

# Official defends affirmative action

**■ Rights:** Lawmakers get a warning about "pitting groups against each other."

By the Los Angeles Times

WASHINGTON — The Clinton administration official responsible for enforcing federal laws that protect minority rights on Friday chastised lawmakers seeking changes in affirmative action programs for believing myths and warned that "pitting groups against each other" would be a "most hurtful strategy."

"I think frankly it would behoove us all to concentrate a little bit more on what the rules are on than on what the myth is," Deval Patrick, assistant attorney general of the Justice Department's Civil Rights Division, told the first House panel to take up the politically charged issue of affirmative action programs.

"And a lot of the myth is that there are unqualified, undeserving women and minorities who are getting benefits that ought to go to qualified and deserving white men. And the evidence just doesn't bear that out," he said.

Facing Republicans bent on scaling back the programs and Democrats intent on preserving them in fact, Patrick walked a fine line



**Deval Patrick**

*Don't believe myths, he warns*  
Senate floor to warn the administration, "there can be no splitting the difference — no 'third way'" in assessing affirmative action programs.

"Discrimination continues to exist. The color-blind ideal is just that — an ideal that has yet to be achieved in the America of 1995," Dole said. "But do you become a color-blind society by dividing people by race? Do you achieve the color-blind ideal by granting preferences to certain groups? Do you continue

programs that have outlived their usefulness or original purpose? The answer to these questions is, of course, a resounding 'no,'" Dole said.

In his testimony before the House Economic and Educational Opportunities Committee's subcommittee on Employer-Employee Relations, Patrick said that affirmative action laws, as upheld by many court decisions, allow consideration of minority status only in cases where applicants' job or academic qualifications are comparable, and where the quality of the resulting pool of students or workers would not be compromised.

He suggested that efforts to amend affirmative action programs is motivated by workers and students seeking scapegoats for their inability to advance.

"One thing we have to do," Patrick said, "is educate the public generally away from the idea that everything that happens to them is the result of somebody else getting something they didn't deserve."

Reverse discrimination "is a powerful symbol," he said. However, he added such cases are rare, making up fewer than 2 percent of cases pending before the Equal Employment Opportunity Commission.

Patrick, 38, a soft-spoken Harvard Law School graduate who is Af-

rican-American, readily acknowledged that his education and career had been helped by affirmative action.

"Everybody — everybody — gets a leg-up," he said. "Everybody gets help. That's the way of the world. Affirmative action is only about giving that break to people who didn't — and don't — tend to get that break — women and minorities. That's all it is. And what you do with that opportunity, how you perform with that opportunity, is up to you. That's where the merit is."

**Industrial**  
18,250 sq. ft.  
**Warehouse or Factory**  
*Plus*  
4,800 sq. ft. office,  
10 minutes to airport  
in enterprise zone.  
**\$460,000**  
**Contact**  
**Ron Schmaedick CRB**  
**465-1704**

REALTY

EXECUTIVES

INDUSTRIAL

PHOTOCOPY PRESERVATION

In a pending review of affirmative action programs, the White House is open to changes in affirmative action programs, Patrick said. But "there is no interest here in retreating on the basic issue and basic commitment to expanding opportunities for all Americans."

Patrick's testimony came as the Senate voted to eliminate a federal program designed to spur minority ownership of cable and broadcast companies. With virtually no debate, the upper chamber voted to repeal a 17-year-old tax break that would have netted entertainment giant Viacom Inc. a savings of some \$500 million in federal taxes when it sold one of its cable systems to a minority-controlled partnership.

The House recently repealed the law, which the White House had hoped to salvage by making reforms.

Also in the Senate, Majority Leader Robert Dole, R-Kan., took aim at the White House review of affirmative action programs while defending his recent controversial comments on the issue.

Two weeks after denouncing "government-sanctioned quotas, timetables, set-asides and other racial preferences," Dole went to the

# Content, Character, And Class

BY JAMIN B. RASKIN

THIS MONTH'S REVIEWS:

**NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES**  
BY CHRISTOPHER EDLEY, JR.

(New York: Hill and Wang, 278 pages; \$25)

**THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION**

BY RICHARD D. KAHLBERG

(New York: Basic Books, 350 pages; \$25)

Can preferences for the poor  
clear a path to social justice better  
than race-based affirmative action?  
Two authors draw contrasting maps  
for the twenty-first century.

**H**OW DEMORALIZING can the debate over affirmative action get? While critics of the practice are acting like Martians who landed in the United States a few days ago and know nothing of the nation's racial history, affirmative action's defenders have lapsed into a race-consciousness that confuses a bureaucratic spoils system with social justice.

Conservatives are tossing inconvenient facts like Jim Crow out the window. Liberals, meanwhile, have lost sight of the conservative roots of affirmative action and, more importantly, the visionary project of the civil rights movement. We're now invited by one side to abolish affirmative action, and blink away racial oppression, and by the other to support racial preferences and forget about the struggle for a society that does not define people by the nineteenth-century superstition of race. Where, one might ask, should we go from here?

Two recent books lift us a few feet above the racial muck that covers America, from the multiethnic wars of California to the harsh zero-sum games of Piscataway, New Jersey. *Not All Black and White* is an appealingly modest and articulate defense of affirmative action, written by Christopher Edley, Jr., a professor at Harvard Law School who led the 1995 White House review of affirmative action as special counsel to President Bill Clinton before returning to Cambridge. As a stark contrast to Edley's work, in *The Remedy*, Richard Kahlenberg, currently a fellow with the Center for National Policy in Washington,

D.C., has penned a sweeping indictment of race preferences. Kahlenberg argues—with a good deal of moral passion but much less historical perspective and logical precision—for a substitute regime of “class-based preferences.”

Edley's book is a sustained elaboration of the Clinton policy of “mend it, don't end it,” and may perhaps be the definitive technocratic defense of racial affirmative action. He carefully examines three different schools of thought: color-blindness (in which “color should not be a consideration in public or private decisions about important economic and social opportunities”); opportunity and antidiscrimination (in which race may be used “to remedy discrimination and promote equal opportunity where past or societal discrimination has diminished opportunity”); and remediation-plus-inclusion (in which we use “race-conscious decision making to lean against that tilt in the playing field that helps those who are familiar to us and hinders those who are different”).

Edley does an admirable, lawyerlike job of unpacking the buried fact and value assumptions that inform each of these moral and political visions, providing a nice road map to the controversy. And this approach lays down the groundwork for his own argument in favor of the remediation-plus-inclusion paradigm, which Edley defines as the most complex and nuanced. It is, he as-

serts, the model most responsive to the values that a multiracial liberal democracy should promote.

Edley worries about the moral costs of affirmative action, but still concludes that race-conscious decision making is justified—not only for remedial purposes, but also because diversity can provide substantial benefits to an institution or to society at large. He argues that such benefits can be instrumental: racial diversity, for example, improves the effectiveness of urban police departments and the armed forces because of the nature of their work. But the benefits of affirmative action, Edley says, also involve “our aspirations to have a more diverse, less balkanized experience of community.” He repeatedly invokes President Clinton's promise to make his original cabinet “look like America” as a model for how we should think about constituting social life.

Measured against the raging indictment of affirmative action in the heartland and the corrosive suspicions of angry white males, Edley's “diversity” justification for affirmative action seems a bit shopworn. I can't help thinking that his book, which is filled with seminar-like graphs and tables, suffers from an excess of politeness and euphemism, cultivated perhaps in too many meetings at the White House. Without making the case that we are living in a moment of profound racial backlash—as

made clear by the Supreme Court's hostility to majority-minority districts, for instance, or the ugly racial ideology articulated in books like *The Bell Curve* or *The End of Racism*—we're left vaguely uncertain why affirmative action is still necessary today. Ultimately, one senses that Edley could make a far more convincing argument for the diversity rationale if he just told us that racism is our original (and remarkably resilient) national sin and that affirmative action is necessary as a mild corrective to our baseline structural condition.

Richard Kahlenberg, on the other hand, simply disappears the primacy of racism in our history. Rather, he argues for a shift to preferences on the basis of “class status,” though he is murky about whether class means wealth, income, family educational background, or personal experience and resources. In Kahlenberg's hands, “class” affirmative action becomes a conservative program that does nothing to redistribute class power. “Class preferences do not imply the moral superiority of the working class or hatred of the rich,” he writes. “They are a way of providing equal opportunity so that the children of the disadvantaged may themselves rise through hard work and effort to become comfortable or even rich.” A few pages later, he concludes that “class preferences are cheaper than social spending, seem less threatening than school class-based integration, and solve the conundrum of welfare by providing direct aid to the child without aiding the undeserving parent.”

Kahlenberg is to be commended for injecting the great unmentionable of American politics—class—into the debate over affirmative action. Yet he's quick to lay out one of his main arguments (a modest class-based proposal for admissions in higher education) without taking a hard look at what passes for meritocracy today. Colleges and universities have long institutionalized preferences based on athletic accomplishment, on geographic distribution, on disability or veterans' status, on wanting to have a fair distribution of academic interests and majors, and so

strong interest of the government's.

As O'Connor and Scalia then moved in with aggressive questioning, Finley asserted more strongly the plight of patients in tense face-to-face confrontations. She said there was "medical evidence that . . . forced physical proximity elevates health risks." She cited research on "how invasions of personal space created physical stress reactions."

However strong her evidence might be in the realms of science or medicine, it did not work as argument in a legal setting. She was promptly exposed to ridicule for her reliance upon behavioral medicine theory. Justice O'Connor added to the embarrassment by implying that Finley was seeking to justify the injunction "on this social theory." Finley moved to extricate her-

self, resorting to a straightforward legal argument to justify the judge's protective zones around patients.

But she was unwilling to let go of her conviction that emotional stress had a bearing on the need for the protective zones. So Justice Scalia and then Justice Kennedy added some further doses of ridicule of that line of argument. Even Justice Ruth Bader Ginsburg, apparent-

ly sympathetic to much of Finley's plea, implored her to get away from that point and to stress the physical jostling that had gone on.

Finley's argument in favor of the bubble zone of protection also suffered when she allowed herself to get drawn into a completely unproductive numbers game with Justice Kennedy over how to measure the space actually encompassed within a 15-foot zone. By the time she sat down, all of the crispness had left her argument.

Acting solicitor general Dellinger, offering the federal government's support for patients, staff, and clinics faced with antiabortion blockaders, suffered his most severe embarrassment at the very beginning of his presentation. But his circumstance got little better as he moved on.

At the beginning, he adopted the ploy of inviting the Court to see the blockade situation through the eyes of the trial judge. Noting the judge's finding about the physical crowding of patients and staff by demonstrators, Dellinger allowed himself to ask a quite open-ended rhetorical question—a very risky gesture.

Said he: "What's a trial judge supposed to do in the face of that kind of finding?" As he started to give his own answer, Justice Kennedy brusquely intruded, saying: "Well, one of the things he's supposed to do is read the First Amendment. I take it." Faced with "conduct based on speech," Kennedy said, the judge was obliged to act narrowly.

As Dellinger tried to get a word in, Kennedy went on, telling Dellinger he was attempting to make "a very difficult" argument under the First Amendment to support the judge's broad injunction. The government lawyer was unable to regain control of his argument, soon allowing himself to get drawn into a useless verbal joust with Justice Scalia over what constituted a blockade. When Justice Breyer moved in to try to shore up Dellinger, Justice Scalia would not let Dellinger take advantage of the help, badgering him relentlessly. By the time Dellinger was ready to conclude, even Justice Ginsburg was ridiculing the scope of the injunction.

Back at the podium for three minutes of rebuttal, Sekulow justifiably was brimming with confidence—and he remembered to keep his voice down. ■

*Lyle Denniston is the Supreme Court reporter for The Baltimore Sun and adjunct professor of law at the Georgetown University Law Center and the American University's Washington College of Law.*

## Reader Service

The American Lawyer

# FREE INFORMATION

Send for free information by using the attached card

- |   |   |
|---|---|
| 1. Altman Weil Pensa, Inc.                | 29. The Garden City Group, Inc.             |
| 2. American Litigation Analysts           | 30. Hildebrandt, Inc.                       |
| 3. Ann Cole Opinion Research and Analysis | 31. IT/IS, Inc.                             |
| 4. Applied Litigation Research            | 32. JuriLink International Corporation      |
| 5. Aspen Systems Corporation              | 33. Jurix, Inc.                             |
| 6. Baker-Robbins & Company                | 34. Jury Research Institute                 |
| 7. Barry Goldberg & Associates, Inc.      | 35. JuryThink, Inc.                         |
| 8. Bodaken Associates                     | 36. KPMG Peat Marwick LLP                   |
| 9. CACI Legal Systems                     | 37. Kluwer Law International                |
| 10. Chicago Partners                      | 38. Legal-Media Center, Inc.                |
| 11. Co-Counsel®                           | 39. LEXIS®-NEXIS®                           |
| 12. Compulit                              | 40. Litigation Sciences, Inc. (LSI)         |
| 13. Coopers & Lybrand                     | 41. MacKenzie Partners, Inc.                |
| 14. Corporate Research Group              | 42. Marley Group Ltd.                       |
| 15. Corrao, Miller, Rush & Wiesenthal     | 43. On Trial Associates, Inc.               |
| 16. Corum Watch                           | 44. Peterson Consulting Limited Partnership |
| 17. Counsel-Connect™                      | 45. Price Waterhouse LLP                    |
| 18. Court TV                              | 46. Prounis Consulting Group, Inc.          |
| 19. D.F. King & Co., Inc.                 | 47. Quorum Litigation Services, Inc.        |
| 20. DATICON Systems, Inc.                 | 48. Sitrick & Company, Inc.                 |
| 21. Decision Research Corporation         | 49. Starr Litigation Services, Inc.         |
| 22. Decision Strategies International     | 50. Trial Behavior Consulting, Inc.         |
| 23. DecisionQuest, Inc.                   | 51. Trial Consultants, Inc.                 |
| 24. Deloitte & Touche LLP                 | 52. Trial Presentation Technologies         |
| 25. EDS/Global Securities Industry Group  | 53. Verdict Success                         |
| 26. FTI Corporation                       | 54. The Wallace Law Registry                |
| 27. Field Research Corporation            | 55. The Wilmington Institute                |
| 28. First USA Bank                        | 56. Zagnoli McEvoy Foley Ltd.               |

Offer expires November 29, 1997

had worked to save local broadcasters, however, Dellinger chose to argue how socially valuable free local TV is and to rely upon assumptions that the "must carry" rule would save it. Congress's goal of "preserv[ing] a healthy multiplicity of broadcast sources" was Dellinger's theme.

Justice Antonin Scalia, who voted against the "must carry" rule the first time around, reacted to Dellinger's strategy by immediately backing him into a corner. Scalia said that the Court wanted to know what the overall impact on free local TV would be without the "must carry" rule, not whether a few stations would fail to survive without it. Dellinger took the bait, and proceeded to argue for government authority to save virtually every local TV station in order to preserve a "robust array of quality programming." In doing so, Dellinger made a major tactical blunder.

After a brief diversion from Chief Justice William Rehnquist, Dellinger moved back to an argument he had begun to make to Scalia, on how program diversity would suffer if even "one or two stations" went under for lack of cable access. He became almost rhapsodic in discussing the virtues of local sources of broadcast information.

He was talking himself into deeper trouble, and that became clear when Justice Breyer entered the questioning. He told Dellinger of "the problem that's bothering me," a problem that went directly to the evidence about the supposed threat to local TV broadcasting. Breyer reminded Dellinger that only 31 stations actually had gone off the air after losing their cable access. If most local stations are "still there broadcasting," Breyer asked, "how are these people hurt?"

Dellinger said "survival is not the only issue." The real casualty, he said, was losing "the ability to put on quality programming." He said that "common sense tells us that." Local stations, he suggested, would have to switch to the unattractive alternative of "home shopping inquiries." Scalia pounced: "So, it's the prosperity of programmers that the government is now concerned about, not just their continued existence?" Prosperity, said Dellinger, is only "an intermediate step" toward maintaining quality programming.

Breyer moved in to ask for evidence that less expensive programming was less desirable. "I saw a theory, but I didn't see evidence," the justice remarked. Dellinger made a fleeting reference to "anecdotal evidence." Then Justice Souter, who was in the majority on "must carry" two years ago and holds a vote crucial to the government, turned Dellinger's argument against him. "When you start talking about quality," Souter said, that was getting into program content—a constitutionally forbidden justification for the government. "The tendency of your answer to Justice Breyer is . . . some kind of content-based standard," Souter said.

Dellinger tried to deflect that thrust,

but was not successful. Justice Sandra Day O'Connor, a foe of the "must carry" rule in the 1994 ruling, picked up on Souter's point and used it to press Dellinger on alternatives to "must carry" obligations. She suggested that the government could provide subsidies if it wanted to save local stations. "You don't have to commandeer all the channels," she said with some sarcasm.

Soon after, Justice Kennedy, who wrote the main opinion in 1994 and is vital to Dellinger in the sequel case, told him he was misreading the earlier opinion and asked for evidence of "a significant effect" on local broadcasting. It was too late for Dellinger to say enough to undo the effects of his argument.

Bruce Ennis, Jr., the managing partner of the Washington, D.C., office of

showing the difficulty of communicating effectively in a close and sometimes tense setting. The case involves a challenge to the power of judges to protect pregnant women and abortion clinic staff members from face-to-face encounters with antiabortion demonstrators outside clinics. Mainly at issue is a judicially devised 15-foot "bubble zone" of protection, which moves with protected individuals as they travel to and from clinics. In that zone, only two abortion foes may be present, and they must leave it on demand.

(After a series of antiabortion blockades of abortion clinics in Buffalo and Rochester, New York, beginning in 1988, a federal judge issued a broad injunction with the bubble zone as its most novel feature. The order has been

**Justice O'Connor suggested that the government could provide subsidies if it wanted to save local TV stations: "You don't have to commandeer all the channels," she said with some sarcasm.**

Chicago's Jenner & Block, had only ten minutes to defend the "must carry" rule on behalf of the over-the-air broadcast industry. Justice after justice—including Breyer—used the damage done by Dellinger to frustrate Ennis's best efforts. Predictably, Farr sounded absolutely triumphant as he worked his way easily through five minutes of rebuttal.

#### TURNING DOWN THE VOLUME

Seldom does the Court's chamber lend itself to a live demonstration on the issues in a pending case. But a hearing on *Schenck v. Pro Choice Network of Western New York* turned the courtroom into something of a stage for acting out that First Amendment controversy.

Involuntarily, Jay Sekulow, the plaintiff's attorney, played the main role, in a way that initially seemed to undermine his case. But his overall performance reduced the negative effect of the hearing's theatrical aspects.

Two other lawyers, Lucinda Finley and acting solicitor general Walter Dellinger (back for a second appearance), were less directly caught up in the theater. But their turns at the lectern, on behalf of the defendant, also brought some unwelcome forensic drama: They had to withstand prickly embarrassment that was more unsettling to their arguments than anything Sekulow had to overcome.

The problems that Finley and Dellinger encountered added to the demonstrative aspect of the hearing,

upheld by the en banc U.S. Court of Appeals for the Second Circuit.)

Sekulow, chief counsel of The American Center for Law and Justice, based in Virginia Beach, Virginia, started his presentation for the demonstrators in the exuberant style he often adopts. Quickly, Chief Justice Rehnquist interrupted: "Mr. Sekulow, I think we can hear you quite well if you were to lower your voice a little." He did so. Unintentionally, the exchange had made an early and important point for the clinics: An in-your-face approach is not necessary to project one's message over a fairly short distance.

That point was made more vividly a few minutes later when Justice Breyer uncharacteristically joined in the questioning early. "We're 15 feet apart now," Breyer said. "Even without this microphone I think I can hear you perfectly well. . . . So what is the problem? . . . We're having a conversation, and we're 15 feet apart."

Sekulow tried to shift the scene. What this case was about, he said, was "the hustle and bustle of any metropolitan area," about trying to "carry on" an intimate conversation "outside an abortion clinic."

Sekulow did not seem to have dispelled the effect of Breyer's demonstration, but he moved on as the Court engaged him on the details of the injunction. Those exchanges, though, did not go particularly well. Justice Kennedy, a swing vote on abortion is-

ues whose support the demonstrators clearly need to win if they are to prevail, spoke approvingly of the judge's action as a "sensible" response to the "discord" that had occurred outside the clinics.

Soon, however, Sekulow came to his own aid, stressing that the bubble zone was not a small speech-free area after all, but actually quite an expansive one because it floated "without any geographic limitation." He also told the chief justice that "the pinpoint precision" the Court had required previously for injunctions against antiabortion protesters "is absent here."

Justice Breyer then brought him back to the close proximity issue. "I still don't understand," he said. "Is there some word or expression or thought or idea, or view that is only communicable when I'm closer to you than I am at this moment, and if so, what is it?"

Sekulow suggested that it would be difficult for a demonstrator to point out, from 15 feet away, a verse in the Bible. A moment later, he commented that "in the decorum of this courtroom, it's quite easy for you and [me] to communicate." It was a point he had already made, but it bore repeating in the face of Breyer's probing. Sekulow seemed to grow in confidence as his argument progressed, particularly with the aid of some timely interventions on his side by Justice Scalia.

Following Sekulow to the lectern, the clinics' lawyer, Finley, a professor at the law school of the State University of New York at Buffalo, tried immediately to paint a different word picture of the scene around the clinics. "We have here an unrelenting campaign . . . of illegal, and tortious harassment, intimidation, obstruction, and trespass at health care facilities," she said.

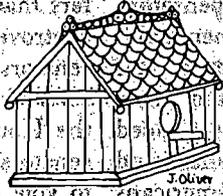
Emphasizing the need to maintain "quiet zones and buffer zones around hospitals," Finley said such zones were all that the clinics were seeking. Justice Scalia mockingly asked whether it would be noisier if people had to speak to patients from a distance "instead of coming up close."

Retorting, Finley said the injunction at issue "gives far more leeway to defendants than buffer zones previously upheld by this Court," despite the record of protesters' "dangerous, medically risky, intimidating, and harassing activity."

It was already apparent that Finley was determined to keep in center stage the image of a medical facility, with patients having to run a gauntlet to get treated. Quickly, Chief Justice Rehnquist pressed her on that theme: "Are you suggesting that there's some special rule for abortion clinics that wouldn't apply in other cases where people are being perhaps harassed or counseled or argued with?" he asked. She said she was not. Rehnquist shot back: "Why do you keep stressing the quiet zone outside the abortion [facility]?" She responded that ensuring "safe conditions for health care" was a

it. The President vetoed the bill, and the Senate fell one vote short of the two-thirds necessary to override the veto. The override vote came in the midst of the President's ordeal over the budget, when he was having an awful time over the subject of taxes, and he was facing a crisis in the Persian Gulf; some Republicans didn't want to compound his troubles by voting against him on the civil-rights bill.

The arguments at the end were over the definition of "business necessity." On one level, this was a lawyers' argument that almost nobody could understand but which the lawyers insisted was very important, since their respective positions were based on case law.



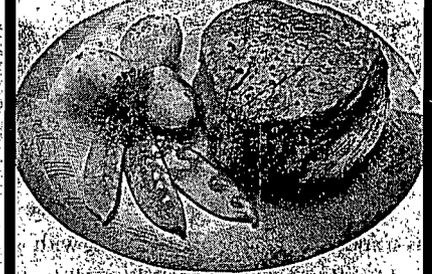
However, even a committed civil-rights lawyer says that at the end the two sides were "dancing on the head of a pin." The advocates of the bill felt they had compromised as far as they could without enraging some of their most important supporters; the Administration was dragging the anchor of those who wanted a looser interpretation of the law—or no law. On another level, the dispute wasn't about the law at all but about the political advantage that the Administration had already seen in branding the bill a "quota bill" and tarring those who supported it as supporting quotas. Numerous civil-rights advocates perceived a political advantage in having the President veto the bill—figuring that such an act would so hurt him with both black and mainstream white constituencies that it would be a net detriment to him and the Republican Party. They failed to see the potency of the "quota" issue.

