it comes to harassment, Presser said. "If the conduct fits the definition of harassment and is sexually related, it doesn't matter what the orientation of the parties is," he said.

Ryan is a member of the firm of Ryan, Martin and Costello in Springfield, Mass.

Presser is with Skoler, Abbott & Presser in Springfield, Mass.

Sexual Harassment**Eighth Circuit Cuts \$5 Million Award Against Wal-Mart Stores to \$350,000**

The U.S. Court of Appeals for the Eighth Circuit has reduced from \$5 million to \$350,000 a jury award of punitive damages to a former Wal-Mart Stores employee who alleged that she was sexually harassed by her supervisor, and the company failed to do anything to stop the harassment.

The Eighth Circuit's reduction of what it called an "excessive" award further cut a punitive damages award that was originally set at \$50 million. The appeals panel did affirm the lower court's finding that Wal-Mart is liable for sexual harassment and an award of compensatory damages to plaintiff Peggy Kimzey (*Kimzey v. Wal-Mart Stores Inc.*, CA 8, Nos. 95-4219 and 95-4220, 2/20/97).

Writing for the Eighth Circuit, Judge Diana E. Murphy said the offensive conduct that Kimzey experienced "was certainly objectionable but was not the most egregious type of sexual harassment." In an opinion joined by Judge George G. Fagg, Murphy observed that "there was no serious sexual assault or physical touching, no quid pro quo harassment, [and] no retaliation for complaints."

In partial dissent, Judge Gerald W. Heaney said that reducing damages to \$350,000 does not adequately punish Wal-Mart for its conduct. "Nor will it serve to deter Wal-Mart or other similarly situated companies from violating their employees' civil rights," he warned.

The jury's \$50 million award earlier had been reduced to \$5 million by the U.S. District Court for the Western District of Missouri (235 DLR AA-1, 12/7/95).

**Harassment Finding Affirmed.** Kimzey alleged that she was subjected to sexual innuendoes and comments from her supervisor and the Eighth Circuit agreed that sufficient evidence exists to support a finding of a sexually hostile work environment in violation of Title VII of the 1964 Civil Rights Act and state law.

Supervisor Henry Brewer and Michael Mais, the store manager, instigated and participated in many of the incidents of harassment against Kimzey, who worked for Wal-Mart in Warsaw, Mo. Mais commented about Kimzey's breasts and her "tight-ass" jeans and on one occasion, told a co-worker that "he had found a place to put his screwdriver" while gesturing toward Kimzey's buttocks, according to the court. Mais also allegedly kicked female employees in the legs as he walked past them.

Kimzey also presented evidence that Wal-Mart management knew that she had been harassed throughout her tenure at the store and that she complained more frequently as Brewer's behavior became more abusive, according to the appeals court.

The district court did not err in submitting Kimzey's constructive discharge claim to the jury, Murphy wrote, because a reasonable jury could have found that Kimzey's working conditions were so intolerable that

she was forced to quit. During an exit interview, Mais offered Kimzey other jobs but she turned them down because of the unfavorable working hours, according to the court.

Although Kimzey tried to use Wal-Mart's open-door policy to complain about the harassment, management generally ignored her complaints, according to the court.

**Anti-Bias Policy a Mitigating Factor.** Even though it held that the evidence supports a verdict against Wal-Mart, the Eighth Circuit added, "No reasonable jury could have awarded \$5 million in punitive damages based on the evidence and the application of the relevant factors under Missouri law."

The district court abused its discretion by not reducing the award in light of all the relevant factors in the case, the Eighth Circuit said. Careful review of the evidence in light of Missouri law and other similar cases shows that the \$5 million award is "still excessive," said the court.

For example, there was no serious sexual assault or physical touching, retaliation for complaints, or quid pro quo harassment against Kimzey. Wal-Mart had an appropriate corporate policy against harassment, and there was no evidence that anyone outside the Warsaw store was aware of the incidents occurring there, said the court. Although there was conflicting testimony about whether the anti-discrimination policy was effective, a witness for Kimzey testified that the policy worked for another employee and that she had been encouraged to use it.