The Administration made no such error. Well before the President vetoed the bill in late October of last year, one of his aides said to me, with a smile, "We'll veto, we'll sustain the veto, we'll end up with Wards Cove, and we'll have raised the quota issue—to our benefit." Another aide says that the veto was driven as much by ideology as it was by politics—that some of the President's advisers simply didn't want a bill. Then came the November elections and the victory of Jesse Helms, who had used a now-famous ad about quotas, showing a white hand crumpling a job-rejection letter. Pete Wilson, a Republican, who was successful in his race for the governorship of

California, had also used the quota issue. (Earlier, David Duke, a former member of the Nazi Party and the Ku Klux Klan, played upon racial tensions in Louisiana and came closer than most people had dared think to winning a Senate seat. Duke won sixty percent of the white vote.) There is a strong argument that Helms, and perhaps Wilson, too, would have won anyway, but many politicians and political analysts tend to deal in simple equations and concluded that both men won because of the quota issue. Subsequent polling data show that the quota issue is perhaps the most powerful one in our politics today—far more powerful than whether a politician erred by supporting the continuation of sanctions against Iraq. A House Democratic aide says, "The quota issue is radioactive." The result has been nothing less than panic in the Democratic ranks. A lot of members are asking why their leaders are putting them through the agony of having to vote on the civil-rights bill again this year.

But the Democratic congressional leadership was stuck. The civil-rights constituency has long been one of the pillars of the Democratic Party, and even when, as in this case, its concerns strike many Democrats as of marginal importance compared with earlier issues (voting rights, school desegregation, ending basic discrimination in jobs) or compared with the appalling conditions of so many urban blacks today, the Democrats couldn't in good conscience walk away. (Many were tempted.) Moreover, in the course of the final dealings on the budget last year, the Congressional Black Caucus, consisting of twenty-three members (twenty-six this year), was upset at some of the budget provisions and enraged at Bush's successful veto of the civil-rights bill, and in exchange for its final support of the budget, extracted a promise that the civil-rights bill would be brought up again early this year and would be given pride of place by being designated H.R. 1. (By custom, it is a big deal to have a bill designated H.R. 1, or S. 1.) Moreover, the Black Caucus members and other House liberals were miffed both that so many compromises had been made in last year's bill and that they hadn't had an opportunity to vote to

# Sizzling Summer Savings...



...on those melt-in-your-mouth Filet Mignon.

**Save \$15.00.** Just in time for summer grilling season. Six extraordinarily elegant, U.S.D.A. CHOICE Filet Mignon (each more than an inch thick, all center cut exclusively delivered with an unconditional guarantee). **Only \$34.50 for six if ordered before Aug. 31, 1991 (reg. \$49.50).** Plus \$6.00 for shipping. Limit three.

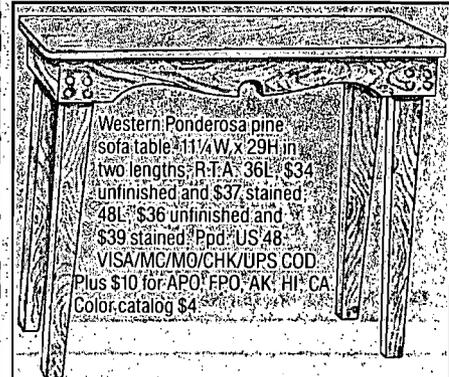
To order your steaks or a free catalog, call toll-free

**1-800-288-2783**

*Classic Steaks of Omaha*  
by Skylark Meats, Inc.

4430 South 110th Street  
Omaha, NE 68137

Visa, MasterCard, and American Express accepted



Western Ponderosa pine  
Sora table 31 1/4" W x 29H in  
two lengths: R-T-A 36L \$34  
unfinished and \$37 stained  
48L \$36 unfinished and  
\$39 stained. Ppd. US 48.  
VISA/MC/MO/CHK/UPS COD  
Plus \$10 for APO, FPO, AK, HI, CA  
Color catalog \$4

THE SHOP WOODCRAFTERS INC.  
PO Box 1450, Quitman, TX 75783  
903/763-5491 fax 903/763-5766

## GALAPAGOS

You, 9 other adventurers and our licensed naturalist will sail by yacht to explore more islands than any other Galapagos expedition. 60 trip dates. Machu Picchu option. Free brochure.

Inca Floats 415-420-1550  
1311-Y 63rd St., Emeryville CA 94608

\*\*\*\*\*  
NEW ORLEANS, FRENCH QUARTER  
Two Blocks From Bourbon St.  
Carrage House Suites  
Balcony Rooms  
Romantic Court Yard  
Outdoor Swimming Pool  
Covered Valet Parking  
FOR FREE BROCHURE & RESERVATIONS  
CALL: (800) 448-4927  
DE LA POSTE 316 Rue Chartres, New Orleans, Louisiana 70130  
\*\*\*\*\*

# YOUR WEIGHT PROBLEM

Get It Under Control  
Keep It Under Control

For fourteen years Structure House has combined emotional counseling with nutritional counseling and body conditioning in a unique program of personally tailored care. Result: the best long-term success rate in the nation. Our professionally recognized staff teaches your mind and your body to defeat weight. Live on campus in your own spacious apartment. Enjoy the full-service dining room, the gym, the indoor pool, the outdoor pool, the peaceful walking trails.

**STRUCTURE HOUSE**

We don't just change your diet, we change your life. And succeed in Durham, North Carolina.

1-800-553-0052

1-800-371-1100



**Artists' Pins**

For creative minds, detailed renditions of an artist's tools. Paint tube pin or tack, \$65 sterling, \$435 14K gold. Brush pin or stick pin, \$60 sterling, \$295 14K gold. Add \$3 shipping. In NY add tax. AMEX: 516-734-4002. Or send check to:

**EAST END SILVER**  
Dept. N4, P.O. Box 151, New Suffolk, NY 11956

**SEACRAFT CLASSICS**

*Hand Built Sailing Ships*

**Mahogany & Teak**  
Fine details  
From \$495 • 14" - 34"

For Our Catalog  
Call (800) 356-1987

6615 N. Scottsdale Rd.  
Scottsdale, AZ 85250  
(602) 951-9518  
Visa/Mastercard accepted

**Sinai, Red Sea, Jerusalem**

This October, bring to film nature's greatest bird migration, breathtaking desert panoramas, exotic wildlife and the world's holiest shrines. Experience Mt. Sinai, Red Sea and Jerusalem. A tour you will re-live forever. **Free brochure.**

**Red Sea Traveler 1-800-999-3587**  
12017 Brookhaven • Silver Spring, MD 20902

override the President's veto. (If one chamber votes to sustain a veto, that's the end of it.) Having come so close, civil-rights groups were also determined to make another effort this year. The view of the increasingly apprehensive House Democratic leadership—now facing the full force of a backlash on the "quota" issue—was that if the thing had to be done it should be got over with as soon as possible.

Also, in order to broaden support for the bill and keep women's groups within the Democratic tent the designers of last year's bill had added compensatory and punitive damages for women found to have been victims of intentional discrimination. (Religious and other minorities and the disabled were added as well, thus giving more punch and potential expense to the Americans with Disabilities Act, passed in July of last year.) Women's groups had been seeking redress for what they saw as the inequity caused by the fact that blacks could receive compensatory and punitive damages under the old Reconstruction law whereas under the 1964 Civil Rights law women and others could receive only back pay and attorneys' fees. Adding damages for women last year and this year created new political problems for the bill, since businesses were loath to be vulnerable to a whole new class of potential damages (and there are far more women than blacks). So, both last year and this year, the bill's sponsors compromised by putting a cap of a hundred and fifty thousand dollars on the amount of damages that women and some other plaintiffs, but not black plaintiffs, could receive, leaving many women encouraged this year by certain women members of Congress—up in arms at what they saw as unequal treatment. The bill's sponsors made sympathetic noises, but said this was the only hope of getting enough votes to override a Presidential veto, and that without the cap women would continue to receive no damages at all. The bill's House backers say the cap picked up at least sixty votes this year. (As the Administration and other Republicans point out, there is a hole in the cap that could lead to damages higher than a hundred and fifty thousand dollars.)

**B**y early this year, Democratic senators were, if anything, more panicked than their House counterparts. Of the nineteen Democratic senators

up for reelection in 1992, eight are from the South and are considered vulnerable to the quota issue. (On the other hand, some of them were elected last time by a narrow margin, with black supporters making the difference.) The Senate leaders decided to let the House go first—perhaps in the hope that the whole thing would go away (which wasn't very likely) or at least that the House would produce a bill that, having been compromised, would be a more palatable place to begin. Actually, the Senate often prefers that the House take up the more controversial legislation first; that way, senators can come out in favor of all sorts of difficult issues that they know the House might kill and relieve the senators' nervous colleagues of having to vote on. A key senator says, "We don't want to go first on controversial issues." So the senators waited to see what emerged from the House with how much steam behind it—and, meanwhile, they became increasingly uneasy about what was already a sensitive problem for them.

Edward Kennedy has long since become the right wing's favorite bugbear. Just saying the name (usually in the form of "Teddy" Kennedy, presumably to diminish the man further, and often with a sneer) in association with any sort of proposal was to identify it as ultra-liberal—and tinged with immorality. Kennedy is without question a great senator—even Hatch, who has become his good friend, says so—and one of the Senate's all-time coalition-builders and workhorses. Because of his close ties with the liberal and labor constituencies of the Democratic Party, and because of his position as chairman of the Labor and Human Resources Committee, he is often the prime moving force behind the Party's liberal legislation. Even before the events at Palm Beach over the Easter weekend, other Senate Democrats, particularly but not entirely from the South, were becoming nervous about Kennedy's prominent role in pushing legislation that enabled Republicans to tag the Party again and again as the tool of its special interests, as anti-business, and (though it was never put quite this way) as being too pro-black. (Tagging Democrats one way or another as favoring blacks goes back to the Nixon era, and certainly reared its head in the 1988 Presidential campaign, but the "quota" issue has pro-

# Serenely against the tide

*As racial troubles flare and the nation backs away from integration, Deval Patrick explains why he fights for an honorable principle*

**T**here were fresh examples of racial strain in the nation last week—including disturbances in St. Petersburg, Fla., and the struggle over a discrimination suit against Texaco. *U.S. News* Senior Writer Lincoln Caplan interviewed Deval Patrick, the outgoing head of the Justice Department's civil rights division, about his work and the future. Excerpts:

**You've said affirmative action is the only effective tool for integrating many American institutions. Why have you had such a hard time making that case?**

One of the reasons why affirmative action, like many remedies to discrimination, has run up against opposition is that we have had difficulty in understanding that after declaring discrimination unlawful and wrong there was still something left to do to complete the work of bringing people together. Affirmative action also faces a sort of opposition by slander, the notion that all affirmative action is some form of bean counting or quotas or that it's a compromise of quality. That has absolutely nothing to do with the way affirmative action is supposed to be done and the way the courts have upheld it.

**The Supreme Court described some majority-minority congressional districts created under the Voting Rights Act as a form of political apartheid. Even with restrictions on those districts, the new Congress will have only one less African American. Why is vigorous enforcement of the act still important?**

The language that the court used to describe those districts was unusually extreme. We're talking about districts where a bare majority of the voters were minorities and everyone else was white. I don't understand why that district is political apartheid and a district which is 90 or 95 percent white is not. The issue is: What is appropriate in places where the politics are already so racially polarized that, in the absence of something like a majority-minority district, it would be impossible for the minority voter to elect a candidate of his or her choice? That's what the Voting Rights Act speaks to.

**What lessons are most critical to impart to those now arguing that it's time for all American choices to be based on merit?**

All American choices are not based on merit, and eliminating considerations of race, ethnicity and gender isn't going to

leave us with choices that are. Merit has a central role and merit need not be compromised in the interest of integration.

**Recent polls have found that less than half of those surveyed believe that integration is an important goal for this country, and that includes blacks as well as whites. You think integration is vital to American democracy. Why?**

Because we are a deeply diverse American society. American democracy is going to depend on people coming together

across all those differences and being united by common civic values. The way that happens, at least in part, is by our overcoming the suspicion and occasionally even the hatred that we bring to the table by virtue of those differences. And I think in my life and in the lives of many others that I know, it is the ability to learn to love across race and ethnic lines that makes the difference in the ability to see and imagine each other as fellow citizens with a stake in each other's struggles. That issue will become even more significant as this country continues to become more diverse and more culturally complex.

**You've been a leader in the effort to end the long run of church burnings in this country and have identified them as an expression of racial hatred. But there's a well-documented view that there**

**are many other reasons for the burnings. In retrospect, do you think that by overemphasizing the racial aspect of the burnings, leaders of both parties have hurt other civil rights efforts?**

No. We've never said that race explained all of the fires. We've said that race explained many. The increase in the rate of attacks on black churches—particularly in the South—beginning in January of 1995, was significant and had to be faced. And as we have continued this investigation, we have seen many instances of racial hostility or religious bigotry driving these fires. There is a large class of cases where we suspect that racial hostility is driving the fires, but we're not confident that we can show that beyond a reasonable doubt in a court of law. In the 120 arrests we've made so far, there are a number of other motivations. There have been a remarkable number of young people involved in these fires as well. But race is with us, and it is with us in the context of the attacks on the black churches. There's absolutely no question about that. And that has to be faced as well.



**St. Petersburg.** A disturbance broke out after a grand jury said a white police officer was justified in killing a black motorist.

*American democracy depends on people coming together across their differences.*

pocket knives, belt buckles, flags, ceremonial swords, paperweights, clothing — most with racist slogans or symbols — and a signature T-shirt, emblazoned with the Confederate flag, that announces that both the flag and the shop are here to stay.

Mr. Howard, once a high-ranking Klan official in South Carolina, said recently that he was no longer officially a member of the Keystone Knights of the Ku Klux Klan, that he just wanted to teach people about the Klan, not spread bigotry.

Mr. Howard's lawyer is Suzanne Coe, who represented Shannon Faulkner, the young woman who won a long battle to attend the Citadel but then dropped out, citing stress. Ms. Coe has built her practice largely on individual rights cases.

The museum, with its framed photographs, robes and other ceremonial trappings, does provide historical information on the Klan, she said.

"It's ugly history," Ms. Coe said, "but it happened."

The fact that the museum angers or embarrasses people in the town is not a legal reason for denying her client a license, she said. The Council's reasons "were specious," she said, and included a contention that disturbances at the business had made it a public nuisance.

"If that is the case, then every N.A.A.C.P. rally in the 1960's was a nuisance," she said. "You can't say that just because someone protests something there, it's a nuisance."

The council also said that Mr. Howard dealt in guns — he has bought and sold rifles, but not in the shop — and that he "had not been truthful on his taxes," Ms. Coe said. But the Council members offered no evidence of that, she said.

"He's never had a criminal conviction," she said, only a long-ago speeding ticket. His outdoor security cameras did, however, record burglars breaking into the courthouse.

Ms. Coe said the city and Mr. Howard had agreed that the shop would remain open until Tuesday, the deadline for the Council's decision. Then, if the Council still denies him a license, Mr. Howard and Ms. Coe will push ahead with a Federal lawsuit.

It seems a departure from the cases she usually takes, what some would see as more liberal causes. At first, Ms. Coe said she did not want the case, "but I was discussing it with my partner, and he said: 'Oh, I see. You only stand up for civil rights you believe in.'"

When Mr. McDaniel, the Councilman, verbally attacked Mr. Howard earlier this year, the former Klansman "sued me for defamation," Mr. McDaniel said.

Mr. McDaniel realizes that the shop has a legal right to exist, but he said it was ridiculous to think that such an establishment would not attract Klan members to the town.

"They are not welcome," he said.

People in town fear that it will become a national rallying place for Klansmen.

"Of course it's a good idea; it's a museum of our history," said Daniel Carver, a Klan grand dragon who lives in Gainesville, Ga.

Jews have a Holocaust museum, he said, and blacks have a black heritage museum. "What's wrong with having a museum for white people, people who are proud to be white?" he said.

"That's the problem," he added. "Some people are not proud to be white."

Mr. Kennedy said that young black people were angry about the museum and that he was afraid it could

start a race war. "Hatred is more dangerous and explosive than drugs," he said. "We cannot allow the museum to remain."

Others say it is not the shop itself that bothers them, but the knowledge that it exists only because there are still people who feel that way about race. Jaz Lane, a 22-year-old beautician, said there was a lot of silent support for the shop and museum.

"It wouldn't be here if there weren't people who want it," she said. The push to remove it is based more on business than on racial harmony, she said.

Some black people, and white people, said they just ignored it and hoped it would go away. Some cross the street to keep from walking in front of it.

It is dangerous to ignore it, Mr. Kennedy said. "If we don't get on top of it, there's no telling what will happen," he said.

Year after year after year, people tried not to see the rope that dangled over River Street, the rope that killed Richard Puckett. Some, like his great-great nephew, can see it still.

Getting beyond race takes more than a program in the workplace. An excerpt from a new book BY ELLIS COSE

# Color Blind

**I**N "THE ETHICS OF LIVING JIM Crow," an autobiographical essay published in *Uncle Tom's Children* in 1940, Richard Wright told of his first job at an eyeglass lens-grinding company in Jackson, Mississippi. He landed the job, in part, because the boss was impressed with his education, and Wright was promised an opportunity to advance. "I had visions of working my way up. Even Negroes have those visions," wrote Wright. But even though he did his best to please, he discovered, over time, that nobody was teaching him a skill. His attempts to change that only provoked outrage. Finally, a co-worker shook his fist in Wright's face and advised him to stop making trouble: "This is a white man's work around here, and you better watch yourself."

Such sentiments obviously would not be openly voiced in most companies today. The civil rights revolution has seen to that. Still, it seems that every so often we get ugly reminders—of which the Texaco im-

Adapted from "Color-Blind" by Ellis Cose. Copyright © 1996 by Ellis Cose. To be published by HarperCollins.



broglio is the latest—that Jim Crow's spirit is not yet dead. In 1994, Denny's restaurant chain agreed—in a settlement with the Justice Department—to put a civil rights monitor on its payroll and to cough up \$45 million in damages, after a slew of complaints alleging discrimination against customers and employees. The previous year Shoney's, another restaurant chain, settled a suit for over \$100 million that alleged, among other things, that managers were told to keep the number of black employees down in certain neighborhoods.

People of color with training and experience are "treated like s—t in too many places on the job," said assistant labor secretary Bernard Anderson, whose responsibilities include the Office of Federal Contract Compliance Programs. Even within the labor department, said Anderson, he had seen racial prejudice. When a black colleague, a Rhodes scholar, appointed two other blacks with impeccable credentials to positions, "the black lawyers were very empowered and encouraged by all of this," recalled Anderson, "but a number of the white lawyers ... were just shaking in their boots." By and by, he said, a "poison pen memorandum" found its way around the department. The missive made insulting, scatological comments, questioned the credentials of the people who had been appointed, and declared that affirmative action had gone too far.

Resentment against minorities often surfaces in places where "diversity" or affirmative action programs are in place. And that resentment often breeds resistance that results not merely in nasty comments but in outright sabotage.

Some time ago, the black employees of a large, international corporation invited me to talk about a previous book, *The Rage of a Privileged Class*, at a corporate-wide event. In talking with my hosts, I quickly discovered that they were not merely interested in my insights. They wanted me to send a message to the management. They were frustrated because a corporate affirmative-action program, of which the management was extremely proud, was not doing them any good. Mid-level managers, it turned out, got diversity points for hiring or promoting minorities, but the corporation had defined minorities in such a way that everyone who was not a U.S.-born white man qualified. In other words, the managers got as much credit for transferring white men from Europe, Australia, and Canada as they did for promoting African Americans. And that is exactly what they were doing, according to the black employees, who wanted me to let the management know, in a nice and subtle way, that such behavior was unacceptable.

I'm not sure what message the management ended up extracting from my speech, but I am sure that the frustrations those black employees felt are widespread—and that the cause lies less in so-called diversity programs than in the widespread tendency to judge minority group members more by color than by ability.

Some two decades ago, I received a brutal lesson in how galling such attitudes can be. At the time, I was a young (maybe twenty-one or twenty-two years old) columnist-reporter for the *Chicago Sun-Times*. Though I had only been in the business a few years, I was acquiring something of a regional reputation. I hoped to break into magazine writing by garnering a few freelance assignments from *Esquire* magazine, so I had made an appointment with one of its editors.

The editor with whom I met was a pleasant and rather gracious man, but what he had to say was sobering. He wasn't sure, he confided, how many black readers *Esquire* had, but

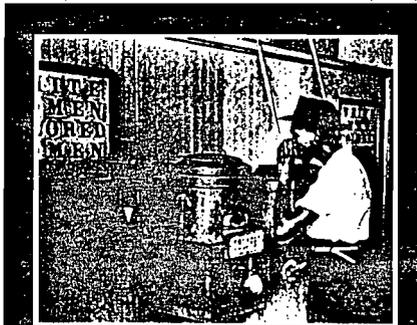
was reasonably certain the number was not high. Since I had not inquired about his readership, the statement took me a bit by surprise. I had been a longtime reader of *Esquire*, and it had never previously occurred to me that I was not supposed to be, that it was not me whom *Esquire* had in mind as an audience—never mind as a contributor. I don't know whether the editor bothered to read my clippings, but then, the clips were somehow superfluous; the very fact that I had written them made them so. All the editor saw was a young black guy, and since *Esquire* was not in need of a young black guy, they were not in need of me. I left that office in a state of controlled fury—not just because the editor had rejected me as a writer, but because he had been so busy focusing on my race that he was incapable of seeing me or my work.

A nominal commitment to diversity does not necessarily guarantee an appreciably better outcome, as I came to see several years ago when I was approached by a newspaper publisher who was in the process of putting together his management team. He was interested, he said, in hiring some minority senior managers, so I gave him some names of people who might be likely candidates. Over the next several months, I watched as he put his team in place—a team, as it turned out, that was totally white. Only after he had largely assembled that group did he begin serious talks with some of the nonwhites I had recommended.

I don't doubt the man's sincerity. He did want to hire some minority managers, and eventually did so. But what was clear to me was that to him, minority recruitment apparently meant the recruitment of people who couldn't be trusted with

the organization's most important jobs. His first priority was hiring people who could do the work—meaning whites—and only after that task was complete would he concern himself with the window dressing of diversity.

Over the years, I have learned that affirmative action in theory and affirmative action in practice are two different things. In the real world it is much more than simply opening up an organization to people who traditionally have been excluded; it is attempting, usually through some contrived measures, to make organizations do what they don't do naturally—and it goes down about as easily as castor oil. Shortly after I announced my resignation as editor of the editorial pages of the *New York Daily News*, I took one of my white staff members out to lunch. He told me he had enjoyed working with me and was sorry to see me go. He had cringed when he heard that I was coming, he confided, for he had feared that I would be just another affirmative action executive, presumably incapable of doing the job competent-



Separate, unequal: Jim Crow may be history, but his spirit has not died

Do we have the vaguest idea how to create a society that is truly race neutral?

ly. He admitted that he had been pleasantly surprised.

I was pleased but also saddened by his confession—pleased that he felt comfortable enough to tell me how he truly felt and saddened that the very fact that a person of color got a high-ranking job would lead him (as it had led so many before him) to question that person's credentials. Yet, having occasionally been the target of affirmative-action recruiters, I am fully aware that (whatever they may say in public) they don't always pay as much attention to credentials as to color. Therefore, I understand clearly why even the ostensible beneficiaries of such recruitment tactics may find affirmative action, as practiced by major corporations, distasteful and even offensive. A decade and a half ago, for instance, I received a call from an associate of an executive search firm who, after verbally tap dancing for several minutes, essentially asked whether I wished to be considered for a job as a corporate director of equal opportunity. I was stunned, for the question made no sense. I was an expert neither on personnel nor on equal-employment law; I was, however, black, which seemed to be the most important qualification. I laughed and told him that I saw my career going in another direction. Still, I wondered just how serious the inquiry could be, since I seemed (to me, at least) so unsuited for the position. Since then, I have received other calls pushing jobs that have seemed every bit as outlandish.

At one point, a man called to discuss the presidency of a major foundation. I confessed I didn't understand why he was calling me, and he assured me that the client was extremely interested in having me apply. The man's earnestness intrigued me enough that I sent him a resume. I never heard from him again, which confirmed, in my mind at any rate, that his interest was anything but genuine. I imagined him sitting in his office with a long list of minority candidates, from whom he would collect resumes and promptly bury them in a file, merely so that his clients would be able to say they had considered minorities. Indeed, when the foundation head was finally named (he was a white man with a long professional association with the foundation trustees), it was clear to me that the supposed search had been a sham. After one takes a few such calls, one realizes that the purpose is often defensibility ("Yes, we took a hard look at fifteen minority candidates, but none quite fit the bill") and that the supposed high-level position is merely bait to attract the interest of people who don't really have a shot—but in whom everyone must pretend they are interested because an affirmative-action program is in place.

It's logical to argue for the replacement of such shameful practices with something better—for some form of meritocracy. Yet affirmative-action critics who extol the virtues of a meritocracy generally ignore the reality of how a real-world so-called meritocracy works. If qualified, capable, and talented minorities and women exist, they say, corporations will reward them because they will recognize that it is within their economic interest to do so. That may well be true. But it is also true that effective executives are trained, not born. They come about because companies make an investment in them, in their so-called human capital, and nurture their careers along—and if corporations only see the potential in white men, those are the people in whom the investments are likely to be made.

John Kotter, a Harvard Business School professor and author of *The General Managers*, discovered that effective executives generally benefited from what he called the "success syndrome." They were constantly provided with opportunities for growth: "They never stagnated for significant periods of time in jobs where there were few growth possibilities." The executives also, to be blunt about it, are often people of relatively modest intellectual endowment. They succeed largely because they are chosen for success.

A true meritocracy would do a much better job of evaluating and choosing a broader variety of people. It would challenge the very way merit is generally imputed and, in giving people ample opportunity to develop and to prove themselves, it would create a truly level playing field.

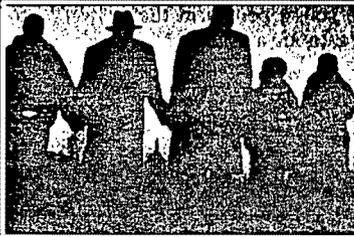
Simply eliminating affirmative action would not bring such a true meritocracy about. Indeed, a large part of the reason

affirmative action is so appealing to so many people is that a meritocracy that fully embraces people of color seems out of reach; and affirmative action is at least one method to get people to accept the fact that talent comes in more than one color.

Yet, by its very nature, affirmative action is polarizing. Wouldn't it be better, argue a growing number of Americans, to let it die in peace? A chorus of conservative critics even invoke the dream of Martin Luther King Jr. to make the case.

King would probably be more astonished than anyone to hear that conservatives now claim him as one of their own, that they have embraced his dream of a color-blind world and invoke it as proof of the immorality and undesirability of gender and racial preferences. But even if he had a bit of trouble accepting his status as a general in the war against affirmative action, he would appreciate the joke. And he would realize

that it is the fate of the dead to be reborn as angels to the living. King no doubt would be pleased to have new friends in his fight for justice, but he would approach them with caution. After sharing his disappointment over past alliances with people whose commitment to change did not match his own, King would address his new associates bluntly. "All right," he might say, "I understand why you oppose affirmative action. But tell me: What is *your* plan? What is *your* plan to cast the slums of our cities, on the junk heaps of history? What is *your* program to transform the dark yesterdays of segregated education into the bright tomorrows of high-quality, integrated education? What is *your* strategy to smash separatism, to destroy discrimination, to make justice roll down like water and righteousness flow like a mighty stream from every city hall and statehouse in this great and blessed nation?" He might then pause for a reply, his countenance making it unmistakably clear that he would accept neither silence nor sweet nothings as an answer. ■



A legacy of hope: Black men and boys at the Million Man March

Our problems including our racial problems, belong to us—not to our descendants

## Twelve Steps Toward Racial Harmony

**A**MERICANS HAVE LITTLE ALTERNATIVE BUT TO ACCEPT THE POSSIBILITY THAT race will continue to divide us. Yet it is clear that society is more hospitable to minorities and more—racially—egalitarian than it was a few generations ago. There is every likelihood that it can become more so. Hence, we have to ask the question—if only as an experiment in thought: Do we have the vaguest idea how to create a society that is truly race neutral? The short answer, I suspect, is no. Otherwise we would be much further along the way than we are. Still, I believe we can get beyond such platitudes as “Let’s just love one another,” which is the verbal equivalent of throwing up our hands in noble resignation. Enumerating steps our society could take toward racial sanity is obviously not the same as putting America’s racial goblins to rest. It is, however, a necessary prelude to moving the dialogue beyond the realm of reassuring yet empty platitudes. So what would some of those steps be?

**1 WE MUST STOP EXPECTING TIME TO SOLVE THE PROBLEM FOR US:** In “Guess Who’s Coming to Dinner,” there is a scene in which Sidney Poitier (who plays a physician in his thirties in love with a young white woman) turns, in a fit of rage, to the actor playing his father. Only when the older generation is dead, Poitier declares, will prejudice wither away. The sobering realization is that Poitier is now older than his “father” was then, and the problem, obviously, remains.

Time doesn’t heal all wounds; it certainly doesn’t solve all problems. It is often merely an excuse for allowing them to fester. Our problems, including our racial problems, belong to us—not to our descendants.

**2 WE MUST RECOGNIZE THAT RACE RELATIONS IS NOT A ZERO-SUM GAME:** The presumption that America is a zero-sum society, that if one race advances another must regress, accounts, in large measure, for the often illogical reaction to programs that aim to help minorities. Such thinking even explains some of the hostility between members of so-called minority groups. *Can only one person of color rise within a given organization? One hopes not. Does an increase in Latino clout portend a decline in blacks’ well-being? It shouldn’t.*

Unfortunately, we have too often reveled in political rhetoric that puts across the opposite message; and have too often rewarded those who exploit our anxiety and insecurities—as opposed to those who demonstrate the willingness and ability to harness our faith in each other and in ourselves.

**3 WE MUST REALIZE THAT ENDING HATE IS THE BEGINNING, NOT THE END, OF OUR MISSION:** Occasionally, I turn on my television and am greeted by some celebrity exhorting me to stop the hate. I always wonder about the target audience for that particular broadside. I suspect that it is aimed mostly at people who don’t hate anyone—perhaps as a reminder of our virtue. I certainly can’t imagine a card-carrying

member of the local Nazi group getting so fired up by the message that he turns to the television and exclaims, “Yes, you’re right. I must immediately stop the hate.”

Stopping the hate does little to bring people of different races or ethnic groups together. Certainly, it’s better than stoking hate, but discrimination and stereotyping are not primarily the result of hatred. If we tell ourselves that the only problem is hate, we avoid facing the reality that it is mostly nice, nonhating people who perpetuate racial inequality.

**4 WE MUST ACCEPT THE FACT THAT EQUALITY IS NOT A HALFWAY PROPOSITION:** This century has seen huge changes in the status of black Americans. It has also seen the growth of largely segregated school systems, the development and maintenance of segregated neighborhoods, and the congealing of the assumption that blacks and whites belong to fundamentally different communities. The mistake was in the notion that social, economic, and political equality are not interrelated, that it was possible to go on living in largely segregated neighborhoods, socialize in largely segregated circles, and even attend segregated places of worship and yet have a workplace and a polity where race ceased to be a factor. As long as we cling to the notion that equality is fine in some spheres and not in others, we will be clinging to a lie.

**5 WE MUST END AMERICAN APARTHEID:** Americans have paid much homage to Martin Luther King’s dream of a society where people would be judged only by the content of their character—even as they have yanked children out of schools when a delicate racial balance tipped, or planted themselves in neighborhoods determinedly monochromatic, or fought programs that would provide housing for poor blacks outside of the slums. There is something fundamentally incongruous in the idea of judging people by the content of their character and yet consigning so many Americans at birth to communi-

ties in which they are written off even before their character has been shaped.

## **6 WE MUST REPLACE A PRESUMPTION THAT MINORITIES WILL FAIL WITH AN EXPECTATION OF THEIR SUCCESS:**

When doing research with young drug dealers in California, anthropologist John Ogbu found himself both impressed and immensely saddened. "Those guys have a sense of the economy. They have talents that could be used on Wall Street," he remarked. "They have intelligence—but not the belief that they can succeed in the mainstream." Somewhere along the line, probably long before they became drug dealers, that belief had been wrenched out of them.

Creating an atmosphere in which people learn they cannot achieve is tantamount to creating failure. The various academic programs that do wonders with "at-risk" youths share a rock-hard belief in the ability of the young people in their care. These programs manage to create an atmosphere in which the "success syndrome" can thrive. Instead of focusing so much attention on whether people with less merit are getting various slots, we should be focusing on how to widen—and reward—the pool of meritorious people.

## **7 WE MUST STOP PLAYING THE BLAME GAME:**

Too often America's racial debate is sidetracked by a search for racial scapegoats. And more often than not, those scapegoats end up being the people on the other side of the debate. "It's your fault because you're a racist." "No, it's your fault because you expect something for nothing." "It's white skin privilege." "It's reverse racism." And on and on it goes. American culture, with its bellicose talk-show hosts and pugnacious politicians, rewards those who cast aspersions at the top of their lungs. And American law, with its concept of damages and reparations, encourages the practice of allocating blame. Although denying the past is dishonest and even sometimes maddening, obsessing about past wrongs is ultimately futile.

Certainly, loudmouths will always be among us and will continue to say obnoxious and foolish things, but it would be wonderful if more of those engaged in what passes for public discourse would recognize an obvious reality: It hardly matters who is responsible for things being screwed up; the only relevant question is, "How do we make them better?"

## **8 WE MUST DO A BETTER JOB AT LEVELING THE PLAYING FIELD:**

As long as roughly a third of black Americans sit on the bottom of the nation's economic pyramid and have little chance of moving up, the United States will have a serious racial problem on its hands. There is simply no way around that cold reality. It is pointless to say that the problem is class, not race, if race and class are tightly linked.

During the past several decades, Americans have witnessed an esoteric debate over whether society must provide equality of opportunity or somehow ensure equality of result. It is, however, something of a phony debate, for the two concepts are not altogether separate things. If America was, in fact, providing equality of opportunity, then we would have something closer to equality of racial result than we do at present. The problem is that equality of opportunity has generally been defined quite narrowly—such as simply letting blacks and whites take the same test, or apply for the same job.

Equality of opportunity is meaningless when inherited wealth is a large determinant of what schools one attends (and even whether one goes to school), what neighborhoods

one can live in, and what influences and contacts one is exposed to. In *Black Wealth, White Wealth*, sociologists Melvin Oliver and Tom Shapiro pointed out that most blacks have virtually no wealth—even if they do earn a decent income. Whites with equal educational levels to blacks typically have five to ten times as much wealth, largely because whites are much more likely to inherit or receive gifts of substantial unearned assets. This disparity is a direct result of Jim Crow practices and discriminatory laws and policies.

America is not about to adopt any scheme to redistribute resources materially. What Americans must do, however, if we are at all serious about equality of opportunity, is to make it easier for those without substantial resources to have secure housing outside urban ghettos, to receive a high-quality education, and to have access to decent jobs.

## **9 WE MUST BECOME SERIOUS ABOUT FIGHTING DISCRIMINATION:**

In their rush to declare this society colorblind, some Americans have leaped to the conclusion that discrimination has largely disappeared. They explain away what little discrimination they believe exists as the fault of a few isolated individuals or the result of the oversensitivity of minorities.

Making discrimination a felony is probably not a solution, but more aggressive monitoring and prosecution—especially in housing and employment situations—would not be a bad start. Just as one cannot get beyond race by treating different races differently, one cannot get beyond discrimination by refusing to acknowledge it. One can get beyond discrimination only by fighting it vigorously wherever it is found.

## **10 WE MUST KEEP THE CONVERSATION GOING:**

Dialogue clearly is no cure-all for racial estrangement. Conversations, as opposed to confrontations, about race are inevitably aimed at a select few—those who make up the empathic elite. Yet, limited as the audience may be, the ongoing discourse is crucial. It gives those who are sincerely interested in examining their attitudes and behavior an opportunity to do so, and, in some instances, can even lead to change.

## **11 WE MUST SEIZE OPPORTUNITIES FOR INTERRACIAL COLLABORATION:**

Even those who have no interest in talking about the so-called racial situation can, through the process of working with (and having to depend on) people of other races, begin to see beyond skin color. Conversation, in short, has its limits. Only through doing things together—things that have nothing specifically to do with race—will people break down racial barriers. Facing common problems as community groups, as work colleagues, or as classmates can provide a focus and reduce awkwardness in a way that simple conversation cannot.

## **12 WE MUST STOP LOOKING FOR ONE SOLUTION TO ALL OUR RACIAL PROBLEMS:**

Meetings on racial justice often resemble nothing so much as a bazaar filled with peddlers offering the all-purpose answer. The reality is that the problem has no single or simple solution. If there is one answer, it lies in recognizing how complex the issue has become and in not using that complexity as an excuse for inaction. In short, if we are to achieve our country, we must attack the enemy on many fronts.

ELLIS COSE

## Klan Museum Tests a Town's Patience and Resurrects Some Ugly Memories

By RICK BRAGG

LAURENS, S.C., Nov. 13 — For decades, a piece of rotted rope dangled from a railroad trestle just outside this little town, a reminder of the last lynching in Laurens County. It was back in 1913, but people still talk of the black man wrongly accused of rape, and the white mob that hanged him.

"We grew up under that rope," said the Rev. David Kennedy, the 43-year-old pastor of New Beginnings Baptist Church in Laurens. The hanged man, Richard Puckett, was his great-great uncle.

Generations were told it was a crime to cut down the rope that dangled over River Street, the entrance into Laurens from the black community. "Its message was, 'Stay in your place,'" Mr. Kennedy said.

The trestle was destroyed in 1986, and while the memory never faded completely, at least people did not have to look at it every day. Now, though, just a few steps from the old county courthouse, in a town where the pickup trucks and cars politely stop for pedestrians even when they are not in the crosswalk, Laurens has a fresh symbol of racial hatred, Mr. Kennedy said.

There, hanging in front of the paper-covered windows of an abandoned movie theater, a skinny tube of orange neon signals that a museum devoted to America's best-known hate group is officially, defiantly "OPEN."

"The World's Only Klan Museum" is spelled out on the first line of the theater marquee, in big black letters. The marquee's second line — "The Redneck Shop Now Open" — reminds visitors not to pass up the souvenir store, which is filled with Klansmen miniatures, Confederate flag windbreakers, "White Power" sweatshirts and racks of T-shirts that read, "It's a White Thing. You Wouldn't Understand."

"The same message" as the rope, Mr. Kennedy said. "It resurrects all the evil experiences of racism in America: the torment, the pain, the grief, the unjust killing."

In the museum itself are some 50 robes, with documents and photographs that tell a partial history of the Ku Klux Klan. One photo shows a young black man being branded by

men in robes. In any small Southern town, it would incite anger, especially among blacks, old and young. But here in the hometown of Richard

Puckett, the very sight of it hurts like a stick in the eye.

"We don't have room for the Klan or any hate group in Laurens," said Edward McDaniel, a three-term City Councilman who grew up with tales of murders, rapes and beatings, motivated by skin color. Mr. Puckett was "one of many."

But the museum and Redneck Shop may be here to stay.

The city, whose population of 9,700 is racially mixed, has refused to grant a business license to the museum's owner, John Howard, a 50-year-old concrete contractor who has said he was retired from the Klan. The museum remains open pending an appeal of that decision and, if it stands, a Federal lawsuit.

Wrapped in the same Federal statutes that once protected blacks in the civil rights movement, Mr. Howard has argued that the city's refusal to grant him a license is a violation of his civil rights.

He has hired a good lawyer, and, apparently, the law is on his side, some townspeople said. The town's former mayor warned that the museum and Redneck Shop might be something people here just have to get used to.

"The people of Laurens are not happy," said Bob Dominick, who served 16 years as Mayor of Laurens and now devotes his time to the local chapter of the American Red Cross and his furniture store, which shares

the square with the shop and museum. He is white, but the museum is "undesirable to both races," he said. Most people in town are against it, said black and white leaders, and only a few people go into the shop each day. "But," Mr. Dominick said, looking across the square to the old theater, "I'm afraid he's probably going to win."

On Wednesday, Mr. Howard sat behind the counter in the Redneck Shop and loudly declared that the stories written about him in the newspapers were lies and that he would talk to no more reporters.

The old Echo Theater brought Hollywood to Laurens earlier this century, but blacks had to watch from the balcony. The word "Echo" still hangs over the building in red letters, and there is irony in that. To some people here, the latest tenant is an echo from the distant, hateful past.

The battle between Mr. Howard and what appears to be most of the townspeople has raged since last winter. At least twice, people hurled bricks through the shop's windows, and one man crashed his vehicle through the front of the building.

While the South has other Confederate museums, their focus is on the Civil War. Even the state leader of the Sons of Confederate Veterans denounced the Redneck Shop, saying its use of the Confederate flag is not what that symbol was intended for, and calling any association between the Confederate soldier and the mod-

### Some see the ghosts of a lynching.

ern Ku Klux Klan "an insult."

"When I was in the Army I put one over my bunk, because I was the only Southern boy there," Mr. Dominick said. To him, the flag is part of his heritage. But when the museum and souvenir shop opened, he passed out little black-and-white ribbons as a show of opposition to the store. In just a few days, opponents gave out more than 1,000.

The Confederate flag is on practically everything in the Redneck Shop, which does business from the theater's concession lobby. It offers

*cont'd*

## PROFILE

by Shannon King Nash, Esquire &  
Camille Evans, Esquire.\*

**T**he Honorable Loretta Collins Argrett is Assistant Attorney General of the Tax Division of the United States Department of Justice. President Clinton nominated Ms. Argrett on October 27, 1993, and she was confirmed by the Senate on November 19, 1993. She is the first African American woman in the history of the Justice Department to hold a position that requires Senate confirmation. However, this top tax litigator was not always a lawyer but initially a scientist.

Born October 7, 1937, in Carlisle, Mississippi, Ms. Argrett was raised in a household that stressed, personal integrity, hard work, and education. She attended Howard University and after graduating with a Bachelor of Science Degree with honors in chemistry, she decided to pursue a career in chemical research. Ms. Argrett flourished in her science career, receiving the Lucy Moten Fellowship and studying at the Institute Fur Organische Chemie, Technische Hochschule, in Zurich Switzerland. However, after years of being a chemistry researcher it became apparent that unless she wanted to venture into management, she had reached the top of her career in the sciences. She decided to pursue a career in law in an unlikely place, her dentist's office. During a routine check-up, her dentist and friend suggested that she become a lawyer because the health care field needed skilled attorneys. After conferring with her family, Ms. Argrett, some fifteen years after graduating from college, decided to attend law school.

After being accepted by several prestigious law schools, Ms. Argrett decided to attend Harvard Law School.



**Honorable Loretta Collins Argrett**

With a daughter in junior high school and a son in the fourth grade, this was a hectic time for her. Yet, Ms. Argrett kept the importance of law school in perspective: her family was most important in her life. She continued to maintain, as much as possible, family routines. She joined in her children's homework following family dinner. It was study time for everyone!

Upon graduating from Harvard, Ms. Argrett accepted a position with the law firm of Arent Fox. It was at Arent Fox that she was able to test her interest in tax law. Besides being intellectually drawn to the tax field, she wanted to cultivate her skills so that she could help minority owned businesses. She felt that a contributing factor for the failure of such businesses is that

they lack adequate professional advice (i.e. from lawyers, accountants, etc.). Moreover, tax lawyers tend to have more control over their time as compared to litigators. Because she wanted to spend as much time with her family as possible and enjoyed the intellectual challenge of tax law, tax was the obvious choice for Ms. Argrett.

Ms. Argrett's career in the tax field spans the array of tax positions available to attorneys. From private practice, to government service and even teaching, Ms. Argrett has done it all. After leaving Arent Fox, she moved to the Washington, D.C. office of Stroock, Stroock & Lavan. In 1979, she left her firm to join the Joint Committee on Taxation of the U.S. Congress, making her the first African American member

of the staff. She credits this position with making her feel like a "real" tax attorney. After returning to private practice, Ms. Argrett joined the Washington, D.C. law firm of Wald, Harkrader and Ross, where she subsequently became a partner. She later became a tenured professor at Howard University School of Law, where she taught courses in income taxation, business planning, and professional responsibility.

In her current position as the Assistant Attorney General of the Tax Division, Ms. Argrett is in charge of over 600 employees, approximately 340 of whom are attorneys. The Tax Division represents the United States and its officers in all civil and criminal litigation arising under the internal revenue laws, other than proceedings in the United States Tax Court. The civil litigation involves defending the United States in refund suits, representing the Internal Revenue Service's ("IRS") interests in bankruptcy cases involving federal tax claims, enforcing administrative summonses, instituting collection actions, defending IRS officials against tort actions, and representing other federal agencies in cases involving the immunity of the Federal Government from state and local taxes. On the criminal side, the Tax Division handles the review and prosecution of violations of the criminal tax laws.

Because of the numerous reductions in the Federal Government, during her tenure as Assistant Attorney General of the Tax Division, one of Ms. Argrett's biggest challenges has been finding a way of producing the same quality of work with limited resources. Currently, the Division is restructuring its attorney/paralegal ratio to more efficiently and effectively use its legal workforce. Another focus has been on increasing the number of minority attorneys in the Tax Division. Ms. Argrett has hired nine minority attorneys for full-time positions in the past 2 1/2 years, notwithstanding a year-long hiring freeze. She hired the 1st African American to head up one of the Divisions offices. She is committed to increasing this number.

Ms. Argrett is concerned that many African Americans shy away from the

tax field and hopes that her experience and level of achievement will cause others to consider tax law as a profession. For attorneys who have not decided on which area of law to focus, Ms. Argrett urges them to consider tax law. She advises that, not only is tax law intellectually stimulating, but it also allows minorities to be a valuable asset and resource to minority communities by providing much needed advice for minority businesses to become economically viable and flourish. In addition, tax attorneys can be involved in national, local, or international tax policy.

As advice for young attorneys, Ms. Argrett suggests that they concentrate on becoming involved in professional activities, such as the National Bar Association. She confides that the National Bar Association and other African American lawyers were very supportive during her appointment process as Assistant Attorney General of the Tax Division. Also, teaching has been a wonderful experience for Ms. Argrett, but she highlights that these positions are highly prized and suggests trying to teach an adjunct class and getting published in legal periodicals as ways to break into this field.

Finally, Ms. Argrett suggests government service. Her positions with the Joint Committee on Taxation and the Department of Justice have provided Ms. Argrett with the most intellectually stimulating work. Although these jobs are also hard to come by, the experience cannot be equalled by any other position. Just consider the success of Ms. Argrett!

In whatever position chosen, Ms. Argrett notes that an important aspect of being successful is finding and cultivating good mentor relationships. Her mentors, early on in her career, believed in her ability as a tax attorney. She attributes much of her success to their help and encouragement.

The Tax Section of the National Bar Association is pleased to announce that Ms. Loretta Collins Argrett is the recipient of the 1996 Outstanding Tax Attorney Award presented at the 1996 NBA Annual Convention.

*\* By Shannon King Nash, Esq. and Camille Evans, Esq. Ms. Nash and Ms. Evans are both tax attorneys practicing in Washington, D.C.*

logs reviewed by BUSINESS WEEK show Quincy even offering a time and date to meet. Huang couldn't be reached; an FDIC spokesman says Quincy has "no recollection" of placing the calls.

LippoBank's current management says it feels it is the target of a witch-hunt. James Per Lee, who joined the bank in 1991 and became president in 1994, vehemently denies that any ques-

tionable activity has occurred. The money-laundering charges "were never brought to our attention," he says. "Nothing sinister has happened here, just lousy banking" during the 1980s.

Lee still bristles that examiners made the bank boost its nonperforming assets—mostly bad real estate loans—from \$759,000 to \$4.2 million earlier this year, despite the rebound in California

real estate. "We got an examiner from Kansas who doesn't understand what's going on here, but we're not in a position to negotiate with the FDIC," he says. But Lee's protests are unlikely to deter investigators. Huang's troubles—and LippoBank's—may be just starting.

*By Dean Foust, with Paula Dwyer, in Washington and Ronald Grover in Los Angeles*

*He set records as President Clinton's fund-raiser. Is Terence McAuliffe (right) the proper person to reform campaign finance?*

# The Money Man

BY TIMOTHY J. BURGER

**T**erence McAuliffe has built one of the best Democratic fund-raising networks in town. He's one of the few power brokers to be memorialized with two portraits on the walls of the Palm Restaurant. And he's fresh from helping President Bill Clinton amass a record \$42 million for his successful re-election campaign.