"Considering all the aggravating and mitigating circumstances, including the nature of the harassment," an award of \$350,000 would be reasonable under Missouri law, the court said, observing that the amount is proportionate to other damages awards in Missouri.

The court noted that it is unclear whether the district court submitted the punitive damages issue to the jury under Missouri law, federal law (which places a cap on damages), or both. Sufficient evidence existed to send Kimzey's claims to the jury under either state or federal law, the court said.

The Eighth Circuit pointed out that the jury assessed low actual damages of \$35,000 and \$1 in back pay even though Kimzey requested damages for emotional pain, inconvenience, humiliation, embarrassment, and degradation and her expert had testified that she lost over \$300,000 in income.

**Reduced Award 'Slap on Hand.'** The mere existence of a policy against harassment "carries very little weight . . . when Wal-Mart failed to train any of its supervisors about the policy," Heaney objected in dissent. That no one outside the Warsaw store knew about the conduct "is further evidence that the open-door policy was not followed," Heaney wrote. The company's failure to take action against Mais or Brewer "may well have indicated a greater need for a severe punitive award," said Heaney.

Wal-Mart's response of offering Kimzey other positions with undesirable working hours "essentially punished the wrong party and condoned the illegal behavior," the dissent said.

A \$350,000 award also fails to reflect serious consideration of Wal-Mart's total assets, Heaney added. At trial, the company's net assets were placed at \$32 billion. The reduction in damages "constitutes less than two one-thousandths of 1 percent of Wal-Mart's net worth," he pointed out.

"Such a minuscule penalty hardly represents more than a slap on the hand for a company of Wal-Mart's size. In purely economic terms, it would be far more beneficial for Wal-Mart to pay out this size award than to implement a companywide training program on sexual harassment," said Heaney.

DLR

2-24-97

## Disabilities Act

### Cases Involving Scar, Dyslexia, Neck Injury Push Federal Courts to Define Disability

**F**aced with cases involving a variety of alleged infirmities, federal courts in Michigan, Illinois, and Georgia have tried to define disability for purposes of the Americans with Disabilities Act in cases involving a computer salesman with a facial scar, a clothing salesman with dyslexia, and a grocery store clerk who was no longer able to perform heavy lifting as a result of a neck surgery.

The U.S. District Court for the Eastern District of Michigan held that although a scar might qualify as a handicap, under the facts of the case, the employee failed to show any nexus between the scar and management's decision to terminate him (*Van Sickle v. Automatic Data Processing Inc.*, DC EMich, No. 95-CV-10335-BC, 2/7/97).

The U.S. District Court for the Northern District of Illinois found that the case involving the dyslexic salesman must go to trial before a jury. Even if the paper record seems weak, the plaintiff might prevail based on the jurors' assessment of the witnesses' credibility, said

the court (*Merry v. A. Sulka & Co. Ltd.*, DC NIll, No. 95 C 6179, 2/7/97).

The U.S. District Court for the Middle District of Georgia said that the claim of the grocery clerk whose neck had been injured must fail. Given the duties of the job, there was no reasonable accommodation that management could be expected to make, according to the court (*Bivins v. Bruno's Inc.*, DC MGa, No. 5:95-cv-400-4, 2/10/97).

**Scar Comments Not Sufficient.** Bradley T. Van Sickle sold computer systems to auto dealerships throughout Michigan. In April 1994, he was in a car accident that left several injuries, including a six-inch scar along the chin. Van Sickle claimed that on three occasions supervisors called him "Scar Face." One supervisor allegedly joked that on tough accounts they would send in "Scar Face Van Sickle."

Judge Robert H. Cleland found that a scar can be a disability if it substantially limits his major life activities. But he found that the employee must present evidence that management treated him as substantially limited in his ability to work. The comments about the scar, or even the subsequent termination, are not sufficient, according to the court. Van Sickle's "beliefs about why he was terminated do not suffice as proof as to the reasons he was fired," said Cleland, finding that the employer is entitled to summary judgment.