Now, it's payback time. The 39-year-old

McAuliffe was tapped last week to co-chair President Clinton's second inauguration—and he's in line for a plum job in the second administration, being prominently mentioned for either chairman of the Democratic National Committee or secretary of commerce.

He's also poised to land right in the middle of

the coming battle over campaign finance reform and the controversy over improper foreign campaign contributions.

Indeed, McAuliffe is confident that he can be the Democrat's point man on campaign finance reform.

"I plan on leading the fight," says McAuliffe. "I think there's entirely too much money in the system today, and reform is desperately needed." His agenda includes limiting soft money, cracking down on foreign contributions by allowing only eligible U.S. voters to give, and requiring members of Congress to raise 60 percent of their money inside their own districts.

"One of the reasons they would look to bring me in" to the DNC, McAuliffe says, is "to try to clean it up."

But some campaign finance reform activists view McAuliffe as a card-carrying member of a fund-raising system that they say corrupts campaigns.

"He raises eyebrows because he's been so much a part of the problem," says Ellen Miller, executive director of the Center for Responsive Politics, a watchdog group that tracks money in politics.

Should McAuliffe be sent in to "clean up" the DNC, one of his first tasks will be to take a look at the fund-raising activities of John Huang, a man with whom McAuliffe has at least a passing acquaintance.

Huang worked at The Lippo Group, an Indonesian conglomerate, before serving a stint at the Commerce Department and then moving to the DNC as a fund-raiser. News reports on "soft money" contributions from people connected to Lippo sparked a firestorm of criticism against President Clinton and the Democratic Party in the closing weeks of the campaign.

Asked whether he knows Huang, McAuliffe says that they met only briefly and never worked together.

"I met him at a dinner sometime in 1996. I said, 'Hello, John.' He said, 'Hi, Terry.' And that was the extent of it. . . . He was not involved in our Clinton-Gore efforts," says McAuliffe.

McAuliffe, who says he assumes Huang has done nothing wrong, adds that he had no role in the 1996 soft-money program that Huang worked on at the DNC.

McAuliffe also has a connection to a controversial fund-raiser at a Buddhist temple in California attended by Vice President Albert Gore Jr. The temple is being represented by Peter Kelly, a former chairman of the California Democratic Party who used to be McAuliffe's law partner.

It is unclear whether the GOP will try to make mischief out of McAuliffe's ties to some of the centers of the current campaign finance controversy. But McAuliffe can count on support from some prominent Republicans if they do.

"To my knowledge, Terry has played by the rules," says Richard Allen, former President Ronald Reagan's first national security adviser, who lunched with McAuliffe as recently as last Tuesday. "I wouldn't hesitate to tell Republicans that I consider Terry to be a first-class fellow."

8

WNTD

NATION

# Enter the Alter Ego

Clinton's new chief of staff has a special bond with the President. But is that enough for the job?

By NANCY GIBBS

**W**HEN BILL CLINTON FIRST CAME TO Washington in 1993, he brought his kindergarten friend Mack McLarty with him as his right hand. That didn't work out very well. Four years later, his new chief of staff, Erskine Bowles, is a man he first met in 1992, and bonded with so close, so fast that even Bowles' admirers have to reach deep into the couch for an explanation. Bowles, says a White House aide, is what a 10-year-old Clinton would have considered a successful real grown-up: "He has money, real self-assurance, he knows what he is in the world, and has class." Asked last year whom Clinton trusts, an aide answered, "Hillary." And then, after a pause, "and Erskine."

Bowles' appointment—and the manner in which it was made—is the clearest ideological statement about Clinton's second term since his election-night promise to govern from "the vital center." Clinton has turned over the most important job in the White House to a pro-business centrist who pushed hard for a balanced budget, advocated cutting a deal with Republicans and was an internal ally of the liberals' pariah, the consultant Dick Morris. If there were any doubts left, they disappeared when liberal-in-chief Harold Ickes read in the papers about how he was being passed over for the job before he heard anything from the President.

Clinton and Bowles met four years ago, when Bowles volunteered himself to the campaign the day Clinton lost the Connecticut primary. Bowles soon became a heavyweight fund raiser in North Carolina, where he was a successful investment banker. He had been to Washington only a couple of times in his life before he moved up in 1993 to take over the dispirited, en-



**CHANGING COURSE:** Clinton taps golfing buddy Bowles, left, in a move toward a centrist White House; but can Bowles help steer an agenda through a bitter G.O.P. Congress?

His wife, textile magnate Crandall Close Bowles, stayed behind in Charlotte with their three children, which left Bowles with little better to do than spend 15 hours a day at the office. He invited employees to E-mail him and answered every message personally. He visited SBA personnel in the hospital. He figured out how to take a 20% budget cut and still increase the number of loans, shedding headquarters jobs to put more people in district offices. It was a crash course for someone who had never

than thinking and planning. Bowles urged Clinton's schedulers to carve some undisturbed office time into his day. He made sure that the right people got to meetings and that they started and ended on time. And he worked assiduously to plug leaks, taking his yellow highlighter to anonymous quotes and confronting the suspects. "He was trying to enforce the rules of the game," says a White House aide. "You keep your mouth shut unless you're authorized to open it. The place became a lot tighter."

Bowles quickly earned a reputation for both rigor and grace. It was Bowles who coordinated the government's response to the Oklahoma City bombing, who integrated Morris into the White House when other top staff members were gunning for him in early 1995, and who negotiated Morris' resignation in the middle of the Democratic Convention. And unlike the other strivers, Bowles, given his happy and lucrative alternatives, had the added virtue of not wanting to stay



DIANA WALKER FOR TIME

## Erskine Bowles

**BORN** Greensboro, North Carolina, on Aug. 8, 1945; father a politician  
**WEALTH** Married a textile magnate and founded his own investment firm  
**TIES WITH CLINTON** Golf, ambition, the South, wives are Wellesley grads  
**STRENGTHS** Gracious and focused  
**WEAKNESSES** Little experience with Congress; not much policy depth

worked outside the private sector. "I managed in the public environment, but off-Broadway," he says. "Not every mistake came under the microscope."

By 1994 Clinton had moved him over to deputy chief of staff, a hall monitor assigned the job of imposing order on a White House that sometimes seemed like a rainy Saturday at the Discovery Zone. He analyzed Clinton's schedule and deduced that a shocking amount of his time was

in his job forever.

In a White House conspicuously short of addicted golfers, Bowles had special access to the President during his prearranged moments for reflection. The two of them would often leave the White House at 5:30 and play through sundown. "We've played the last hole in the dark many times," says Bowles, who is reported to be a far better player than the President. The two men have in common their Southern ambition

4  
(CONT'D)

## In the Loneliest Spot

Clinton loyalists think she's not on the team. No wonder Republicans want Reno to keep her job

By ELAINE SHANNON WASHINGTON

**J**ANET RENO'S IDEA OF A GOOD OLD TIME is putting on an outfit she calls her "rough jollies" and hiking along the Chesapeake and Ohio canal path that links Washington's Georgetown neighborhood to Cumberland, Maryland. Since becoming Attorney General in 1993, she has trekked 84 of the canal's 180 miles, and she is determined—despite her recently diagnosed case of Parkinson's disease—to walk the rest of the way.

But it's not clear whether Reno will complete her journey while in office. Clinton has twice refused to say he wants to keep the 58-year-old Miami native in her job, and has made no effort to squelch newspaper headlines describing her as "twisting in the wind." With a thin smile Reno told reporters last week, "My father taught me never to believe everything I read in the paper." Others are apparently more credulous. Massachusetts Governor William Weld announced last week that he would gladly accept her job.

In the opportunistic, symbiotic world of Washington, the sometimes liberal Reno—she opposes the death penalty—may keep her Cabinet spot with the help of unlikely allies. Senate Judiciary Committee chairman Orrin Hatch and other congressional Republicans support Reno because of her willingness to name special counsels to investigate her fellow Administration officials. Senate majority leader Trent Lott has threatened to launch a new round of hearings if Reno is boot-ed. If she does keep her job, it will be in part due to the perception that she is keeping the White House honest.

During the presidential campaign, Reno was conspicuous in her lack of rah-rah support for the Administration's new crime-fighting ideas, which White House officials thought so crucial to Clinton's re-election. "Janet would never let herself be used as a political operative, and that perhaps wasn't appreciated," says Reno friend Talbot D'Alemberte, past president of the American Bar Association. The reserved, no-small-talk career prosecutor who loves Florida's mangrove swamps sometimes seems like the loneliest woman inside the Beltway. She will

never be found at Bill and Hillary's pizza-and-popcorn get-togethers in the White House screening room. Two weeks ago, as the Cabinet room was abuzz with chatter and back slapping, Reno was sitting all alone at the other side of the table, her eyes down, engaging no one, lost in thought.



She won't be found at White House movie screenings

**"Janet would never let herself be used as a political operative, and that perhaps wasn't appreciated."**

An unrepentant workaholic, Reno rises at 5 a.m., walks to the office and labors there till late in the evening. Many weekends she holes up alone in her office and has been known to answer the telephone herself, listening to tirades against Janet Reno and politely promising, "I'll pass it along." When she gets out of the office, it is usually to promote her message about the nurturing of children, to exhort lawyers to do more pro

bono work, and to promote her current pet project: alternative dispute resolution.

The problem with Reno, says a White House official, is that for her, "consultation with the White House is an afterthought." Her critics there claim that she acts as if she's on the Supreme Court, not an appointed official running an important agency for the President. Reno's decision to seek no fewer than four independent counsels to probe Administration scandals—from allegations regarding Housing and Urban Development Secretary Henry Cisneros to Whitewater charges—has exacerbated tensions with the White House. "They don't know what she's going to do," says a Reno aide

But it is her independence that accounts for both her successes and failures. It has helped restore public confidence in the justice system and attracted a new crop of young lawyers to public service. Her department's prosecutors have won convictions of high-profile criminals ranging from airline-bomb-plot mastermind Ramzi Yousef to Mexican drug tycoon Juan Garcia Abrego. And she has revitalized Justice's antitrust, civil rights and environment divisions. But she has also failed to harness her popularity to win important legislative battles, such as expanding the FBI's wiretap authority. Her darkest day remains the deadly assault on the Branch Davidian compound in Waco, Texas; its devastating effect on the morale of the FBI continues to haunt the agency.

Last week she rebuffed a call by Republican Senator John McCain of Arizona for a fifth independent counsel to investigate allegedly illegal contributions to the Democratic Party by wealthy foreign nationals. But other requests are pending, and last week offered new evidence of possible transgressions by former party fund-raiser John Huang. The Los Angeles Times reported that several Asian business executives visited or called Huang when he was a Commerce Department official, in at least one case seeking a specific favor from the White House, and sometimes within days wrote big checks to the Democratic National Committee. Also, in an interview with the New York

Times Thursday, Clinton admitted he had policy discussions with James Riady, the wealthy Indonesian businessman whose family's company once employed Huang and has contributed large sums to the D.N.C. It is revelations like these that would make it increasingly awkward for Clinton to throw Reno, Washington's current referee, out of the game.

—With reporting by Sally B. Donnelly/Washington

coholic parent (Clinton's stepfather, Bowles' mother, long since recovered). But the pair are opposites in many ways. "I spent my whole life in the private sector, he in the public," observes Bowles. "Some of my greatest strengths are in organization and structure; he is a freer thinker than I am." Clinton has always been a show-boater; Bowles was forever modest. One of his prep-school teachers stuck a note in his school file praising his respectful manners with a prescient metaphor: "When you're in a duck blind with him and he shoots the bird out from under you, he will make you feel like it was your shot at the bird."

The question now is whether those skills make him the right man for the job at this time. Outgoing chief Leon Panetta is a master legislator who knows his way around the Hill and knows how lawmakers want to be treated. Bowles has none of that personal experience or policy savvy, a disadvantage in dealing with a bitter Republican Congress and a bruising budget fight. "He doesn't suffer fools gladly," says Doug Sosnik, Clinton's political director. "That may not always serve him well in Washington."

It's the job of a chief of staff to tee up decisions for the President and to take care of the ones he shouldn't be bothered with. The role requires someone with strong political judgment, not an honest broker—unless Clinton himself plans to spend more time down in the weeds this term. "The White House makes ideas, it makes policies," says a senior official. "Erskine would come and ask us what we need"—as a good manager might ask subordinates in a business—"and people would look back at him kind of baffled. What they needed was an answer—what does the President want to do?"

Of course, in the Clinton White House, even smooth transitions can be rough. Jesse Jackson was calling every day to talk about who would get what job, and women's groups and Hispanics wondered noisily whether the "vital center" of Clinton's second term would include any of them. Bowles had barely arrived in his temporary quarters in the Old Executive Office Building when he was locked in a strange battle with Panetta for control of the transition. Panetta, despite his East Room farewell last week, wasn't going away quietly, bird-dogging the nightly transition meeting and proving slow to cede authority to his courtly successor. "There are advantages and disadvantages to this," says a White House official. "The advantage is that you have continuity and overlap. The disadvantage is that you have two chiefs of staff."

—Reported by  
**Michael Duffy and J.F.O. McAllister/Washington**  
**and Lisa H. Towle/Raleigh**

## THE POLITICAL INTEREST

Michael Kramer

# The Short Goodbye

No liberals need apply to work for Clinton II

**B**ILL CLINTON SAYS HE HAS RUN HIS LAST CAMPAIGN. THAT IS NOT TRUE. ANOTHER election looms. It is the race to be judged a great President, and the voters in that contest, historians, will look to see how Clinton tackles the thorniest issues, like balancing the budget and reforming the costly entitlement programs that perpetually threaten the nation's fiscal stability.

To reach the first rank of Presidents (a tall order, since it includes the men for whom monuments are built), Clinton knows he must govern as he ran, as a centrist. That means dealing constructively with a Congress controlled by Republicans and, at least in his mind, reconstituting his Administration in a way that mutes the influence of the liberal Democrats who have occupied critical posts since 1993.

Some who first earned their reputations as champions of the Democratic left, like White House chief of staff Leon Panetta and senior adviser George Stephanopoulos, are leaving voluntarily. Others, such as deputy chief of staff

CHRISTINA JOHNSON FOR TIME



Ickes helped save Clinton and got dumped

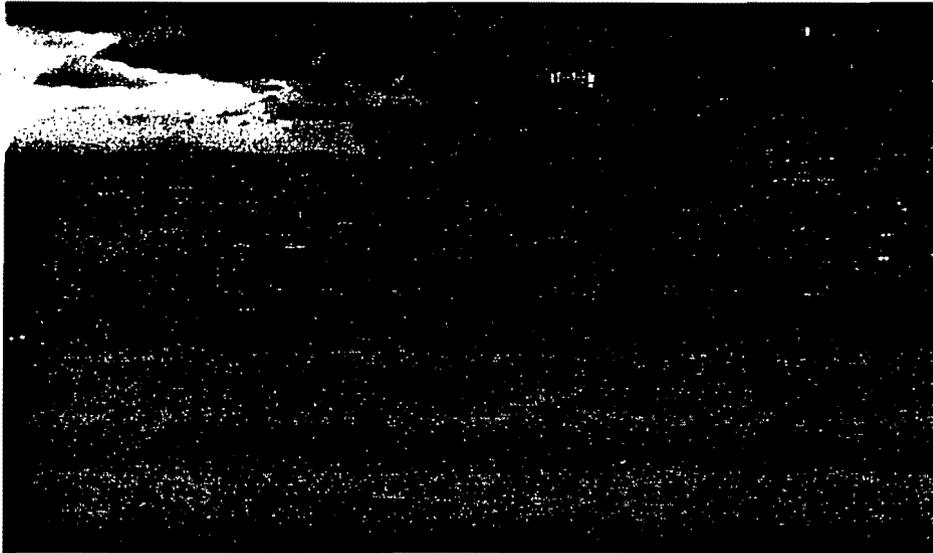
Harold Ickes, are being dumped unceremoniously. No one disputes the President's prerogative. He can have around him whomever he likes. But the shabby treatment accorded Ickes guarantees that while Clinton may someday be considered a great President, he will never be judged a particularly humane one.

Among those who have cleaned up after Clinton, Ickes stands alone. He helped steer Clinton through the shoals of personal trouble that threatened his first election and shrewdly ensured his being unchallenged from the left in '96. In between, Ickes served in two vital roles: he was the White House enforcer (the person who said no, since the President famously never could); and he was one of the few voices arguing for the kind of compassionate liberalism that has defined the Democratic party until now. In the latter role especially, he will be missed. "The center is where it's at for us," says a Clinton aide. "But congressional liberals want a fair hearing even if the President goes against them. Harold was their conduit. So ditching him is shortsighted. Even if he just continued in the deputy job but really only twiddled his thumbs, he could always be portrayed as the 'in-close' guy the liberals could talk to."

Ickes wanted to succeed Panetta and told Clinton so. The President consulted a small circle that included nonfan Al Gore—a lifelong centrist, eager to run as one in 2000. As a result, the moderate Erskine Bowles was chosen instead. Ickes' one true advocate, Hillary Clinton, was outside the selection loop.

Ickes first heard rumors of his demise last Wednesday. He met the next day with Panetta, who said the choice was between Bowles and Deputy National Security Adviser Sandy Berger. Panetta also confirmed that Bowles had demanded Ickes' sacking as a condition for taking the job, a proviso leaked on Thursday for publication the next day. On Friday, Ickes, who had just heard nothing official, learned of Bowles' appointment from other aides as he helped brief Clinton for the press conference later that morning. But the President had not spoken with Ickes about his own fate. It was only later that day, after the mediafest, that Clinton finally told Ickes he was sorry. "It was outrageous but not surprising," says a top Clinton adviser. "Harold is owed a lot, but for Clinton, friendship and loyalty run only one way."

## News: Analysis & Commentary



### "MARGINAL"

The Los Angeles bank, once headed by John Huang, has repeatedly run afoul of regulators

der. "This has been a marginal bank for years," says consultant Bert Ely, who analyzed LippoBank's condition for BUSINESS WEEK.

That's no surprise to former associates. They say Riady's style of lending, based largely on trust and character, has been a disaster in the U.S. The approach unnerved officials at Little Rock-based Worthen Bank, in which the Riadys bought a 15% stake in

1983. Worthen officials shut down an international division launched by James Riady in 1988. "We ask for security and signatures; they lend on a handshake," says one former associate. "When you mix their culture with ours, it's a clash."

LippoBank was first rebuked by regulators in the mid-'80s for paying some expenses incurred by a New York bank in which the Riadys held a stake. And regulators objected when Riady transferred his 98.7% stake in LippoBank in 1987 to a Netherlands Antilles holding company controlled by his father. The move violated U.S. laws, and Riady was forced to reverse the deal in 1988.

But the most pointed questions are yet to come. Lawmakers plan to grill Huang over money-laundering allegations raised by the FDIC. According to investigators, FDIC examiners in June, 1990, filed a criminal referral to authorities for suspected money laundering af-

ter discovering that a 21-year-old teller, with apparent knowledge of her supervisor, made over 900 suspicious wire transfers totaling \$7 million over 11 months to a Riady bank in Hong Kong. The FDIC alleges that the teller routinely made transfers of just under \$10,000—the threshold at which reports must be filed with

regulators—from 13 fictitious accounts to the Hong Kong bank.

Lawmakers also want to know why, as a top Commerce appointee, Huang got two 1995 calls from an FDIC official, Ken Quincey, who had overseen examinations of LippoBank. Commerce phone

### BANKING

## 'DONORGATE' IS JUST ONE OF LIPOBANK'S PROBLEMS

Money-laundering allegations and red ink are dogging it, too

As bank headquarters go, it's about as downscale as you can get—a pale-yellow building occupied by medical offices, labs, and pharmacies in the Chinatown district of Los Angeles.

But the modest headquarters of LippoBank of California is fast becoming a branch of the tangled "Donorgate" scandal. Republican lawmakers are preparing to grill former Commerce Dept. aide John Huang over his role in the affairs of the tiny Indonesian-owned U.S. bank that he once headed—and that has repeatedly run afoul of U.S. regulators. GOP investigators want to know if Huang, as acting president and later vice-chairman of LippoBank, was involved in an alleged money-laundering scheme that began in the late 1980s. They also want to know whether he used his pull as a Clinton appointee to stop regulators from cracking down on the troubled bank.

**A BUST.** LippoBank's troubles are only the latest for Huang, whose overseas fund-raising for President Clinton's reelection effort has sparked controversy. On Nov. 12, Commerce asked its inspector general to examine records that "appear to present questions concerning the conduct" of Huang while he was at the agency. And Capitol Hill panels are preparing for an investigation into his

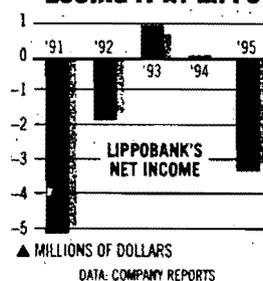
dealings that could last for a year.

Acquired on the cheap in the mid-1980s by James T. Riady, LippoBank was supposed to become a \$1 billion institution providing trade financing for importers in California, most of them Asian American. Riady is the 39-year-old son of Mochtar Riady, one of Indonesia's most powerful financiers and a frequent guest at the Clinton White House. But the younger Riady's Golden State excursion has been a bust: The \$110-million bank has lost \$16.5 million since 1990 from write-downs of bad real-estate loans (chart). LippoBank has survived because the Riadys pumped in \$20.5 million in new capital and purchased millions more in bad loans.

Riady may soon have to ante up again: Regulators at the Federal Deposit Insurance Corp.

decline to comment, but a recent internal FDIC memo notes that "earnings are poor, are overstated and that large net operating losses for 1996 are highly likely." If Riady doesn't pony up more capital, regulators may slap the bank for a third time with a "cease and desist" or-

### LOSING IT AT LIPO



▲ MILLIONS OF DOLLARS  
DATA: COMPANY REPORTS

10

(MONT'D)

## A day in the death of affirmative action

*Editor's note: The following "memorandum to Republican leaders" is being released today by the Project for the Republican Future, whose chairman is William Kristol.*

*"[In 1988, the Republican] resort to a racial card was no measure of G.O.P. strength; it was the measure of an unstable Republican coalition unable to win over America on the strength of ideas. The Republicans' sudden interest in affirmative action is not propelled by any electoral mandate. . . . [T]he political temptations of exploiting the race issue should not be confused with a conservative mandate. The Republicans are playing a dangerous game."*

— White House pollster Stanley B. Greenberg, *The New York Times*, March 9, 1995

*"Stanley Greenberg . . . said yesterday the [Democratic] party's future lies not in protecting government affirmative action programs but in promoting policies that are more universal' . . . In his new book on building a Democratic majority, Greenberg writes that 'the plight of the poor and the unfinished business of civil rights are no longer the first principles of Democratic politics' . . . He also says that politics organized around race and civil rights was critical to the transformation of American life in the 1960s and 1970s but now is 'unproductive.'"*

— *The Washington Post*, March 9, 1995

Three weeks ago, you will recall, on February 21, the House of Representatives, by overwhelming vote, passed H.R. 831, a bill drafted by Ways and Means Committee Chairman Bill Archer that would permanently extend an existing and soon-to-expire 25 percent federal tax deduction for the health insurance expenses of self-employed individuals. The House bill pays for this deduction by repealing section 1071 of the Internal Revenue Code — and with it, a Federal Communications Commission program that grants huge tax deferrals to companies that sell broadcast properties to "minority controlled" enterprises.

That FCC initiative, as we have

previously argued — and as recent news accounts of the pending deal between two giant communications corporations have helped make abundantly clear — is indefensible. And by voting to kill the FCC's "minority ownership program," the House has done the country a genuine service: opening the entire, rusted arsenal of federal "affirmative action" provisions to real, meaningful debate at last, and removing from American law ugly manifestations of race-consciousness.

Now to the Senate. Tomorrow, Senator Bob Packwood's Finance Committee will mark up its bill to extend the self-employment health insurance deduction. And the funding mechanism that committee chooses, like it or not, will signal the Republican Party's courage where the future of racial, ethnic and gender preferences are concerned. Will the Senate join the House to undo an irremediably defective and offensive "affirmative action" program? Or will fear of potential Democratic denunciations of "racial politics" deter the Senate — and deny the country its long-overdue honest conversation about basic questions of American justice?

Let's address those Democratic denunciations first, because current "racial politics" in America are actually far more complicated and interesting than they sometimes appear. Take the case of Stanley B. Greenberg, the president's high-priced pollster, who unburdened himself on affirmative action at some length in last Thursday's newspapers. In *The Washington Post* (above), Mr. Greenberg sug-

gested that affirmative action's time has come and gone, that the Democratic Party — in the national interest and for its own electoral purposes — must liberate itself from the culture of group entitlement that "affirmative action" has come to embody. In *The New York Times* (also above), Mr. Greenberg argued that Republicans should be ashamed of themselves for saying . . . well, for saying what Mr. Greenberg said that same day in the *Post*.

We raise this example not simply to poke fun at the poor man. The larger point, instead, is liberalism's awful current confusion about the morality, utility, and (yes) partisan

implications of American society's 30-year-old system of legally imposed "minority" preferences. A full White House review of the federal government's affirmative action programs and regulations is currently under way, directed by George Stephanopoulos, due the end of this month, and designed to resolve this confusion. We can't wait.

On the one hand, the Democratic Party has made the assertion of group claims and the extraction of group benefits its domestic policy signpost for three decades now, and the civil rights activists and feminists who give that party most of its energy feel understandably betrayed by any talk of affirmative action rollback. Jesse Jackson, for example, has condemned the Stephanopoulos review as a "retreat," wants the president to "personally repudiate" Mr. Greenberg (in his *Post* incarnation), and has threatened a 1996 presidential primary challenge unless "the president goes on national TV and offers a clear and authoritative statement" in defense of affirmative action.

On the other hand, most Democrats recognize affirmative action as a "loser," in every sense of the word. The incoming chairman of the Democratic Leadership Council, Connecticut Senator Joe Lieberman, calls affirmative action "patently unfair." One "liberal Democratic lawmaker" quoted anonymously by *U.S. News & World Report* (February 13), is even blunter: "I'll be goddamned why the son of a wealthy black businessman should have a slot reserved for that race when the son of a white auto-assembly worker is excluded. That's just not right." And President Clinton himself now says that his party "shouldn't be defending things that we can't defend. So it's time to review it, discuss it and be straightforward about it."

Of gender- and race-based legal preferences in particular, the president admits that "[i]t's difficult to draw a conclusion that they even do what they were intended to do in the first place." And while he's prepared to defend Head Start, the earned-income tax credit, and empowerment zones — which no one has ever argued constitute "affirmative action," to begin with — Mr. Clinton isn't even sure that "a minority scholarship program," in

## ✓ DEMOCRACY WATCH

### Now Let's Get Going

Gov. Pete Wilson's lawsuit blocking implementation of "Motor Voter," the National Voter Registration Act, was rejected earlier this month in federal district court.

The governor had argued that the law usurped powers reserved to the states by the 10th Amendment to the Constitution. However, Article I, Section 4 of the Constitution gives the federal government an enumerated right to regulate voter registration. In resolving the conflict and rejecting Wilson's claim, U.S. District Judge James Ware quoted the crystal-clear language of a 1963 decision: "Nothing in the language or history of the 10th Amendment gives the state the exclusive sovereignty over the election processes against the federal government's otherwise constitutional exercise of a power within the scope of Article I, Section 4. . . . In Justice Holmes' phrase, this 'is not a controversy between equals.' It is necessary at this time to say again, and underscore it, that *within the area of delegated power, express or implied, the 10th Amendment does not reduce the powers of the United States.*"

Wilson claims that "Motor Voter" will cost California \$20 million. Others claim as little as \$5 million. In our judgment, money spent to preserve and extend democracy at home is money well spent. "Motor Voter" has added 100,000 new voters to the rolls in Florida, 50,000 in Georgia, 39,000 in New York.

The court ruling made one thing clear: In this case, Washington has not exceeded its authority. It is time for Gov. Wilson to stop obstructing this law and start implementing it.

## 'GOP Members Accuse EPA of Playing Politics

### *Browner Denies Agency Has 'Hit List'*

By Gary Lee  
Washington Post Staff Writer

GOP lawmakers opened a new battle in their war of words against the Environmental Protection Agency yesterday, charging agency officials with preparing what they called a "political hit list" of Republican members.

At a news conference, Rep. John L. Mica (R-Fla.) cited a fax he received last Thursday. The fax invited him to an EPA meeting about wetlands policy and was addressed to Mica as well as to two candidates who had opposed him in last November's election. Two other GOP lawmakers received similar faxes, with the names of their political opponents attached, Mica said.

Mica and the other GOP lawmakers interpreted the fact that the EPA had their opponents' names as evidence that the agency was compiling a "political hit list" that could be used in various ways to oppose GOP policies.

"I am quite disturbed that EPA is keeping a political hit list or political enemies list," an angry Mica told a Capitol Hill news conference. Rep. David M. McIntosh (R-Ind.) who heads the House subcommittee on economic growth, natural resources and regulatory affairs, threatened to launch an investigation into the matter. Rep. William F. Clinger Jr. (R-Pa.) threw his hat into the ring, too.

"At best this is a major political blooper," he told journalists. "But it might also be a violation of one or more laws."

EPA Administrator Carol M. Browner promptly dismissed the charge as "ridiculous." "This agency does not keep secret files," she said in a statement. "I will not allow this political sideshow to interfere with the agency's responsibility to participate in a critical policy discussion."

EPA officials described the flap as much ado about nothing and attributed the fax to a staff error. The agency explained the staff member drew his list of officials to invite to the wetlands meeting from a congressional list obtained from America Online, a popular computer service.

The list included the names of the lawmakers' opponents. Mistaking the opponents for the lawmakers' aides, the EPA staff member attached their names to the same invitations faxed to the lawmakers.

After catching the error, EPA officials called the congressional offices that had received the faxes to apologize. A spokesman said, "It was an honest mistake."

The skirmish comes one week after McIntosh accused Browner of mounting a lobbying campaign against House Republicans' anti-regulatory risk assessment bill. Pointing to faxes the EPA had sent to environmental groups and other

---

*"I am quite  
disturbed that EPA  
is keeping a  
political hit list or  
political enemies  
list."*

— Rep. John L. Mica

organizations criticizing the proposed statute, McIntosh charged Browner with violating an obscure 1919 anti-lobbying statute that prohibits federal officials from using government funds to lobby against legislative proposals.

The penalty for violating the statute could include imprisonment.

Browner, who said she takes the charges personally, is not backing down. "This is nothing more than an attempt to silence me and distract the agency," she said. "I will not be silenced."

But the lawmakers are not buckling either. For McIntosh, the affair renews a long-standing feud with the EPA. As head of then-Vice President Dan Quayle's Competitiveness Council, a body designed to ease the regulatory burden on industry, he openly opposed EPA policies and officials. And he has announced plans to conduct a full overhaul of the 1990 Clean Air Act, which the EPA administers.

what he calls a "gray area," would pass muster.

We hate to say it, but we owe President Clinton a debt of gratitude. He has now used his bully pulpit to call into question, as effectively as anyone else, the philosophical premises of a quarter century's worth of "affirmative action" programs. It is true that a series of Republican presidential candidates have expressed an admirable determination to pursue the subject, and one of them, Senate majority leader Bob Dole, has asked Senators Kit Bond and Nancy Kassebaum to hold oversight hearings on the huge "affirmative action" programs in their two committees' jurisdiction. But so far, for the most part, the Republican Party has restricted itself to preliminary and simple — if portentous — questions about existing law and regulation. Affirmative action, in fact, doesn't even figure in the Contract With America, which Democrats labored so hard last year to demon-

nize, and now work just as hard to dismiss.

High-minded Democratic "anger" over still-subdued Republican anti-affirmative action rhetoric, then, is a fraud. Republicans have spread no "poison" over the American racial and ethnic landscape, as a New York Times editorial so ludicrously complained two weeks ago. Quite the contrary: a Democratic Party devastated by national voter repudiation and disoriented by its own, increasingly

obvious contradictions, has worriedly begun to air its racial laundry in public. And they are mad at us not because we seem eager to discuss affirmative action "destructively" — there's very little evidence of that, as it happens — but

because we seem finally prepared, after years of timid silence, to discuss the issue *at all*.

Theodore M. Shaw, associate director-counsel for the NAACP Legal Defense and Education Fund, tells The New York Times (Febru-

ary 7) that the prospect of "Congress opening up affirmative action programs for review is one that is a cause for concern. These issues are very complex and sensitive. . . . But the political process and the nature of political discourse these days do not insure these issues will be dealt with in a thoughtful and sensitive way."

In other words, a full public debate about the justice of counting American citizens by race and gender, and then endlessly imposing group "remedies" for vague or ancient wrongs, may conclude inconveniently for the Democratic Party: with the rejection of such remedies, at last, in favor of tradi-

tional American individual liberties and protections.

Good. Republicans have nothing to fear or be ashamed of in joining such a debate. Messrs. Clinton, Lieberman, Greenberg and Company have engaged the debate. We should continue it with due dispatch. The Senate Finance Committee should begin to do its part tomorrow by taking up the House's challenge and reporting to the floor a bill that repeals section 1071 of the Internal Revenue Code. The full Senate should work quickly to debate and pass that bill. And the president of the United States, Mr. Stephanopoulos's review in hand, can then decide whether to sign it.

## Clinton's Choice to Review Affirmative Action Underscores Delicate Nature of Undertaking

By MICHAEL K. FRISBY

Staff Reporter of THE WALL STREET JOURNAL  
WASHINGTON—Deval Patrick may be finding it's possible to be too good at your job.

Mr. Patrick is head of the Justice Department's civil rights division and a passionate enforcer of civil rights. So now that the Clinton administration is launching a highly sensitive review of affirmative action, who has it put in charge?

Not Mr. Patrick, but Christopher Edley Jr., an African-American legal scholar who has just finished a stint as a White House budget aide. The reason, some civil rights activists and administration aides say, is that Mr. Patrick's intense dedication worries the administration, while Mr. Edley is considered a more measured and politically seasoned alternative.



Deval Patrick

That situation only underscores the delicate task the White House faces in the mushrooming national debate over affirmative action—a debate in which the administration wants to address the complaints of working-class whites without offending its core black constituency. Seeking a middle ground, President Clinton ordered a review of all affirmative-action programs. Yet the administration's approach is putting Messrs. Edley and Patrick, two prominent black advisers who share an overall commitment to affirmative action, in awkward positions.

The larger problem for the administration is that, at a time when affirmative action is under heavy Republican attack, some will view Mr. Patrick's low-profile role as a sign that Mr. Clinton may roll back affirmative-action programs. Mr. Edley says "there is not a daylight of difference between" him and Mr. Patrick on affirmative action, but others don't see it quite that way.

### White House Meeting

Recognizing the unfriendly political climate in both parties, friends and associates say, Mr. Edley seems more likely to seek a fall-back position and give up a few programs to save the most defensible ones. Mr. Patrick, by contrast, doesn't like to make concessions out of fear that it will put the administration on a slippery slope that allows decades of progress to slip away.

"It's a troubling problem that Patrick has not been more involved" in the

review, says Ron Walters, a Howard University political scientist. "He has been a leader on these issues," adds Mr. Walters, noting that the Justice Department and Equal Employment Opportunity Commission usually play leading roles on affirmative-action policy. When Mr. Walters accompanied Jesse Jackson to a White House meeting last week, he says, they requested that Mr. Patrick and other strong backers of affirmative action play more significant roles.

Administration officials say Mr. Patrick's role will be to help oversee the review, along with senior White House advisers, such as George Stephanopoulos, Harold Ickes and Alexis Herman. They say Mr. Patrick's Justice Department duties don't leave him the time to conduct an intensive review of affirmative-action programs in other government agencies.

"Deval has been at every single meeting," Mr. Stephanopoulos said. "It is an interagency review that is appropriately going through the executive office. They have different responsibilities." What's more, administration officials note that Mr. Patrick is providing themes for a coming presidential speech designed to put affirmative action into a broader context of race relations.

Even before the affirmative-action debate, Mr. Patrick had ruffled some in the White House with his pugnacity in pressuring Chevy Chase Federal Savings Bank into an \$11 million settlement of a discrimination charge, and in switching the Justice Department's position to oppose a white teacher charging reverse discrimination in New Jersey.

And, as Republicans began attacking preference programs a few weeks ago, Mr. Patrick helped spur the White House to respond to the GOP assault on such programs by urging President Clinton not to leave the playing field to the Republicans.

But more recently, Mr. Patrick fought in a series of meetings for the president to deliver an affirmative-action speech at the start of the review, arguing that Mr. Clinton's words should guide it. "The president has to make a statement," he argued. He lost that battle, though his persistence insures that at least some speech will come before the review is completed.

### Different Backgrounds

Messrs. Edley and Patrick are an intriguing pair. They come from different worlds and have different styles. Mr. Patrick was raised by a single mother in a poor Chicago South Side neighborhood, while Mr. Edley knew a more patrician life in New Rochelle, N.Y., an upper-middle class

suburb. One thing that may link them is the fact that they both benefited to some extent by the kinds of programs now being reviewed.

Mr. Edley, 42 years old, is the son of the former head of the United Negro College Fund, and he has followed in his father's footsteps by dedicating his life to teaching and public service rather than making money.

He is a tenured professor of administrative law at Harvard Law School who was an assistant director of domestic policy in the Carter administration and the issues director for Michael Dukakis's 1988 presidential campaign. He has been associate director of the Clinton Office of Management and Budget, but now will handle the affirmative-action review and do work for the Urban Institute before returning to Harvard in the fall.

### Helped by Program

He acknowledges to friends that affirmative action played a role in his admission to Swarthmore College and Harvard Law School and in his being considered for tenure at Harvard. But he strongly asserts, friends say, that it was his teaching skills and qualifications that convinced the school that it should make him a tenured law professor.

Mr. Patrick's ticket out of a violent neighborhood was a scholarship to Milton Academy in Massachusetts. The scholarship program, called A Better Chance, provided funds for poor children, such as Mr. Patrick, to attend elite private schools.

From Milton, he went to Harvard University and Harvard Law School. He clerked for a federal judge in California

and worked for the NAACP Legal Defense and Education Fund, then later became a partner in the Hill & Barlow law firm in Boston.

Mr. Patrick, now 38, discussed affirmative action on a 1992 Boston cable television show: "The Democrats need to redefining or remind people of the original definition of affirmative action, which is just a synonym for opportunity. It was not originally devised as a quota system or a ceiling system or much more than a set of goals and aspirations for employers... to bring capable



Christopher Edley Jr.

and competent and qualified workers who had traditionally been excluded for reasons of race into the workplace."

Through the current debate, Mr. Edley and Mr. Patrick talk frequently and try to work together. Indeed, the White House may be miscalculating Mr. Edley's own dedication. More than a year ago, Mr. Edley pushed for the administration to begin a dialogue on race and it led to weekly meetings of the civil rights enforcers from all the agencies - meetings that were led by both him and Mr. Patrick.

Still, "I think this issue could be so explosive, and so bad, that I don't expect either Deval or Chris to be in the administration by the beginning of next year," says Harvard law professor Charles Ogletree, who has been a professional acquaintance as well as a close friend of both. "This is something that will take a toll on them."

cont'd  
293

# Dream

dark and desolate valley of segregation to the sunlit path of racial justice; now is the time to open the doors of opportunity to all of God's children; now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood. It would be fatal for the nation to overlook the urgency of the moment and to underestimate the determination of the Negro. This sweltering summer of the Negro's legitimate discontent will not pass until there is an invigorating autumn of freedom and equality.

Nineteen sixty-three is not an end, but a beginning. Those who hope that the Negro needed to blow off steam and will now be content will have a rude awakening if the nation returns to business as usual. There will be neither rest nor tranquility in America until the Negro is granted his citizenship rights. The whirlwinds of revolt will continue to shake the foundations of our nation until the bright day of justice emerges.

But there is something I must say to my people, who stand on the worn threshold which leads into the palace of justice. In the process of gaining our rightful place, we must not be guilty of wrongful deeds. Let us not seek to satisfy our thirst for freedom by drinking from the cup of bitterness and hatred. We must forever conduct our struggle on the high plain of dignity and discipline. We must not allow our creative protests to degenerate into physical violence.

Again and again we must rise to the majestic heights of meeting physical force with soul force. The marvelous new militancy, which has engulfed the Negro community, must not lead us to a distrust of all white people. For many of our white brothers, as evidenced by their presence here today, have come to realize that their destiny is tied up with our destiny, and their freedom is inextricably bound to our freedom. We cannot walk alone. And as we walk, we must make the pledge that we shall march ahead. We cannot turn back.

There are those who are asking the devotees of civil rights, "When will you be satisfied?" We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality; we can never be satisfied as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities; we cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one; we can never be satisfied as long as the Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No. No, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream.

I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow jail cells. Some of you have come from areas where your quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality. You have been the veterans of creative suffering. Continue to work with the faith that unearned suffering is redemptive. Go back to Mississippi. Go back to Alabama. Go back to South Carolina. Go back to Georgia. Go back to Louisiana. Go back to the slums and ghettos of our northern cities, knowing that somehow this situation can and will be changed. Let us not wallow in the valley of despair.

I say to you today, my friends, that in spite of the difficulties and frustrations of the moment I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed, "We hold these truths to be self-evident, that all men are created equal." I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.

I have a dream that one day even the state of Mississippi, a desert state sweltering with the heat of injustice and oppression, will be transformed into an oasis of freedom and justice. I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but the content of their character.

I have a dream today. I have a dream that one day the state of Alabama — whose governor's lips are presently dripping with the words of interposition and nullification — will be transformed into a situation where little black boys and black girls will be able to join hands with little white boys and white girls and walk together as sisters and brothers.

I have a dream today. I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low. The rough places will be made plain and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together.

This is our hope. This is the faith with which I return to the South. With this faith we will be able to hew out of the mountain of despair a stone of hope. With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood. With this faith we will be able to work together, to pray together, to

373

struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day. This will be the day when all of God's children will be able to sing with new meaning, "My country 'tis of thee, sweet land of liberty, of thee I sing. Land where my father died, land of the Pilgrims' pride, from every mountainside, let freedom ring." And if America is to be a great nation, this must become true. So let freedom ring from the prodigious hilltops of New Hampshire; let freedom ring from the mighty mountains of New York; let freedom ring from the heightening Alleghenies of Pennsylvania; let freedom ring from the snow-capped Rockies of Colorado; let freedom ring from the curvaceous peaks of California. But not only that. Let freedom ring from Stone Mountain of Georgia; let freedom ring from Lookout Mountain of Tennessee; let freedom ring from every hill and molehill of Mississippi. "From every mountainside, let freedom ring." When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual: "Free at last. Free at last. Thank God almighty, we are free at last."

Copyright by Dr. Martin Luther King Jr.

*Wash Times*

JANUARY 13, 1995 G3

# Calif. bias policy dealt new blow

By Bob Egelko  
The Associated Press

SAN FRANCISCO — California's voter-approved ban on affirmative action suffered another blow Monday when a judge extended a ban on its enforcement, saying it was probably unconstitutional.

Chief U.S. District Judge Thelton Henderson, in granting a preliminary injunction, said civil rights groups "demonstrated a probability of success" in claiming Proposition 209 violates the Constitution's

equal protection guarantee.

An appeal is expected.

Approved by 54% of the voters Nov. 5, 209 bans discrimination or preferences based on race, sex or national origin.

It was challenged the next day by groups representing minority and female students, contractors and public employees, and the state AFL-CIO.

They argued that the initiative, despite neutral language, was designed solely to abolish programs that include special consideration for traditionally under-represented groups.

Gov. Pete Wilson, a supporter of Proposition 209, said the ruling "turns the Equal Protection Clause into the Unequal Protection Clause."

Ward Connerly, who chaired the campaign for 209, called the ruling "one of the most perverse ... in the history of American jurisprudence."

But Ramona Ripston of the American Civil Liberties Union, said: "Whenever the Constitution prevails it's a victory for all Americans."

The Clinton administration is opposed to the measure.

TUESDAY, DECEMBER 24, 1996

THE WASHINGTON POST

## Judge Extends Ruling Against California Ban on Affirmative Action

By William Claiborne  
Washington Post Staff Writer

LOS ANGELES, Dec. 23—A federal judge in San Francisco today issued a preliminary injunction against California's voter-approved ban on affirmative action, saying that it probably is unconstitutional.

The ruling had been expected since U.S. District Judge Thelton Henderson issued a temporary restraining order on Nov. 27 barring Gov. Pete Wilson (R) and Attorney General Dan Lungren from enforcing the initiative—better known as Proposition 209—that outlawed race- and gender-based preferences in state hiring, contracting and university admissions.

But the injunction Henderson issued today has greater legal impact than the restraining order because it will remain in effect until the case goes to trial unless it is overturned by a higher court. Lungren said tonight that the state would appeal.

In his ruling today, Henderson said the American Civil Liberties Union of Southern California and other civil rights groups that brought the law-

suit "have demonstrated a probability of success on their claim that Proposition 209 violates the 14th Amendment's equal protection guarantee to full participation in the political life of the community."

As he did in his temporary restraining order, the judge said today that the measure probably would be proven unconstitutional and permanently struck down because it disadvantages women and racial minorities who seek relief from discrimination, but not members of other groups.

Proposition 209 states simply: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."

The coalition of civil rights groups that filed the lawsuit contended that the new law selectively bars women and racial minorities from seeking redress through affirmative action programs, while those seeking preferences on such grounds as age, disability or veteran status face no such barriers.

The Clinton administration announced last week that it will mount a legal challenge to the initiative, because Justice Department and White House attorneys fear it could undermine federal civil rights policy and encourage other states to follow California's lead. The officials advanced the same argument as the civil rights groups—that the measure may violate the equal protection clause by favoring some groups over others in their access to protection from discrimination.

Wilson has tried unsuccessfully to persuade Henderson to recuse himself from the Proposition 209 case because of his longtime association with the ACLU and other civil rights groups before he was appointed to the federal bench by President Jimmy Carter in 1980. The governor also sought a hearing of the case in a state court, where he might have an advantage because most state judges have been appointed by Wilson or other Republican governors and the state judges, unlike their federal counterparts, regularly face retention elections.

The lawsuit against Proposition

209 was originally assigned to a Republican appointee in the San Francisco federal judicial district, Judge Vaughn Walker. But civil rights lawyers got the case shifted to Henderson, who is black and regarded as a liberal jurist, on the grounds that he already was hearing a related case. Wilson's office has accused the ACLU of shopping for a favorable judge, something the civil rights group and Henderson have denied.

TUESDAY, DECEMBER 24, 1996

# U.S. Judge Blocks State, UC From Invoking Prop. 209

■ **Courts:** Problem lies with anti-affirmative action measure's method, jurist says. State will appeal ruling that Gov. Wilson says 'deeply disappointed' him.

By MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

SAN FRANCISCO—Dealing another blow to opponents of affirmative action, a federal judge Monday blocked enforcement of Proposition 209 indefinitely, ruling that the initiative passed by 54% of California voters is probably unconstitutional.

Chief U.S. District Judge Thelton E. Henderson granted a preliminary injunction that prevents the state, the University of California and local governments from implementing the November ballot measure pending a trial or final ruling on its legality.

"It is not for this or any other court to lightly upset the expectations of the voters," Henderson wrote in a 67-page ruling. "At the same time, our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution."

Henderson, a former civil rights lawyer, had previously issued a temporary restraining order against the measure. But an injunction carries more legal weight because it stays in effect until the case is finally resolved or until a higher court overturns it.

State lawyers will appeal the injunction and a lengthy legal fight is expected by many. Gov. Pete Wilson said he was "deeply disappointed" by Henderson's decision but declared that it came as "no surprise" that a judge who served on the board of the American Civil Liberties Union 20 years ago would "endorse the ACLU's Orwellian argument."

"This decision, however, will not stand," said Wilson, describing Henderson's legal analysis as "surreal." Atty. Gen. Dan Lungren also refused to concede defeat.

"This is only the first of a many-round fight," Lungren said.

"The final battle is far from decided."

While awaiting a ruling on the injunction from a higher court, state officials have said, they will press Henderson to decide the case as quickly as possible in hopes that the U.S. Supreme Court can review it within two years. A majority of the Supreme Court has been dubious of affirmative action, and supporters of Proposition 209 are hopeful that the measure will be declared constitutional by the high court.