**Learning Disability Cited as Handicap.** Judge Milton I. Shadur of the U.S. District Court for Northern Illinois held that with reasonable inferences drawn in favor of plaintiff Morgan Merry, he might prevail before a jury on his claim that he was discriminated against because of dyslexia.

Merry worked at Sulka, a luxury men's clothing store in Chicago. When he took the job he advised the general manager of his learning disability.

In a system unique among men's retailers, sales associates must hand letter a bill a sale, with notations of the customer's name and address, and other details including the credit card number. Salesmen are also expected to maintain contact with customers through handwritten thank-you notes.

Merry filed a complaint with EEOC in June 1995 alleging that Sulka failed to accommodate his disability and then fired him.

Shadur concluded that whether dyslexia is disabling for Merry presents issues of fact requiring resolution by the jury. The court observed that Merry completed a four-year liberal arts college with a 3.0 grade average, but it cited difficulties the condition poses in dealing with arithmetic, or transcribing phone numbers and credit card account numbers.

Shadur cited testimony that Merry cannot follow a cooking recipe, that he skims magazines rather than reads them, and that his limitations worsen when he is fatigued.

The court remarked that it could not conclude as a matter of law that management made a good faith effort to accommodate him.

**Clerk Suffers Neck Injury.** The Georgia case involved a frozen foods clerk at a Piggly Wiggly store in Macon. Milton Bivins was hired as a bag clerk in January 1974, and became a clerk in 1989, but was fired four years later.

The job requires the movement of wheeled pallets weighing up to 1,800 pounds each. Packages and boxes, particularly large bags of ice, may weigh up to 48 pounds.

Bivins injured his neck in 1986 when a case of Cof-feemate fell on his head. He underwent surgery in 1988 to fuse joints in his neck and back. He reinjured his neck in September 1991 and underwent a second operation. He then wore a brace at work that severely restricted his movements.

Bivins sought to return to light-duty work with a 10-pound restriction, but management said it would prefer that he return only when fully recovered. He was terminated in December 1993 under a policy of permanently dismissing anyone who fails to return to work within a year.

The store manager urged him to reapply but his application for a stock clerk position was denied in mid-February because of a lack of vacancies.

Judge Wilbur D. Owens held the evidence insufficient to get to the jury on either the termination or the failure to rehire. The court found that the crux of the case is the refusal to allow Bivins to return to the job and perform light-duty work.

The court held that Bivins was not a qualified individual under the Disabilities Act because he was unable to perform some 50 percent of the duties of stock clerk. The ADA "was not intended to force the employer to subsidize disabled people by keeping them in their paid positions while still having to hire someone else to actually do their jobs," said Owens. "The inescapable fact is that a stock clerk position consists almost entirely of lifting, reaching, carrying, pushing and pulling items, some of which are heavy and some of which are not. Bivins simply could not do a lot of this type of activity at the time."

DLR

2-24-97

## Discrimination

### Georgia High Court Finds No Clash Between State Law and Disabilities Act

**G**eorgia's highest court has upheld a state policy denying workers' compensation benefits to those who lie about a disability on a job application, deciding the rule is not inconsistent with the Americans with Disabilities Act and promotes state public policy.

With one justice dissenting, the Georgia Supreme Court reviewed for the first time its "false representation defense" in light of the ADA. (*Caldwell v. Aarlin/Holcombe Armature Co.*, Ga Sup Ct, No. S96A1419, 2/17/97).

The decision by Judge Carol W. Hunstein centered on an ADA provision at 42 U.S.C. Section 12112(d)(2)(A), which prohibits employers from asking job applicants if they are disabled or from asking about the nature and extent of a disability. However, an employer may "make pre-employment inquiries into the ability of an applicant to perform job-related functions," the law provides.

The majority ruled that if a job applicant is improperly asked about a disability on a job application, the proper response is to pursue ADA-provided remedies, not to lie. The denial of workers' compensation benefits to those who misrepresent themselves is justified, the Georgia Supreme Court held, because the false representation defense promotes a state public policy of truthfulness on job applications and the voiding of contracts for fraud.