Delay could work to the advantage of civil rights groups and other opponents, as long as the injunction remains in force. A trial in Henderson's district court in San Francisco could take one or two years, and the makeup of the Supreme Court might change in the meantime, tipping the balance in favor of affirmative action.

In blocking the measure, Henderson wrote that civil rights lawyers demonstrated a "probability of success" in their claim that the initiative violates equal protection guarantees and a "likelihood of success" with the argument that it illegally interferes with federal civil rights policy.

He relied in part on a 1982 Supreme Court ruling that struck down a Washington state initiative barring voluntary race-based school busing.

Proposition 209, like the Washington initiative, was a state constitutional amendment. It cannot be changed without a statewide vote of the electorate.

Henderson stressed that his ruling does not determine whether

affirmative action is right or wrong or affect the ability of government entities to repeal affirmative action programs voluntarily.

Rather, he said, the problem lies with "the particular method" Proposition 209 uses to ban affirmative action. By requiring a future statewide vote to win relief from discrimination, the measure creates a significant hurdle for women and minorities while leaving other groups unfettered, he said.

"The primary practical effect of Proposition 209 is to eliminate existing governmental race- and gender-conscious affirmative action programs in contracting, education and employment and prohibit their creation in the future, while leaving governmental entities free to employ preferences based on any criteria other than race or gender," Henderson wrote.

Some legal analysts believe the constitutional issue cited by Henderson is sufficiently close that a panel of more conservative judges on the U.S. 9th Circuit Court of Appeals might overturn the injunction and even decide the constitutionality of the measure without any more rulings by Henderson.

But other analysts note that appellate courts rescind injunctions only sparingly and only if the trial judge has clearly committed an error.

Mark Rosenbaum, legal director of the ACLU of Southern California, called the ruling "historic" and pronounced the opponents "ready to go to trial."

The ruling shows that "in a constitutional democracy, the political process has to remain open to everyone, including minorities and women," said Rosenbaum, one of the lawyers who argued the case against the proposition.

But Ward Connerly, a UC regent and one of the sponsors of Proposition 209, said Henderson's decision "will be recorded in the history of American jurisprudence as one of the most perverse."

"To say that an initiative which grants equal treatment under the law to all citizens grants a privilege to some is doublespeak at its worst," Connerly said, "and represents contempt for the constitutional principle of equality."

University of California attorneys and senior managers had not received a copy of the ruling to

172

2 of 2  
review before leaving for the Christmas holidays, said UC spokesman Rick Malaspina.

"But if the injunction is consistent with the restraining order, the university will revert to the policies and plans that were in place before the election," Malaspina said.

That means UC admissions officers would use race and gender for the last time in evaluating applicants for the fall 1997 freshman class for the nine-campus, 164,000-student system.

Next year, UC officials are scheduled to phase in a UC regent-imposed ban on affirmative action, starting with 1998 admissions.

Malaspina said he did not anticipate a final determination on 1997 admissions criteria until after Christmas, when UC attorneys can fully evaluate the judge's ruling.

Henderson, who was appointed by Democratic President Jimmy

Carter, is regarded as a cautious liberal. He was the first African American appointed to the district court here and the first to administer the courts as chief judge, a position obtained by seniority.

He attended law school at UC Berkeley and served as an assistant dean for several years at Stanford University's law school.

State officials have filed a motion asking Henderson to step aside and allow a California state court to interpret Proposition 209. That motion will be heard in early January.

The sponsors of Proposition 209 also have submitted a request that Henderson be removed because he served on the ACLU Board of Directors briefly 20 years ago and until 1992 retained membership in another civil rights group that favors affirmative action.

Henderson has declined to step down and has asked the clerk of the court to assign another judge to rule on the request.

When Henderson granted a temporary restraining order last month against the proposition, a state lawmaker derided him as an example of why affirmative action benefits the unqualified, and Wilson called the ruling an affront to

voters.

Civil rights lawyers had argued that the law is unconstitutional because it preempts federal civil rights policies and bars women and minorities from seeking government remedies from discrimination while allowing all other groups, including the aged and the disabled, such access.

Led by the ACLU, those lawyers have been trying to divert the arguments away from affirmative action, framing the case instead as a question of equal access to government.

The Clinton administration gave them a boost last week, announcing that the U.S. Justice Department would join the ACLU, either as a party to the litigation or as a friend of the court, in arguing against Proposition 209.

State lawyers contend that the law simply bans all kinds of discrimination and therefore could not possibly violate equal protection rights. State officials maintain that victims of discrimination can still seek redress by asking for reconsideration of a contract or employment decision or by filing a lawsuit.

Times staff writers Kenneth R. Weiss in Los Angeles and Mark Gladstone in Sacramento contributed to this story.

# The New York Times

Founded in 1851

ADOLPH S. OCHS, *Publisher 1896-1935*  
 ARTHUR HAYS SULZBERGER, *Publisher 1935-1961*  
 ORVIL E. DRYFOOS, *Publisher 1961-1963*  
 ARTHUR OCHS SULZBERGER, *Publisher 1963-1992*

ARTHUR OCHS SULZBERGER JR., *Publisher*

JOSEPH LELYVELD, *Executive Editor*  
 GENE ROBERTS, *Managing Editor*

*Assistant Managing Editors*

SOMA GOLDEN BEHR      CAROLYN LEE  
 GERALD M. BOYD      JACK ROSENTHAL  
 DAVID R. JONES      ALLAN M. SIEGAL

HOWELL RAINES, *Editorial Page Editor*  
 PHILIP M. BOFFEY, *Deputy Editorial Page Editor*

JANET L. ROBINSON, *President, General Manager*  
 WILLIAM L. POLLAK, *Executive V.P., Circulation*  
 PENELOPE MUSE ABERNATHY, *Senior V.P.,  
 Planning and Human Resources*  
 DANIEL H. COHEN, *Senior V.P., Advertising*  
 RICHARD H. GILMAN, *Senior V.P., Operations*  
 RAYMOND E. DOUGLAS, *V.P., Systems and Technology*  
 DONNA C. MIELE, *V.P., Human Resources*  
 CHARLES E. SHELTON, *V.P., Distribution*  
 DAVID A. THURM, *V.P., Production*

## Texaco's Turnaround

Embarrassed by a discrimination case that exposed a regressive corporate culture, Texaco has announced a comprehensive plan to promote employment and business opportunities for minorities. The move should help Texaco's bottom line and is being done for business reasons, the company says. But Texaco also seems genuinely contrite. Civil rights leaders who had condemned Texaco as a dinosaur now hail it as a model of corporate commitment to diversity. Moreover, at a time when the concept of affirmative action has fallen on hard times politically, Texaco may emerge as a leader in the struggle for equal opportunity.

Early last month, a damaging tape surfaced in a two-year-old racial discrimination lawsuit charging Texaco with a lackluster performance in hiring and promoting minorities. On the tape, a few company managers could be heard apparently plotting the destruction of important documents relating to the lawsuit and making what some viewed as derogatory comments about minority employees.

The Rev. Jesse Jackson and other civil rights leaders called for a boycott. In mid-November, the company said it would settle the lawsuit by paying \$140 million to its minority employees. Texaco has now unveiled the hiring and promotion plan, which is aimed at increasing employment of African-Americans from 9 to 13 percent and of women from 32 to 35 percent by the year 2000. The company wants to raise overall employment of minorities

from 23 to 29 percent. Texaco officials insist that these are goals, not quotas, based on realistic business and demographic projections.

To help reach these targets, Texaco will set up training programs aimed at educating all of its United States-based employees on diversity issues and enhancing the career prospects of minority employees through "mentoring" plans. Compensation for senior managers will be tied in part to how well they do in terms of increasing work-force diversity. Beyond that, Texaco aims to increase the pool of potential minority employees by intensifying its college recruitment efforts and financing a nationwide internship and scholarship program.

Over five years, Texaco will expand its contracts and purchasing agreements with minority- and women-owned businesses from \$135 million to \$1 billion. That includes contracts with engineering and construction companies and professional service concerns like law firms, advertisers and accountants. Texaco also pledges to do more business with banks and insurance companies owned by minorities and women.

Texaco executives say the plan is tailored to the company's special needs and that any example it sets for the rest of corporate America is coincidental. They also concede that they have a long way to go. Even so, Texaco has made a remarkably fast turnaround with what appears to be an aggressive and realistic plan to make amends.

# Administration to Join Fight On California Preferences Law

By Pierre Thomas and William Claiborne  
Washington Post Staff Writers

The Clinton administration will mount a legal challenge against California's recently approved ballot initiative outlawing affirmative action, arguing that the new law is unconstitutional and should not be allowed to take effect.

"We intend to intervene in the case at an appropriate time," said Justice Department spokesman Myron Marlin. "It's not a question of if, just a question of when."

Justice Department and White House attorneys fear the new law could severely undermine federal civil rights policy and spur other states to follow California's lead. The amendment, approved last month by California voters, prohibits preferences based on gender and race in state contracting, hiring and university admissions. In a filing, the administration will argue that Proposition 209 may violate the equal protection clause of the 14th Amendment by putting women and minorities who seek relief from discrimination at a disadvantage.

In deciding to fight the law, the federal government will be joining civil rights groups who already have succeeded in temporarily blocking the law's enforcement.

The "presence of the nation's highest civil rights enforcement body is a powerful indictment of Proposition 209," said Mark Rosenbaum, of the American Civil Liberties Union of Southern California, which sued to halt Proposition 209. "It adds a nail to the coffin of this very bad proposition."

Conservatives and California proponents of the law blasted the administration and warned against trying to supersede the electorate's will.

Calling the decision "absolutely Orwellian," California Gov. Pete Wilson (R) said the Clinton White House "now has the distinction of being the first administration since the enactment of the 1964 Civil Rights Act to contend that a state cannot enact a law prohibiting all racial- and gender-based discrimination."

"The fact that the federal government seeks to confer preferential treatment and set-aside positions, promotions and contracts to the politically favored group of the moment—not on account of discrimination that the individual suffered but solely because of their group membership—is an affront to the American dream of equal opportunity to all and special preference to none," Wilson said.

Earlier this week, Clinton said he "publicly and strongly" opposed Prop 209 during his campaign. "I thought it was bad policy for the people of California, and a bad example for America," he said.

Yesterday's announcement comes several weeks after a U.S. District Court in San Francisco temporarily blocked enforcement of the ballot initiative, saying there was a "strong possibility" that it will be proven unconstitutional. The ballot was hotly debated in the final days of last month's election, pitting social conservatives against mainstream civil activists. Within a day of the election, civil rights organizations filed suit against the new law.

White House officials were mindful of the political and social ramifications of the decision, but concluded the Justice Department needed to act. Solicitor General Walter E. Dellinger had urged the administration to move slowly, concerned about the legal theories behind the challenge.

The Justice Department is relying largely on a 1982 Supreme Court ruling known as *Washington v. Seattle School District*, which struck down a Washington state statute barring local school boards from using busing to integrate schools. The court said the law, adopted as a ballot initiative, "uses the racial nature of an issue" to control local governments and "imposes substantial and unique burdens on racial minorities."

That case was decided 5 to 4. But most of the justices in the majority on that decision have since retired, and today's court is far more critical of race-based policies favoring minorities.

The Justice Department has yet to determine whether it will file an amicus brief in a show of support for parties trying to block the law or whether they will take a more aggressive stance and become a direct participant in the litigation.

Staff writer Joan Biskupic contributed to this report.

## **Clinton Decides To Join a Fight On Preferences**

### **U.S. Will Oppose Ban Passed in California**

AI

By STEVEN A. HOLMES

WASHINGTON, Dec. 20 — Plunging into a contentious legal and political arena, the White House announced today that the Administration had decided to join a challenge to the constitutionality of a successful California ballot initiative that bans affirmative action programs by the state and its local governments.

The Justice Department had recommended the Administration's intervention after concluding that the ballot initiative, Proposition 209, approved by California's voters last month, violated the equal protection clause of the 14th Amendment.

The initiative, amending the State Constitution, forbids California to use race, ethnicity or sex as a basis for preferences in hiring, promotion, contracting or school admissions.

"Rather than remedying what's wrong with the affirmative action programs that exist, Proposition 209 has the effect of abolishing affirmative action," Michael D. McCurry, the White House press secretary, said today in announcing the Administration's decision. "The President believes that we need to continue to have that as a tool to remedy discrimination in our society."

Although Proposition 209 won passage at the California polls in November, 54 percent to 46 percent, the American Civil Liberties Union won a temporary restraining order against it before it could take effect. That order was issued by Thelton E. Henderson, chief judge of the Federal District Court in San Francisco, who is to decide by Monday whether to issue an injunction against the measure and so extend the blocking of it until the matter is settled at trial.

Justice Department officials said

FRONT  
PAGE

1/2

(MORE)

DAILY

CITIZEN NEWS

# Impression or reality, it doesn't much matter

Did World discriminate when it replaced women in its Customweave division with men? As can be expected, the company says no, while the women involved say yes. The investigating agency also says yes.

The Equal Employment Opportunity Commission came to the conclusion after a years-long investigation that World Carpets violated federal statutes regarding sex discrimination.

The case, first filed with the EEOC in 1993 by five former employees of World, said that the Dalton carpet manufacturer discriminated on the basis of sex when it performed a sweep of the then-struggling Customweave carpet line. World eliminated the Customweave territory manager positions, held predominantly by women, and replaced them with six men, each given the new title of Customweave regional vice president.

Sound business, says the company, citing a need to revamp a foundering product line. Clear sex discrimination, say the five women who filed charges.

Who's right?

After examining the evidence, the EEOC believes the women have a legitimate claim. Although World has filed a motion for reconsideration, it's unlikely the EEOC will suddenly change its mind over a decision that took years in coming.

The truly disturbing aspect of this whole case comes from a simple little phone line set up by the five women involved to help gather corroborating evidence as they presented their case to the EEOC. A true torrent of calls came in from the Dalton area, says Patricia Folino, one of the five women involved. The calls came from women employees throughout the carpet industry and many other industries as well, all saying they had experienced discrimination in their workplace.

Are all these women wrong? Even if they are, which is not

## OPINION

likely, there is no question that the impression of discrimination exists, rightly or wrongly, in the local labor force. An impression is enough to warrant action by any business interested in truly meeting its potential.

Consider this — roughly one-half of a company's labor force is women. If one-half of your company believes that, no matter how good they are at what they do, promotions will be limited because they are women, where is the incentive to excel?

Strictly from a sound business viewpoint, it makes nothing but sense to foster a workplace atmosphere that says no matter your sex, color, age or nose size, results are what matters.

From an evolutionary viewpoint, please, let's move beyond such irrelevant measures of a person's value to a company. It shouldn't require legal arm wrestling for a company to take a look at its own attitudes toward all of its workers.

Regardless of the outcome of the World case, there is no question that these five women feel that they have been given a raw deal because of their sex. Even World's president, David Polley, did not question their motives, saying he realizes this is what they believe. He just denies that their sex was a factor in the whole business shuffle.

Either way, it doesn't matter. As in anything, there is little difference between an impression and reality. If your workers believe something is true, then, for all intents and purposes, it is.

World, as well as the other companies whose female employees called the discrimination hotline, need to re-examine what kind of messages all levels of management are sending to workers. The highly competitive carpet industry demands it.

If a company is, unwittingly or otherwise, shackling half of its workforce through outdated attitudes, there are a lot of other companies that would eagerly pick up the slack.

Welcome to the edge of a new century.



CHRISTIAN  
MILLMAN

Christian Millman is business editor of The Daily Citizen-News.

2/2

# U.S. to Join Fight Against Ban on Preferences

Continued From Page 1.

today that they had not yet decided whether they would petition the court to become a party to the suit or instead simply file a friend-of-the-court brief.

The Justice Department does not intend to argue broadly on behalf of any practical or legal merits of granting preferences to minorities and women per se. Instead, it will make the more limited argument that in approving the ballot measure, the voters illegally denied minorities and women the ability to seek redress from state and local institutions for past discrimination.

"The argument is not that affirmative action is constitutionally required," said a Justice Department official who demanded anonymity. "It is not that affirmative action can never be repealed or that it is always appropriate as a matter of policy."

The Administration's decision to intervene cheered the initiative's opponents, who before its passage had grumbled that President Clinton, although expressing opposition to it, was not doing enough to help defeat it.

"I think this puts a red, white and blue nail in Proposition 209's coffin," said Mark Rosenbaum, a lawyer with the A.C.L.U. of Southern California, which filed the challenge to the measure.

Supporters of the initiative attacked the Administration's move.

"By joining the lawsuit against Proposition 209, President Clinton has betrayed his commitment to centrist politics," said Ward Connerly, a black California businessman who

led the campaign for the initiative. "He recently said he wanted to forge a coalition of the center, yet by this action he joins the radical left."

The Administration last year undertook a broad review of Federal affirmative action programs, prompted by Republican pressure to legislate an end to them. After that review, Mr. Clinton concluded that while some programs needed revising, the concept of preference programs for minorities and women ought to be retained.

But the decision to enter the California case raises the political stakes for Democrats, especially for their Presidential nominee in the year 2000. Although Mr. Clinton carried California this year despite his expressed opposition to the ballot measure, voters tend not to treat kindly politicians who seek to overturn popularly passed initiatives. Indeed, a legal challenge filed by Thomas S. Foley, Speaker of the House, against a voter-passed amendment in Washington State limiting terms for elected officials proved to be a major reason for his election defeat in 1994.

"The Administration has placed itself not only against the principle of non-discrimination but also against the popular will," said Clint Bolick, vice president of the Institute for Justice, a group that opposes affirmative action programs.

And with Republicans maintaining control of Congress, the Administration's rationale for intervening in the case will be vigorously dissected in hearings for a new Assistant Attorney General for Civil Rights, whom Mr. Clinton has yet to nominate.

Mr. McCurry, the Presidential

press secretary, said the decision to try to overturn a measure approved by voters had been a difficult one for Mr. Clinton. But he added, "If a significant, overriding constitutional concern presents itself, the President, as the nation's chief constitutional officer, has to act to defend the Constitution."

Some civil rights figures put the issue in starker terms.

"If we were to make policy based on popularity alone, African-Americans would still be slaves and women would still be denied the right to vote," said Wade Henderson, executive director of the Leadership Conference on Civil Rights.

The Justice Department's central argument in the case will mirror that of the A.C.L.U. lawyers. It is based on a 1982 Supreme Court decision, *State of Washington v. the Seattle School District*, in which the Justices declared unconstitutional a successful statewide ballot initiative that barred school districts from adopting busing plans to end de facto segregation.

In that 5-to-4 decision, the Court said that by depriving blacks of the ability to petition school boards to institute busing, the Washington measure denied them the opportunity to seek redress for discrimination through the ordinary political process. While blacks were denied that ability, others could request busing plans for reasons other than ending racial segregation, and the Justices concluded that this disparity violated the Constitution's equal protection clause.

DO NOT FORGET THE NEEDIEST

# Too Hot to Touch

**Just last year, many Republicans were set to dismantle affirmative action programs. Now many in Washington fear the issue could blow up in their faces and are looking to a California initiative as a way to make their point but keep a safe distance.**

**BY ROCHELLE L. STANFIELD**

**W**as it only a year ago that the affirmative action ploy seemed to so many Republican strategists like such a good idea? The current calculation is that the risks of backlash could outweigh the political payoffs. But by election time—it's anyone's guess.

Many conservative activists, of course, are still enthusiastic about a plan they see as a natural winner: Label affirmative action as discrimination, attract angry white men to the Republican cause and drive a wedge through the traditional Democratic heart, splitting blacks, Jews and working-class whites.

"If I were Bill Clinton, I'd be deathly afraid of this issue," Marshall Wittmann, an analyst at the conservative Heritage Foundation in Washington, said. "In many ways, it's the Democratic constituencies that feel most strongly, both pro and con. And it's an extremely divisive issue within the Democratic coalition."

But it turns out to be potentially just as divisive an issue within the Republican coalition. As the fall election campaigns shape up, many Republicans on Capitol Hill and around the country are backing away from a topic they fear could be radioactive and detonate in their faces.

Much of the explosiveness depends on the definition assigned to affirmative action. To supporters, it is a narrow policy of broadening the access of minorities and women to education and jobs by making integration a goal and by including race and gender as factors in deciding whom to accept for college, hire for a job or award a government contract. To opponents, this is setting quotas or giving preferences and is, pure and simple, discrimination.

Gov. Pete Wilson, R-Calif., has made his campaign against affirmative action a major item on his state agenda—and because of California's importance in national politics, an issue automatically to be reckoned with in the presidential campaigns. But other prominent Republican governors such as Massachusetts's William Weld, New Jersey's Christine Todd Whitman and Ohio's George V. Voinovich favor retaining affirmative

action programs and playing down the politics.

On a national level, Colin L. Powell, one of the most popular and charismatic Republicans, favors affirmative action, while television commentator and presidential wannabe Patrick J. Buchanan vigorously denounces it. Buchanan has promised to take his opposition to the party's convention in San Diego in August as part of his McLean Manifesto of conservative and populist issues. Others would just as soon sweep the subject under the rug.

"There are, if not managed correctly, potential political problems on the issue, and we have to proceed very carefully," said a House Republican aide who refused to be quoted by name.

"It definitely is a charged issue," another acknowledged. "So there are people in our party who will be preaching caution."

"The Republicans have been gutless wonders on this issue, and it's been very, very frustrating," declared Clint Bolick, vice president of the Institute for Justice, a Washington-based conservative public-interest law firm, and author of *The Affirmative Action Fraud*, a book recently published by the Cato Institute.

While the issue is tricky for President Clinton—he's a longtime supporter of affirmative action but, in a nod to detractors on the Democratic Right, has sought the middle road to "mend it, not end it"—affirmative action is even more difficult for Senate Majority Leader Robert Dole, R-Kan., Clinton's all-but-officially-anointed opponent in the November presidential election.

Dole had supported the policy for many years, even when Presidents Reagan and Bush tried to constrain it. Last year, when affirmative action foe Sen. Phil Gramm of Texas loomed as a major rival for the Republican presidential nomination, Dole declared that the policy was no longer necessary and attached his name to legislation to end federal programs that encourage affirmative action. That bill, however, lies fallow in the Senate, where substantial opposition comes from both Democrats and Republicans. Dole is con-

*William Raspberry*

## An All-Out Attack on Civil Rights Gains

There *must* be some noncynical reason for the legislation that was reported out of a House Judiciary subcommittee last week. Surely the bill's sponsors—presidential nominee-apparent Bob Dole and Rep. Charles T. Canady (R-Fla.)—aren't just being nasty with their archly titled "Equal Opportunity Act of 1996."

The obvious (and obviously intended) effect of this regressive legislation would be the utter destruction of "affirmative action," root and branch. Its title notwithstanding, it is manifestly not about improving opportunities for women or minorities. Nothing in the bill acknowledges even the existence of sexual or racial discrimination—except, implicitly, discrimination against white men.

It's hard not to view it cynically. Canady, who has never impressed me as a thoughtful man, at least is consistently conservative. I'm not surprised either to find him sponsoring this bill or to find him offering no remedy for America's real problems of discrimination. But what of Senate Majority Leader Dole, who used to be a supporter of affirmative action, until that position became a threat to his presidential ambitions? Has some flash of philosophical insight turned him into an all-out opponent of what he lately backed?

The kindest thing I've heard from the Kansan's African American supporters is that now that the nomination is virtually secured, Dole will revert to his mainstream core. The problem is, if this bill is passed, it won't matter.

I ought to say here that I have no

*It's hard not to view  
this bill cynically.*

quarrel with principled objections to some of the manipulation and self-dealing that go on in the name of affirmative action. I have expressed my own objections often enough.

But this legislation isn't about fine-tuning principles. It's not a proposal for an alternative plan for securing rights and opportunities for those to whom they have been denied. It is an all-out, in-your-face attack, a walking away from hard-earned civil rights gains.

Not only does it forbid any federal agent to discriminate in hiring or contracting on the basis of gender or race; it even outlaws goals and timetables, long considered essential for measuring progress toward actual (as opposed to mere theoretical) fairness.

"Wiping out goals strikes at the very heart of equal opportunity enforcement," says Penda Hair of the Washington office of the NAACP Legal Defense Fund. "The numbers were never binding—just a signal that, if they were out of line, you ought to look for an explanation. The explanation might be benign, but at least you were on notice to look. This bill says you can't even do that."

It says more than that, in the reading of Barbara Arnwine, executive director of the National Lawyers' Committee for Civil Rights Under Law. "The FBI has been sued for discrimination in the hiring and treatment of women and blacks. This bill says that if the plaintiffs absolutely proved their case, you could not have a consent decree that required expanding opportunities for blacks or women. The language is quite clear: 'preference' means 'an advantage of any kind, and includes a quota, set-aside, numerical goal, timetable, or other numerical objective.'"

Again, since it's impossible to read the legislation as improving opportunity for those groups that historically have been denied opportunity, what noncynical purpose could its sponsors have in mind? Is it an assertion that racial and sexual discrimination have been conquered and are no longer a problem America need be concerned about? A declaration that the only discrimination

worth remedying is the so-called "reverse" discrimination against white men?

I recall a frustrating exchange with Rep. Canady in which he simply could not bring himself to say that the government had any role in fighting discrimination beyond asserting that discrimination is against the law. What do you *do*, I kept pressing him, when the discriminators go on discriminating? Don't you, at some point, have to require evidence—yes, numerical evidence—that the discrimination has ceased?

Canady had no answer then. His answer now involves only what government must *not* do. As I read him, his idea is that government must not do anything that has any chance whatever of being effective.

And the philosophically flexible Dole? The suspicion is that he signed on to the legislation last fall as a sort of bookmark for proving his conservative bona fides and that he'd much prefer that it not be brought up for consideration now, while he's embarked on his party-healing trek back toward the political middle.

Maybe Canady, who is chiefly responsible for the present spurt of activity on the bill, is justified in refusing to let Dole have it both ways.

Still, it's a dreadful piece of legislation that, as far as I can see, can only do mischief. Is it cynical to suspect that that's what some of its supporters have in mind?

## Church arsonists won't burn out spirit

The wave of about 30 black church burnings, some by white racists, seems an attempt to murder the spirit of black America.

Arsonists are hitting just as millions of blacks are returning to the church for spiritual growth, a trend documented by Beverly Hall Lawrence in *Reviving the Spirit*. The nation's 65,000 black churches have 22 million members, collect \$2.1 billion in annual offerings, and have produced much of today's political and economic leadership. So the attacks strike at the jugular. A South Carolina sheriff probing a Klan-related burning says, "The KKK believes the best way to get the black man is through the church."

The torchings, however, are not about white vs. black. Some whites are helping to restore burned-out edifices, and the Congressional Family Caucus, a group of 75 conservative Republicans, wants hearings.

This is about extremism run amok, which activists like the Rev. Jesse Jackson blame largely on the hateful messages of men like Patrick Buchanan and Newt Gingrich. "They have wrongly painted a black face on welfare, crime and unemployment, where blacks are blamed for taking whites' jobs by affirmative action," says Jackson.

Klanwatch, part of the Southern Poverty Law Center, counts a rise from an average of one fire a year between 1987 and 1994 to nearly two a month since 1994. This year already has seen 10. Many are unsolved, a few are not race-related, and all have been in the South. But they could shift northward. Last month, a Richmond, Va., church, just 100 miles from Washington, was burned, and recently the FBI foiled a white supremacist plot to bomb the largest African Methodist Episcopal church in Los Angeles.

Police have linked the Klan, skinheads or their sympathizers to about a dozen fires. Two white men, one a card-carrying member of the Christian Knights of the KKK, were arrested in South Carolina. A "Skinhead for Justice" flyer was left behind at a burned-out church in Knoxville, where football star Reggie White is co-pastor. Three white teens ignited hymnals to burn a Mississippi church to celebrate the murder of Dr. Martin Luther King Jr.

The crimes prompt flashbacks to similar terrorism in the '60s, when four little girls died in a Birmingham church bombing.

Hard to swallow is the thought of white Christians burning down the churches of black Christians. But the KKK has historically claimed to be a "Christian" organization.

"It wouldn't surprise me if white Christians were burning the churches," says Dr. Joseph C. McKinney, international treasurer of the AME denomination, representing 3.5 million people. He raised the issue of whether federal police can be trusted to aggressively pursue the white perpetrators. It's a good question in light of a Justice Department report that federal agents attended a "good ol' boys roundup" in Tennessee where TV cameras showed "nigger-hunting licenses" were passed out. The report concluded that only one agent engaged in activity that deserved punishment.

It would surprise me, though, if the fires don't invigorate the faithful. When trouble hits, they cling to the adage that "while the devil may have meant it for harm, God uses it for good."



By Barbara Reynolds

# The Washington Times

## 'GOP, Democrats clash over affirmative action

### Dole bill stirs echoes of California debate

By Ruth Larson  
and E. Michael Myers  
THE WASHINGTON TIMES

California's politically charged voter initiative to end affirmative action came to Capitol Hill yesterday, with Republicans and Democrats sparring over legislation expected to take on increased visibility between now and Election Day.

California Gov. Pete Wilson and University of California Regent Ward Connerly, who is black, testified before the Senate Judiciary Committee on behalf of legislation proposed by Senate Majority Leader Bob Dole that would eliminate race- and sex-based preferences in federal contracts and hiring.

But the Clinton administration's chief civil rights advocate said yesterday in a related Senate hearing that the GOP bill would provoke a presidential veto.

Assistant Attorney General Deval Patrick, testifying before the Senate Labor and Human Resources Committee, called Mr. Dole's bill "a giant step in the wrong direction."

Congressional Democrats and civil rights groups have vowed to wage an all-out effort to defeat the bill in what could be among the most contentious struggles of the 104th Congress.

Mr. Wilson told the Judiciary Committee yesterday, "We can no longer allow the unfairness of preferences to continue — not in California, not in any town or village across the land."

Supporters of the California Civil Rights Initiative (CCRI), a measure to bar state and local governments from using race and sex standards for contracts, hiring and college admissions, oppose "policies and practices that began with the best of intentions, but that today breed resentment," the governor said.

Californians will vote on the initiative Nov. 5.

Mr. Connerly, who successfully campaigned against affirmative action programs in the University of California system and is chairman of the pro-CCRI drive, testified before the same committee that "wealthy sons and daughters of 'underrepresented minorities' receive extra points on their admissions applications to the university, based solely on their race, while higher-achieving Asians and whites from lower-income families are turned away from the university."

This country no longer needs affirmative action, he argued, saying: "The principle of fairness is embraced by the majority of our people."

Sen. Orrin Hatch, Utah Republican and chairman of the Judiciary Committee, endorsed the initiative and praised Mr. Wilson and Mr. Connerly for "trying to lead California down the right path."

But Sen. Dianne Feinstein, California Democrat, who lost the 1990 gubernatorial race to Mr. Wilson, countered that "all the California initiative would do is throw open this very controversial area to enormous misunderstanding and perpetual litigation, and will not solve the problem at hand.

To back her argument, Mrs. Feinstein defended programs that "set voluntary goals, seek diversification through targeted recruitment efforts, mentoring programs, or remedial assistance to underrepresented communities."

Mrs. Feinstein said the language of the California initiative is written "so ambiguously" that it would effectively end affirmative action. "President Clinton said it right, 'Mend it, not end it,'" she said. "This will really not solve the problems at hand."

"Senator Feinstein has good intentions, but she is engaging in wishful thinking," Mr. Wilson told the panel. "'Preference' is a semantic dodge for a system where quotas are achieved."

The Equal Opportunity Act of 1996, introduced last year by Mr.

DATE: 5-1-96

PAGE: A-1

Dole and Rep. Charles T. Canady, Florida Republican, would allow recruiting programs for female or minority applicants to continue as long as the final selection decision does not give preference on the basis of race or sex.

Sen. Edward M. Kennedy, Massachusetts Democrat, accused Mr. Dole and other Republicans of election-year gimmickry. "The issue of discrimination is too important to become a political football in Congress," he said, noting that Mr. Dole had previously supported affirmative-action programs.

Sen. Carol Moseley-Braun, Illinois Democrat, the only black in the Senate, said, "Preference is an issue only when it comes to race," but not in the case of preferences for veterans or those with powerful connections.

Mr. Wilson countered that veterans earn preferences without regard to sex, race or ethnic background, but he agreed that there should be no considerations for people with powerful connections.

Surveying the racially charged atmosphere and the antagonisms apparent on both sides of the debate, Sen. Paul Simon said Congress was playing with "social dynamite."

The Illinois Democrat said that discrimination continues to plague society and that federal programs remain essential to "create the level playing field that has been promised to all."

Mr. Simon, noting that Mr. Wilson is a former Marine, praised the service to the United States of a black man who worked his way to the chairmanship of the Joint Chiefs of Staff, retired Gen. Colin Powell. "Affirmative action worked in the military," said Mr. Simon, who then asked Mr. Wilson about "diversity" in his state office.

The governor said that by law he is not required to have diversity on his staff.

"I am convinced I am able to achieve diversity" by a system based on merit, Mr. Wilson said.

Californians, he said, "lose the job, contract or place in the class because it is given by a government to a less qualified member of a preferred group."

Democrats accused the Republicans of election-year politicking. "It is curious that during this presidential election year, Bob

Dole and Pete Wilson, once supporters of affirmative action, are now two of the most vocal supporters of eliminating affirmative action," Sen. Ted Kennedy, D-Mass., told the Labor Committee.

The bill, said Democrat Eleanor Holmes Norton, the District of Columbia's representative, "is punitive and unnecessary except as a partisan political vehicle."

Dole, who introduced the bill in the Senate last July, has indicated he will seek Senate action on it this year and will make affirmative action a prominent issue in his presidential campaign against Clinton.

---  
The bill is S.1085.

7TH STORY of Level 1 printed in FULL format.

Copyright 1995 Associated Press  
AP Online

October 17, 1995; Tuesday 13:31 Eastern Time

SECTION: Domestic, non-Washington, general news item

LENGTH: 1320 words

HEADLINE: English Language Laws Looming

DATELINE: ALLENTOWN, Pa.

BODY:

"One Flag, One Country," says Allentown's old downtown monument. But there are 18 languages in the valley it overlooks and strains on the sense of community hailed by its stone inscription.

Cities like this one, swollen by newcomers, their words and their ways, are driving efforts around the country and now in Washington to make English the official language.

While typically limited by the law to making governments speak in one language, the push has wider goals: speeding assimilation, upending the "linguistic ghettos" that keep foreign schoolchildren in their native tongue, and in some cases discouraging immigration itself.

"I'm an architect" by profession, says Mauro Mujica, a Chilean immigrant leading the group U.S. English and the fight for official English. "We build the foundation first."

A year after Allentown passed an ordinance urging the exclusive use of English in government, little has changed. So few documents were printed in other languages that Mayor William Heydt pegs savings at \$36.

"Absolutely meaningless," the Republican says of the law he neither signed nor vetoed. "Basically you do what you want."

But if English-only laws like Allentown's have no teeth, they do have legs.

More than 20 states and 40 municipalities have laws declaring English official and setting or urging limits on the use of other languages by government.

Bills introduced in the House and Senate appear to have wide GOP support and polls suggest most Americans like the idea, however faintly it has been defined.

In the Republican presidential campaign, Sen. Bob Dole of Kansas, Sen. Dick Lugar of Indiana and commentator Pat Buchanan are behind the cause. A notable exception is Texas Sen. Phil Gramm, who wants to cut off social services to immigrants but has seen no mileage in official English.

As in Allentown, little would change in Washington, at least on the surface.

# Justice for All

## Q and A with Leon Higginbotham

**L**eon Higginbotham is a visiting professor at Harvard Law School teaching the course *Race, Values and the American Legal Process*. He is Public Service Professor of Jurisprudence at the Kennedy School and of counsel to Paul, Weiss, Rifkind, Wharton & Garrison in their New York and Washington, D.C. offices. Higginbotham retired as chief judge for the U.S. Court of Appeals for the Third Circuit in 1993 after 29 years on the bench. He was appointed federal district judge for the Eastern District of Pennsylvania in 1964 at the age of 35 and at the time of his retirement from the Third Circuit he was the longest-serving active federal judge.

Higginbotham attended Purdue University and graduated from Antioch College and Yale Law School. He has received more than 60 honorary degrees and served as adjunct professor at numerous law schools, including Harvard Law School where he was a lecturer from 1983 to 1987. President Lyndon Johnson appointed him vice chairman of the National Commission on the Causes and Prevention of Violence, and President John Kennedy appointed him commissioner of the Federal Trade Commission. From 1959 to 1962 he served as president of the Philadelphia Branch of the NAACP. His book, *In the Matter of Color: Race and the American Legal Process* (Oxford University Press, 1978), has received national and international awards, including the ABA's Silver Gavel Award. He is also author of more than 40 articles. In 1994 Higginbotham was one of seven international mediators invited to South Africa by Nelson Mandela to help resolve differences on the proposed South African constitution. In September 1995 he received from President Clinton the Presidential Medal of Freedom, the nation's highest civilian honor, and in November 1995 Clinton appointed him to the U.S. Commission on Civil Rights. This interview was conducted in January.

**What led you to become a lawyer?**  
I started out studying electrical engineering at Purdue. There were 13 "colored" students, as we were then called. We stayed at a place called International House and slept in an unheated attic. One day I went to see the university president, Charles Elliot, to ask if we could stay in a section of the dorm so we could be warm. I was not urging integration. He said, "Higginbotham, you either take things as they are or leave the university. The law doesn't require us to let colored students into the dorm." I think that day I decided I had to be an advocate against injustice. And I thought the best way to do it was probably as a lawyer, and not as an engineer.

**You had an extraordinarily distinguished career on the bench. What prompted you to leave the Third Circuit three years ago?**

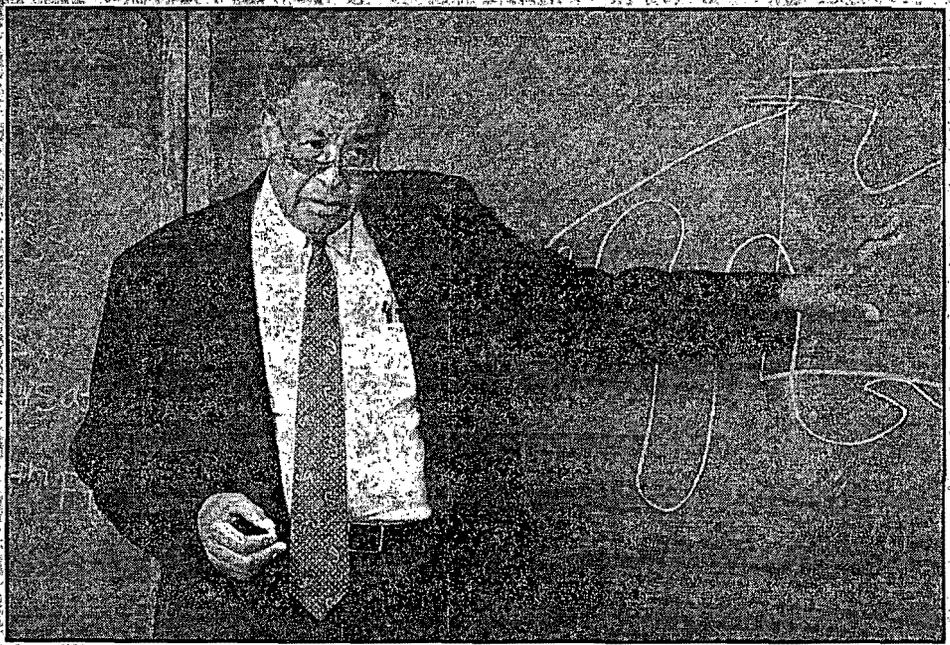


Photo by Richard Chase

*HLS Visiting Professor Leon Higginbotham is teaching Race, Values and the American Legal Process.*

I felt I had given the judiciary my very best and that there were other areas where I could perhaps make more of a difference. As a judge, you're in a reactive position; as a lawyer, you can raise issues. I thought this was an appropriate time for me to pursue both pro bono work on cutting edge issues and also academic scholarship. I'm involved in several seminal voting rights cases, and I am of counsel at Paul, Weiss, on several important civil appellate cases. I knew that as an academician I would have the extraordinary opportunity to reflect on serious public policy issues and express my views to students and a wider audience. I send open letters to Newt Gingrich; I testify before legislative committees. The role of an academician is much broader than walking into a class at 10 o'clock and walking out at 11.

**How do you like teaching at HLS?**  
Very much. In my field I meet many Harvard Law students who are extremely interested in human rights and in utilizing law to aid those who are weak and powerless. The greatness of HLS is not only its commanding excellence in so many traditional fields, but also its potential to inspire a large number of graduates who become eloquent advocates for the one-fourth of the people in this country who live at or below the poverty level.

**Tell me about your course, *Race, Values, and the American Legal Process*.**  
The course examines deliberate choices made between 1619 and 1865 in the American legal system on the issue of race. It soon becomes evident as you read the cases that the process led to the most pernicious option. There's no doubt that white people can plant cotton, hoe tobacco, and work as farmhands, but for some strange reason in this country, only individuals who were non-white were compelled to be

slaves. We also look at what happened after the 13th, 14th, and 15th amendments, with a broad overview up to the *Brown* case. Then we focus on a particular issue. This year we are looking at a number of voting rights cases.

**Why the emphasis on voting rights? You also mentioned that you were in the midst of litigating several such cases.**

Yes. The most critical issue in America is whether there will be a sharing of power. In 1993 the Supreme Court ruled in *Shaw v. Reno* that the redistricting in North Carolina, which had resulted in increasing from zero to two the number of black representatives from North Carolina in Congress, was presumptively unconstitutional. There have been similar outcomes in other recent cases, and if these decisions stand and the trend continues, the number of African Americans in Congress will probably be reduced by at least 10 or 15 and maybe 20 — from the present number of 39. In December I filed amicus briefs in *Shaw v. Reno* and a Georgia case, *Miller v. Johnson*, on behalf of the Congressional Black Caucus. I am also chief trial counsel in a Louisiana case where ex-Klansman David Duke could replace a brilliant young African-American congressman, Cleo Fields.

African Americans are very successful in the entertainment field. But there's nothing Michael Jordan or Charles Barkley can do to change public policy so that millions of children who currently have no health insurance can be protected. The only environment where you can decide such policy issues is the U.S. Congress. And when you decrease the number of congresspersons who are minorities, you eliminate a core of individuals who are instinctively concerned about injustices having to do with race and poverty.

**What about minority representation**  
(Continued on page 4)

# Justice for All: Interview with Leon Higginbotham

(Continued from page 3)

## in the judiciary?

Pluralism creates a milieu in which most often both the judiciary and the litigants benefit from the experience of those whose backgrounds reflect the breadth of the American experience. Justice Sandra Day O'Connor speaks eloquently to this point when she talks about what she learned from Justice Thurgood Marshall's life.

I think President Clinton understands the value of pluralism. The data on his judicial appointments show a substantial number of African Americans, as well as Latinos and women. During the Reagan-Bush years, African-American federal judges became an endangered species.

**You have been publicly critical of one of your black colleagues on the bench, Clarence Thomas, most volubly in your "Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague" in the *University of Pennsylvania Law Review* in 1992. What prompted you to write the letter, and what has the fallout been?**

In 1983 Justice Thomas said that "but for affirmative action laws, God only knows where I would be today. These laws, and their proper application, are all that stand between the first 17 years of my life, and the second 17 years." I wrote to him to say that he had acknowledged that these laws made the difference in his ability to enter the arena and to be competitive. And that I thought that since he had made it from Pinpoint, Georgia, to the Supreme Court, he had an obligation not to forget the thousands of individuals who still face extraordinary obstacles. I was concerned that he would forget. His Supreme Court opin-

ions have borne out my worst fears. I received more than 800 letters in response, and more than 90 percent were very supportive. A third or more were from whites.

**What's your view of the contribution of the NAACP and the significance of a black congressman, Kweisi Mfume of Maryland, becoming president of the organization?**

A review of its 90-year history demonstrates that no single organization has done as much to eradicate racial injustice as the NAACP. Its success also made a major contribution to the advancement of women. If the NAACP had not won the *Brown* case, you would never have had the 1964 Civil Rights Act, which prohibits discrimination on the basis of gender, race, religion, and national origin.

As for Congressman Mfume, he has won more than 82 percent of the vote in his district. He could have stayed in Congress forever, maybe even becoming a speaker of the house. Yet with this impressive record, he leaves Congress. It indicates his assessment of the NAACP's potential as a national instrument for change.

**How does it feel to have participated in the 1963 march on Washington, and how does it feel not to have participated in the Million Man March in October?**

The 1963 march was the most exhilarating experience of my life. My children, who were then about 8 and 11, were with me, and they heard Martin Luther King's dramatic speech. I was in the midst of a movement that just had so much moral force that I was confident it was going to ultimately succeed, despite

all the adversity, despite the fact that critical civil rights acts had not yet been passed. The decision to not participate in the Million Man March last year was difficult. But from what I had read and observed, and from what I heard, I thought that it was going to be primarily a program for the advocacy of Louis Farrakhan's personal agenda. One of the easiest ways to measure who's in control is who speaks and for how long. When someone as brilliant and dedicated as [Harvard University] Professor Cornell West is on the platform and is denied the right to speak, and Mr. Farrakhan speaks for two and a half hours, the balance isn't right.

**You're known for planning your calendar a year in advance and for maintaining an incredibly ambitious work schedule. What's your agenda for the coming year, and have you slowed down any since leaving the court at 65?**

Well, I still start at five in the morning and work until nine or ten at night. A good thing about Paul Weiss is that there are secretarial services 24 hours a day, so I often get up at five and dictate onto their system, and they have it back to me in a few hours. My wife and I try to have dinner before nine, and that's a very important respite. I do think that I'm going to have to find a formula to cut back my pace a bit. My first effort will be after these major voting rights cases are finished. I'll try to extricate myself from being lead counsel on future pro bono cases. I hope that I will spend less time on litigating and more on writing.

**What are your writing projects?**

The second volume in my *Race in the*

American Legal Process series, *Shades of Freedom*, will be published by Oxford University Press in the next six months. I've tried to make it more than merely an updating of the first volume, *In the Matter of Color*. That book examined race and the American legal process in the Colonial period. The new volume looks at how the legal system develops certain criteria about how black people should be treated. In 1997 and in 1998, I will finish an additional two volumes, one comparing racial similarities between the United States and South Africa, the other on race and the Supreme Court. And then there's the autobiography, which I am anxious to complete. I'm the only survivor of the first five African Americans who were appointed federal judges. I knew them all, and they all said they were going to write autobiographies describing their personal reaction to the challenges they have confronted, the changes they have seen, and the failures that still concerned them. They died without giving us fully their insights. God willing, I'm going to write mine.

**What do you do for fun?**

My wife, Evelyn, who is also a professor at Harvard, and I watch detective shows, like *Poirot* and *Columbo*; we also watch *Murder, She Wrote*. And we enjoy having students over for dinner. I played tennis until I developed a slight heart condition several years ago. The cardiologist said he thought I was too aggressive a personality to keep on playing tennis because I did not have, in his view, the restraint not to go for the impossible shot.

INTERVIEW CONDUCTED BY

Nancy Waring

## Woman Alleging Harassment at Mitsubishi Plant Receives Death Threat

By Kirsten Downey Grimalley  
and Warren Brown  
*Washington Post Staff Writers*

NORMAL, Ill., April 25—A woman charging sexual harassment at the Mitsubishi Motor Manufacturing plant has received a death threat as tensions rise in the plant over fears that a massive suit by the Equal Employment Opportunity Commission could cost workers their jobs.

"Die Bitch! You'll Be Sorry!" said the crudely scrawled note Terry Paz discovered in her locker at 5:30 a.m. as she reported for work just hours after other employees returned from a large, company-financed demonstration in front of the EEOC's Chicago office.

The act threatened in the note wouldn't be the first violence reported in this rural community halfway between Chicago and St. Louis since the EEOC filed its suit charging pervasive sexual harassment. An arson fire destroyed the home of a top U.S. official at the plant 10 days earlier.

Even the EEOC has been made wary by the violent nature of the situation here. During its 15-month investigation at the Mitsubishi plant, investigators traveled in groups of three or four for protection. Now, said John Rowe, director of the federal agency's Chicago office, "From now on when we go, we'll take an army" of EEOC officials.