"Where an employer seeks to elicit the truth regarding a job applicant's physical condition in a manner that violates the ADA, the remedy is not for the applicant to misrepresent his or her physical condition to the employer; rather the remedy is recourse to the provisions of the ADA," the majority concluded.

Judge Robert Benham dissented, saying that the majority's ruling "rewards the employer's wrongdoing," will encourage dishonesty at the pre-job-offer stage of employment, and could have a "chilling effect on the employment process" in the state.

**Applicant Lied on Job Form.** In the case at bar, Julius Caldwell injured his back while working for a restaurant in March 1994, and received disability and medical benefits. In May of the same year, he applied for a job with Aarlin/Holcombe Armature Co., and answered "no" to the question: "[h]ave you ever been treated for back problems?" He was hired as a lathe operator and within weeks experienced back trouble. He stopped working in July 1994, saying that he was disabled.

In a subsequent workers' compensation proceeding, Caldwell lost under Georgia's high court 1989 decision in *Georgia Co. v. Rycroft* (378 SE2d 111). *Rycroft* held that a false statement in a job application bars recovery of workers' compensation benefits if a three-part test is met: 1) the employee knowingly and willfully lied about a condition, 2) the employer relied upon the misrepresentation in the hiring decision, and 3) there was a connection between the worker's injury and the job application lie.

In Caldwell's case, the workers' compensation judge found that all three elements were met: Caldwell misrepresented his back condition, his employer relied upon the misrepresentation when it hired him as a lathe operator, and the false representation was connected to the subsequent injury. The ruling was appealed until it reached Georgia's highest court, with Caldwell losing all the way up.

**Challenge Application, Don't Lie.** The Georgia Supreme Court rejected Caldwell's argument that the *Rycroft* rule "rewarded" employers that violated the ADA and that the rule was inconsistent with the ADA. The court wrote that while it did not condone employers' ADA breaches on job applications, people in Caldwell's position should challenge the improper question on the application rather than lie.

Caldwell "did not have to answer the questions at all, and certainly did not have to answer them falsely," and his actions led to a worsening of his back injury, the majority said. To rule otherwise would reward Caldwell for making false statements, the majority reasoned.

The decision was joined by judges Norman S. Fletcher, Leah J. Sears, George H. Carley, Hugh P. Thompson, and P. Harris Hines.

The dissent argued that the *Rycroft* rule was established in a 4-3 vote by the Georgia Supreme Court before the ADA was passed. Georgia should follow the example set by the Alabama legislature, the dissent argued. Alabama law bars recovery of workers' compensation benefits if an employee makes misrepresentations after the pre-employment stage, the dissent wrote.

# HOUSE Future Listings

## Appropriations

### **FY98 COMMERCE-JUSTICE-STATE** ★ **APPROPS**

Commerce, Justice, State and Judiciary Subcommittee (Chairman Rogers, R-Ky.) of House Appropriations Committee will hold hearings on FY98 appropriations for programs under its jurisdiction.

2pm H-310 Capitol Bldg. **Feb. 25**

11am H-310 Capitol Bldg. **Feb. 26**

2pm H-310 Capitol Bldg. **Feb. 26**

#### **Witnesses scheduled:**

**Feb. 25** Jacquelyn Williams-Bridges - inspector general, Department of State; Frank DeGeorge - inspector general, Department of Commerce

**Feb. 26** Michael Bromwich - inspector general, Department of Justice

**Feb. 26** Representatives from Legal Services Corporation

### **REHABILITATION ACT** ■

Postsecondary Education, Training and Life-Long Learning (Chairman McKeon, R-Calif.) of House Education and the Workforce Committee will hold a hearing on the Rehabilitation Act.

9:30am 2175 Rayburn Bldg. **Feb. 27**

Agenda & witnesses scheduled:

#### **PANEL:**

Judy Heumann - assistant secretary of Education, Office of Special Education and Rehabilitative Services; Frederic Schroeder - commissioner, Rehabilitation Services, Department of Education

#### **PANEL:**

Paul Spooner - executive director, MetroWest Center for Independent Living, Inc. Framingham, Mass.; P. Charles LaRosa - commissioner, South Carolina Vocational Rehabilitation Department, West Columbia, S.C.; Suzanne Hutcheson - president, Tri-County TEC, Stuart, Fla.

■ *Revised Listing*

★ *New Listing*

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# Switching Health Plans

By Mike Causey  
Washington Post Staff Writer

**O**pen season, when federal workers and retirees may pick a new health plan, takes place about the same time each year: usually from mid-November to early December. Most of the people who later regret their choice must live with that plan for a year.

But there are exceptions, usually because of an event: birth, death, change in marital status or key birthday.

Specifically, you can change coverage if you:

- Marry, making you eligible for family coverage.
- Lose a spouse because of death or divorce, making you eligible for single coverage.
- Have or adopt a child and need to move from single to family coverage. Married feds with single coverage who want family coverage must enroll in the same family plan. The husband, for example, can't keep a single policy while the wife and child get family coverage.

■ Celebrate your 65th birthday. Being eligible for Medicare means that many retirees can switch to a less costly plan and still get almost total coverage.

■ Move outside the coverage area of your health maintenance organization. You can pick a new HMO at the new site or switch to a fee-for-service plan.

Although HMOs provide emergency coverage out of area, they aren't good for people who travel frequently or who spend part of the year outside the HMO area.

## Investment Hindsight

I've received lots of calls from people planning for the thrift savings plan open season that begins May 31. That's when nonparticipants can sign up for the federal 401(k) plan and participants can reallocate where future payroll contributions will go.

Feds have three choices: the C-fund, which, like other index funds, tracks the S&P 500 stock index; the F-fund, which tracks the Lehman Brothers Aggregate Bond Index; and the G-fund,

which invests in U.S. Treasury securities not available to the general public. The C and F funds rise and fall with the stock and bond markets. The G-fund rate is set each month and is guaranteed by the Treasury.

Over the life of the three funds, the high-risk C-fund has done the best. Its compounded annual rate of return has been 15.9 percent, compared with 8.4 percent for the F-fund and 7.7 percent for the G-fund. Here's the track record of the three funds from 1988 to 1996. The amounts shown are after expenses.

■ G-fund (Treasury securities): 8.8 percent in 1988 and 1989, 8.9 percent in 1990, 8.1 percent in 1991, 7.2 percent in 1992, 6.1 percent in 1993, 7.2 percent in 1994, 7 percent in 1995 and 6.8 percent in 1996. Compounded annual rate of return for the period: 7.7 percent.

■ C-fund (stocks): 11.8 percent in 1988, 31 percent in 1989, minus 3.2 percent in 1990, 30.8 percent in 1991, 7.7 percent in 1992, 10.1 percent in 1993, 1.3 percent in 1994, 37.4 percent in 1995 and 22.8 percent in 1996. Compounded annual rate of return for the period: 15.9 percent.

■ F-fund (bonds): 3.6 percent in 1988, 13.9 percent in 1989, 8 percent in 1990, 15.7 percent in 1991, 7.2 percent in 1992, 9.5 percent in 1993, minus 3 percent in 1994, 18.3 percent in 1995 and 3.7 percent in 1996. Compounded annual rate of return for the period: 8.4 percent.

Feds with accounts in the tax-deferred thrift savings plan can move money from one fund to another any time. But they must wait for an open season to redesignate where their future payroll contributions will go. For example, someone can move existing account money from the C-fund to the F-fund or G-fund any time. Or vice versa.

But to join the savings plan, or to reallocate where future payroll contributions will go, individuals must wait for the open season, this year beginning May 31.

THE WASHINGTON POST

MONDAY, FEBRUARY 24, 1997

STEVE

## JAMES BOVARD

# Our premier racial racketeering agency

When does a goal for hiring become a racial quota? When there is a federal agent sitting across the table with a nuclear bomb.

The Office of Federal Contract Compliance Programs, a little known but extremely powerful branch of the U.S. Department of Labor, is America's premier racial racketeering agency. OFCCP Director Shirley Wilcher declared last year: "Enforcement of equality in the work place includes penalties to deter violations and to get results as quickly and efficiently as the law permits." Not equality of opportunity — not equal chances for equal talent — but equality, plain and simple, by hook or by crook.

The OFCCP enforces affirmative action obligations on federal contractors. More than 200,000 companies and institutions with more than 25 million employees are subject to the OFCCP's racial and gender dictates. The OFCCP has more coercive power and less judicial scrutiny than any other quota police agency in the nation.

OFCCP gains much of its power from its ability to debar private companies from federal contracts. Assistant Labor Secretary Bernard Anderson described the

power of debarment as "a kind of nuclear bomb." Under the Clinton administration, the OFCCP has cut off government contracts to twice as many companies as happened during the Bush administration.

OFCCP'S passion for the correct numbers far exceeds its devotion to following the law. New Jersey human resources consultant Mary Jane Sinclair observed: "The government regs take the standing that you are out to screw the system so we are going to screw you first. It is like

you are sitting down with a Mafia don. . . . They put the fear of God into you — that is how they get the numbers."

Even when OFCCP officials admit they have no policy, companies can still be found guilty. Ms. Sinclair is advising a company that has a high percentage of temporary workers. Ms. Sinclair contacted OFCCP headquarters for advice on how to account for the temps in the company's annual affirmative action plan. OFCCP headquarters officials were mystified and

informed her that guidance was not yet available on the subject. But, the local OFCCP compliance officer demanded that the temps be included in the plan — and then announced that the company was guilty of hiring insufficient black employees. This company has spent tens of thousands of dollars providing training to and recruiting low-income blacks and has almost three times as many blacks on its payrolls as reside in the area. Yet, because some black applicants had not been hired, the officer became "obsessed," in Ms. Sinclair's view, and threatened to seek a huge settlement for the alleged "victims."

Many OFCCP compliance officers abuse their power. One lawyer with 20 years' experience dealing with OFCCP related, "They used to show up and demand coffee and doughnuts and demand to be taken to lunch. I don't see much of that any more — because they are all reporting on each other." A different form of abuse occurred when an OFCCP agent arrived at a California movie studio. The lawyer noted, "The investigator was so enthralled that she basically moved in. She would show up every morning with a huge bag of popcorn and a pack of Cokes and every time the company needed to talk to her, they would find her on a movie set some-

place."

One Midwest human resource director complained of OFCCP agents compliance officers "just coming on site and scaring everyone to death and costing them thousands of dollars in time and effort." According to former OFCCP Director Ellen Shong Bergman, OFCCP officers are sometimes guilty of "attempted extortion" in their threats against businesses found not hiring and promoting enough minorities and women.

A female lawyer with more than a quarter-century's experience with OFCCP efforts said that browbeating, intimidation and lying about the law by OFCCP compliance officers happens "all the time."

French philosopher Bertrand de Jouvenal observed, "A society of sheep must in time beget a government of wolves." Government contractors rarely challenge the principle of OFCCP power grabs; for instance, Diane Generous of the National Association of Manufacturers, when asked about her members' problems with the OFCCP, replied: "Our concern is the paperwork." Wayne State University law school professor Kingsley Browne observed: "Everybody knows what is going on. The problem is that the business community has been completely spineless on this issue."

The issue of OFCCP affirmative action goals and timetable the heart of the coercive Welfare State. These vague regulations maximize power of government to intimidate and browbeat businesses. The essence of OFCCP's concept of social justice is compelling companies to play for work that they never based on secret rules the continually changes.

Unfortunately, Republican government contractors at the scam of federal racial preferences. Sen. Bi sponsored an excellent bill would have ended such practices; however, the House Republican leadership last week to abandon the bill. (Mr. I also been ducking the issue). The GOP is terrified of losing potential female and black voters. However, by not having courage to stand for their principles, the Republicans have again made their "revolution" like a laughingstock.

*James Bovard is a Washington writer. Portions of this are adapted from a piece in the current issue of America magazine.*

PHOTOCOPY PRESERVATION