EEOC Chairman Gilbert F. Casellas issued a statement today after the New York Times reported that the top Mitsubishi executive at the plant was interested in settling the case. Although the agency said Mitsubishi had not contacted it, Casellas said his agency remained open to "discussions that might lead to resolution of this very serious matter." A spokeswoman for Mitsubishi declined comment on the Times report except

to say the Mitsubishi executive may have been misinterpreted.

The controversy at the gleaming white auto assembly plant that rises out of the cornfields on the edge of this Central Plains community has divided workers there.

Many workers say they are unaware of the incidents that led to the government charges. Others privately say many of the government allegations are true, and often add stories of their own.

The attorney for Paz, one of 29 women in a private sexual harassment suit against the company, yesterday asked Mitsubishi for round-the-clock protection for all 29 women after Paz received the death threat at the factory.

Paz told police she had been receiving threatening calls at her home in the

days before the written death threat was found. Paz is currently in seclusion and will only speak through her attorney.

The EEOC has used the private lawsuit as a road map in filing what it called the largest sexual harassment lawsuit since the passage of the 1964 Civil Rights Act. The suit against Mitsubishi, if the EEOC wins, could cost the firm more than \$10 million in fines.

EEOC Vice Chairman Paul M. Iga-saki said at the time the suit was filed that his agency "expects to show the court that from at least 1990 forward, the working environment at Mitsubishi was characterized by continuous physical and verbal abuse against women." He told of men grabbing the breasts and genitals of female co-workers, obscene drawings on the fender covers used to protect cars from scratches during the assembly process and a constant barrage of verbal harassment.

He also told how women who complained were threatened on the job and their work was sabotaged.

Mitsubishi officials, in meetings with plant employees, have made it clear

that the adverse publicity the company has been receiving over the harassment charges could reduce sales of Mitsubishi cars in the United States. If that happens, the company has warned that it could force a reduction in the work force here.

The potential for lost sales in a company that aggressively markets to women buyers was underscored in a letter released yesterday by a group of 10 congresswomen.

Writing both to Mitsubishi and Japan's ambassador to the United States, the letter, spearheaded by Rep. Patricia Schroeder (D-Colo.), called on the company to end its "retaliatory behavior and instead demonstrate good corporate leadership and citizenship in this matter."

The House members also warned the company that "the women of America will be watching your actions in this matter."

United Auto Workers officials at Local 2488 acknowledge that people in the plant are "scared to death" that they will lose their jobs as a result of the lawsuits.

"These are the best jobs in Illinois," said local union president Charles Kearney.

Skilled workers at the plant can earn as much as \$100,000 a year, depending on how much overtime they work.

*Staff writer Frank Swoboda contributed to this report from Washington.*



DATE: 04-24-96

PAGE: 12-A

### **Old-fashioned discrimination**

Tony Snow distorts the facts in criticizing a settlement to which the North Carolina Department of Corrections agreed after it was accused of discriminating against women ("Clinton Against Quotas?" Counterpoints, Monday).

First, he falsely claims that the suit was based solely on statistics. Not true. We brought the suit because the state was intentionally discriminating against women. Snow never mentioned that several of the correctional facilities placed a ceiling on the number of women they would hire. Nor did he reveal that a majority of the state's correctional jobs were put off-limits to women.

Second, the settlement does not force the state to embrace quotas. We oppose quotas. To remedy its discriminatory practices, the state agreed to make good-faith efforts to increase the number of qualified women without specifying a particular number.

Third, this case is about old-fashioned discrimination and long-standing, common-sense remedies. In fact, the suit was initiated in the Bush administration, and the remedies sought are those pursued in the Reagan administration.

Deval L. Patrick  
Assistant attorney general  
Civil Rights Division  
U.S. Justice Department  
Washington, D.C.

**IN WASHINGTON**

## Administration to suspend 'set-asides,' report says

The Clinton administration has decided to suspend, for at least three years, all federal programs that reserve some contracts exclusively for minority and female-owned firms, *The New York Times* reports today.

The *Times*, attributing its story to anonymous U.S. officials, says stringent conditions for reintroducing the programs after the three-year moratorium mean it is doubtful that they will ever return. But the White House has decided to allow federal agencies, if they can justify it, to use other lists of preferences, such as giving extra points in evaluating contract bids by minority and female-owned companies.

The programs, called "set-asides," and other affirmative action practices, have been targeted by Republicans since they took control of Congress in 1994 elections.

**BUDGET DISPUTE III:** Despite agreement that they should avoid another government shutdown, House Republicans and the White House are on a collision course over a spending bill that falls billions short of what President Clinton wants. The House voted 209-206 Thursday to extend funding for the rest of the fiscal year for scores of agencies. Without action, the agencies would be forced to shut down March 15 for the third time since November.

But the White House issued a fresh veto threat, saying the House bill "still falls short — by over \$7 billion — of funding the administration's priorities" for schools, the environment, crime, veterans and other programs. The bill would provide \$3.3 billion toward Clinton's requests, but it makes that money contingent on other savings being found.

The bill faces another test in the Senate, where a similar bill provides about \$2 billion more than the House.

Another looming budget crisis was postponed: Both the House and Senate approved and sent Clinton a bill extending for a week, until March 29, the government's ability to borrow and pay its bills.

— William M. Welch

NYT 2/2

Under the guidelines Federal agencies are first required to use racially neutral means, such as enhanced recruiting, stepped up advertising on minority radio stations and in minority periodicals to try to reach the five percent goal.

Federal agencies now have the discretion whether or not to use these types of methods first or not. "Prior, it wasn't required," an Administration official said. "It was a thing that depended almost entirely on the energy of the procurement officers."

The guidelines also require that agencies commission so-called "disparity studies" to determine what is the available pool of minority or female contractors who could provide a good or service in a given area. These studies also have to determine how large that applicant pool would be if not for provable discrimination in that particular industry.

Using these figures, agencies then determine a benchmark for the percentage of minority or female contractors it ought to have. That benchmark will determine what kind of affirmative action steps the agency may take. The further away from the benchmark an agency finds itself, the more blatantly preference means in contracting it may employ.

"It has to be a pretty egregious, persistent situation for set-asides to be used," a Justice Department official said today.

Representatives for civil rights groups and organizations that object to affirmative action declined to comment today, saying they had not yet seen the Administration's plans.

## The ACLU Takes Aim at the California Civil Rights Initiative

Minutes after the federal courthouse in San Francisco opened the day after Election Day, the ACLU asked the courts to undo voters' verdict on the California Civil Rights Initiative. The media were quick to predict that the suit will tie up implementation of CCRI. It's too soon to say whether this will happen, but even if it does, the thin legal reeds on which the lawsuit is based make success unlikely.

CCRI was very carefully drafted. In language echoing the Civil Rights Act of 1964, it provides that the "state shall not discriminate against, or grant preferential treatment to any individual or group on

### Rule of Law

By Clint Bolick

the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Because CCRI amends the California Constitution, in order to overturn it the ACLU must argue that it somehow offends the U.S. Constitution or federal civil rights laws.

It tries to do so in a suit representing the NAACP, minority and women contractors, the California Labor Federation and a purported class of more than 50,000 people "adversely affected by Proposition 209's prohibition of 'preferential treatment.'" The argument is that CCRI "singles out race and gender issues for special, adverse treatment and removes the race and gender issue of Affirmative action from normal political processes." Given that "public universities could still grant preferential treatment to some applicants over others based on whether their parents are alumni or have 'connections,'" the ACLU contends, CCRI places "special burdens on women or racial or ethnic minorities."

The ACLU pins its hopes on a 1982 U.S. Supreme Court decision, *Washington v. Seattle School District No. 1*, in which a 5-4 majority invalidated an initiative that forbade pupil assignments away from neighborhood schools for the purpose of racial integration while allowing such assignments for purposes such as special education or school overcrowding. Because integration was singled out, the court found that the law was not based on any "general principle" but instead impermissibly

"places special burdens on minorities within the governmental process."

Justice Lewis Powell and three others dissented, protesting the "unprecedented intrusion into the structure of a state government." The court has "never held, or even intimated, that absent a federal constitutional violation, a State must choose to treat persons differently on the basis of race," Justice Powell observed, adding that "a policy of strict racial neutrality by a State would violate no federal constitutional principle."

To underscore that point, the court the same day upheld a California initiative forbidding state courts to order busing except to remedy 14th Amendment violations. Writing for an 8-1 majority in *Crawford v. Board of Education of the City of Los Angeles*, Justice Powell said: "Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population." He went on: "States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice." Justice Henry Blackmun was even more explicit, warning that a contrary ruling "seemingly would mean that statutory affirmative-action or antidiscrimination programs never could be repealed."

CCRI fits safely within this framework. Unlike the Washington initiative, CCRI creates a "general principle" of nondiscrimination, forbidding race-based assignments of minority pupils just as it prohibits minority contract set-asides. Moreover, the preference programs were created by the state and its subdivisions, which retain the power to repeal them. The amendment expressly recognizes the supremacy of federal civil rights laws and exempts existing court orders as well as actions necessary to establish or maintain eligibility for federal funding.

Beyond arguing that an antidiscrimination law is constitutionally invalid, the anti-CCRI forces are compelled to contradict themselves in other ways. The contention that a state may not secure greater equal protection than is guaranteed by the 14th Amendment cuts against the principle—oft-cited by the ACLU in other cases—that the federal Constitution creates a floor, not a ceiling, for individual liberties. And the suggestion that racial preferences may not be repealed gives lie to the pervasive myth that such programs are in any way "temporary."

The ACLU is pursuing other tactics to buck up its fragile legal claims. It did the ordinary "forum shopping" by filing the suit in San Francisco even though the defendants are in Sacramento and the ACLU chapter is in Los Angeles. Beyond that, the ACLU doesn't want to take its chances with random judge selection. The case has been assigned to Judge Vaughn Walker, a Reagan appointee. But the ACLU is trying to get it transferred to Judge Thelton E.

Henderson, a Carter appointee, on the argument that it should be consolidated with a "related" case—a challenge to San Francisco contract set-asides that has nothing to do with CCRI.

The anti-CCRI forces also are trying to bring in the federal civil rights arsenal. Last week Jesse Jackson and National Organization of Women President Patricia Ireland met with Assistant Attorney General Deval Patrick and Deputy White House Chief of Staff Harold Ickes to urge that the Justice Department bring a lawsuit challenging CCRI.

Mr. Patrick is a zealous defender of preference policies but is constrained because the Justice Department may take legal action only against violations of federal civil rights statutes. And, as Attorney General Janet Reno candidly noted at a news conference last week, CCRI "does not affect federal law." Federal courts already have chastised both the Civil Rights Division, which Mr. Patrick heads, and the EEOC for abusing law-enforcement prerogatives, so another errant mission could prove extremely ill-advised.

As CCRI's opponents mount their resistance, Gov. Pete Wilson is taking steps to enforce it and Attorney General Dan Lungren to defend it in court. The initiative's drafters, represented by the Pacific Legal Foundation, have launched their own court action challenging several state programs that violate the amendment.

This post-Election Day legal barrage seeks to deny California voters' declaration of an end to racial preferences. All the energy spent trying to resurrect the dead could be channeled much more productively into efforts to make America's promise of opportunity a reality for our most disadvantaged citizens.

*Mr. Bolick is litigation director of the Institute for Justice in Washington, which is helping coordinate legal defense of CCRI.*

## Racial hand-ups

To encourage more bright and talented lawyers to practice in Delaware, a group of private law firms, the state bar association and state and federal agencies came up with an innovative recruiting tool. They set up a summer clerkship program for first-year law students which would, among other things, pay participants \$600 a week for 11 weeks to work at some of the agencies and law firms. Upon successful completion of the clerkship, participants would receive another \$2,000. Interested? There's just one caveat: Applicants must be white.

It's not hard to imagine the scandal such a program would cause. Just think of the journalistic umbrage, the Nightline cameras, the convention boycotts of Delaware, the lawsuits and the IRS threats to remove the plan's tax-deductible status. The program wouldn't last long.

Well, believe it or not, there was a segregated clerkship program in Delaware as recently as this year, with one important distinction. Only minorities could apply. If the U.S. Justice Department had its way, whites would still be banned.

The clerkship program actually began last year after published reports found that only 40 of the state's 2,091 lawyers were black. So the clerkship sponsors cited above got together to set up the program, which would both attract minorities to the state and encourage them to remain after receiving their law degrees. Apparently without the slightest sense of irony, they named it the Louis L. Redding Fellowship after the first black member of the Delaware Bar. Mr. Redding was counsel to the plaintiffs in a 1961 case in which the Supreme Court ruled against the practice of excluding blacks from lunch counters.

Two white students, who met all requirements for the prestigious fellowships except their skin color, sued, charging they were the victims of unlawful discrimination. With the help of the Washington-based Center for Individual Rights, they won a settlement that included \$20,000 in attorneys' fees, costs and damages. The settlement also precludes all

parties from participating in race-restricted summer programs, insofar as government agencies or taxpayer-backed organizations run them.

There is still one agency, however, that continues to defend the indefensible. The U.S. Justice Department says it sees nothing unconstitutional about the racial set-asides in the Redding program. No court case, the department says, "clearly establishes that federal actors are proscribed from participating in employment programs which, like the Redding Fellowship Program, rely on minority preferences."

Well, the courts have held that any such programs have to be "narrowly tailored" to serve some compelling governmental interest, such as remedying the government's own previous discrimination. So the broader the preference — including not just blacks but Hispanics, Asians, Aleuts and women who may or may not have suffered discrimination in Delaware — the more difficulty the Justice Department would have defending it. (The precise eligibility standards of the Delaware program will have to be sorted out in court.) Likewise, the program eligibility of out-of-state minorities, who may never have suffered discrimination in Delaware, raises question about just how remedial the program really is. All of which may help explain why other program sponsors have decided to settle.

The Justice Department has now defended racial preferences in a number of cases, including one in which a New Jersey school board chose to keep a black teacher rather than a white one based on skin color alone and another in which the University of Texas gave preferential admissions treatment to minority students. In each case, the courts ruled against it.

Perhaps it's time for lawmakers to give the Justice Department a chance to explain its obsession with skin color in congressional hearings. The department might start by explaining why it believes racial preferences should be restored in the name of a man, Louis Redding, who is remembered primarily for his work in abolishing them.

## Wanted: The Rights Stuff

### White House Faces Tough Task in Filling DOJ Civil Rights Job

BY BENJAMIN WITTES

President Bill Clinton had great difficulty filling the Justice Department's top civil rights job in his first administration.

It won't be any easier the second time around.

The departure of Assistant Attorney General Deval Patrick—who was tapped only after the failed nomination of law professor Lani Guinier and a long subsequent delay—creates a politically sensitive vacancy for the administration at an especially delicate time.

The African-American community, which gave more than 80 percent of its votes to Clinton this year, is worried about the exodus of black officials from top executive branch posts—and eager to ensure that

its support gets repaid. Texaco Inc.'s settlement of a well-publicized discrimination suit has fueled fresh concern about racism in the workplace. And California's election-day embrace of a hotly debated racial preferences referendum keeps the spotlight on the thorny issue of affirmative action.

Throw in the added pressures of a powerful civil rights community itching for action and a Republican-controlled Congress just as eager to hold the line against liberal incursions, and the pressures surrounding the Civil



Exiting civil rights chief Deval Patrick won kudos from activists.

Rights chief's job become abundantly clear.

Officially, the Justice Department's top managers remain confident that they'll be able to win confirmation

of the candidate of their choice.

"I don't think that Republicans in Congress would . . . deny the president

an assistant attorney general for civil rights who could carry out the administration's policies in that area," says Associate Attorney General John Schmidt. "I think that there's a recognition that the confirmation process is not the place where you can attempt to impose a policy position counter to what the administration has supported."

But four other department and White House officials acknowledge privately that replacing Patrick presents a huge problem.

"The list of plausible candidates who could be supported by the groups that support that administration, could be nominated by the president, could be confirmed, and would make everybody happy could be a null set," says one Justice official. "I cannot think of a single plausible candidate for the position."

Other observers, however, say there are a number of potential nominees who could expect enthusiastic backing from civil rights groups and bipartisan Senate support.

Patrick himself, who is set to depart on Jan. 20, did not respond to an interview request.

### ADVOCATE WANTED BY SOME

While the White House focuses on other vacancies, pressure is mounting.

"Whoever the nominee is has to be someone who is an advocate for civil rights, civil liberties, and equal protection," says Kweisi Mfume, head of the National Association for the Advancement of Colored People. "For those of us who

12

Cont'd

ave worked very hard to create an energetic sense of advocacy in the streets, I would like to see the same sense of energetic advocacy coming out of the administration," adds Mfume, a former House Democrat from Maryland.

Adds Rep. John Lewis (D-Ga.), who has been a civil rights leader since the 1960s,

"There is a need for . . . someone with the commitment and dedication to the idea that there is a role for the federal government to play, a major role, to carry out the laws and statutes that we have on the books."

Opponents of affirmative action, however, say they will not stand for the sort of appointment Mfume and Lewis describe.

"If Clinton looks to the liberal special interest groups for his nominee . . . such a nominee could be defeated," says Clint Bolick, who

worked in the Civil Rights Division in the Reagan administration and now serves as vice president and director of litigation at the Institute for Justice, a libertarian legal interest group. "Any nominee is going to be closely scrutinized. There is no one who is going to sail through."

So far, the administration grapevine is unusually quiet; the president, of course, still has not formally announced whether he wants to keep Attorney-General Janet Reno on the job, and the plans of other top-tier department managers also remain unclear.

### POSSIBLE NOMINEES

And the civil rights groups, perhaps wary of setting up a target for conservative sniping, have also largely refrained from floating names. Still, one source familiar with the nomination process lists several possible nominees who would satisfy the civil rights groups' qualifications.

These include Joseph Sellers, director of EEO projects at the Washington Lawyers' Committee for Civil Rights and Urban Affairs; Jeffrey Robinson, name partner at



Associate Attorney General John Schmidt doesn't think GOP will block White House civil rights pick.

D.C.'s Baach Robinson & Lewis; Theodore Shaw of the NAACP Legal Defense and Education Fund; Judith Winston, general counsel of the Department of Education; and Richard Roberts, currently head of the Civil Rights Division's Criminal Section.

Filling the top civil rights slot has always wedged Clinton between his left flank and a more conservative Congress.

His nomination of Guinier, a professor

at the University of Pennsylvania Law School, was derailed following criticism of her legal writings as too radical. His next proposed nominee, then D.C. Corporation Counsel John Payton, withdrew his name from consideration when members of the Congressional Black Caucus voiced concerns that Payton was

inadequately committed to enforcing voting-rights law.

But this time, there are added complications. The Senate is now controlled by Republicans. And while Judiciary Committee staffers did not respond to requests for comment on the nomination process, Bolick says a fight seems likely.

"The Republicans on the Hill view this nomination as an awfully good forum to talk about racial preference issues," he says.

Another new factor could be the injection of abortion politics into the nomination debate.

A key element of Patrick's legacy is the aggressive enforcement of the 1994 Freedom of Access to Clinic Entrances (FACE) Act. And abortion rights activists are insisting that his successor be similarly committed.

"Deval Patrick enforced the law. He opened investigations, he brought lawsuits, he brought prosecutions, and he obtained convictions—and that sent a very strong message," says

Marcy Wilder, legal director of the National Abortion and Reproductive Rights Action League. "Clearly, we need someone in that position who will continue to enforce the FACE law with vigor."

All this, of course, could be a recipe for another long period of delay.

Whoever ultimately gets the job, civil rights advocates say they will greatly miss Patrick, who came to Justice as something of a question mark in the minds of civil rights leaders.

A young corporate lawyer who did not previously enjoy a particularly high profile in the civil rights community, Patrick now wins extremely high marks from these activists, who praise his work within the administration.

"Deval Patrick helped rebuild the Civil Rights Division after 12 years of dismantlement efforts," says Ralph Neas, long-time executive director of the Leadership Conference on Civil Rights who signed on as of counsel at D.C.'s Fox, Bennett & Turner last year.

Adds Georgina Verdugo, regional counsel of the Mexican American Legal Defense and Educational Fund: "He always has been extremely open to our concerns."

Among his other high-profile actions, Patrick helped spur federal investigation of a rash of church burnings; worked on the home-stretch phase of the government's bid to force the all-male Virginia Military Institute to accept women; and drew conservative ire for reversing the Bush administration's position

Firms that transmit electronic returns say about 25% are being rejected because of inaccurate Social Security numbers. Last year's rejection rate: less than 5%.

Intuit, which electronically files returns prepared on its MacInTax and TurboTax software, has added 20 service representatives to answer questions about rejected returns.

Mark Goines, vice president of Intuit's personal tax group, has been filing electronically for years.

This year his return was rejected because his wife of 20 years never changed her name with the Social Security Administration. They refiled the return using her maiden name and it was accepted.

Slight differences in names — Tracy instead of Traci — also will cause a return to be rejected.

In most cases, refunds will be delayed if Social Security numbers don't match. Exception: a couple who files on paper and the spouse's Social Security number doesn't match. Their refund will come with a letter telling them to fix the error.

Despite this year's outcries from taxpayers and businesses, the IRS has no intention of letting up on its anti-fraud campaign.

"You've got to be able to verify the claims, and that's really what we're doing," Richardson says. "It's no different than if someone filed a claim with his or her insurance company."

Contributing: Becky Beyers

## Crackdown putting refunds on hold

*Taxes are on everyone's mind. And because the Internal Revenue Service has stepped up its anti-fraud effort, more people are upset with the tax system this year. USA TODAY's Anne Willette talked with IRS Commissioner Margaret Milner Richardson:*

**Q. Are more refunds being delayed this year?**

**A.** Most definitely ... We said at the outset that we were going to slow down the process of refunds. ... I'm disappointed and I'm sorry that there are some people who are legitimately entitled to refunds whose refunds have slowed down, but we've also uncovered 341 (fraud) schemes this year already ... Our desire is to make our system so unattractive that crooks will go elsewhere.

**Q. If refunds are being delayed, why should taxpayers file electronically?**

**A.** If they're entitled to an earned income tax credit and they file an accurate return electronically, they will still get that refund more quickly than filing on paper. The other thing I'd like to make sure people understand is that we are scrutinizing paper returns as well as electronically filed taxes, so this is not just an electronic filing issue. It's not just an earned income tax credit issue at all. We are very concerned ... about refund fraud. ... There are people out there who are basically ripping off people who have worked hard and deserve refunds.

**Q. What can people eligible for the earned income tax credit do to get their money faster?**

**A.** One of the things that we've been trying to get the word out about is that you don't have to wait to file your return to get the earned income tax credit. It's payable in advance in each paycheck. Employees can get up to \$105 a month in their paychecks.

**Q. Besides a speedy refund, what's the advantage to filing electronically?**

**A.** The accuracy rates are so much higher than they are with paper processes. We have almost 99.5% accuracy with electronically filed returns. Whereas in the paper processing, the accuracy rate is somewhere between 83% and 86%. (On paper returns) we key-punch in the data, taxpayers make errors when they add and subtract, and between the two of us, we make a significant number of errors.

**Q. Why would taxpayers pay a fee for that?**

**A.** We have this year 242 (IRS) offices where they can file electronically for free. We have another 1,000 volunteer sites around the country where we have



By Tim Dillon, USA TODAY

**RICHARDSON:** "Our desire is to make our system so unattractive that crooks will go elsewhere."

free electronic filing. We are trying to make it available to people on a no-cost basis. ... More employers this year are offering free electronic filing.

**Q. The response to your anti-fraud efforts?**

**A.** I think some of the people who are making the loudest noises were disappointed because they didn't tell their clients what they knew we were going to be doing and what we announced we were going to be doing. ... Most of the responses that we've received have been positive. A lot of people who have received letters notifying them that we're holding up their refunds or at least a portion of them have not responded to us. And some that have, have admitted that they probably weren't entitled (to the refund). So I'm not so sure that the response, despite what some people have tried to orchestrate, has been nearly as negative.

## Washington Talk

# Affirmative Action, by Another Name

By STEVEN A. HOLMES



WASHINGTON, March 9 — Judge Stanley Sporkin of Federal District Court as an advocate of affirmative action?

Judge Sporkin, who was appointed by President Ronald Reagan, might not think so. But when he dismissed an out-of-court settlement that was to forestall prosecution of the Microsoft Corporation on antitrust charges he sounded suspiciously like a person making the case for preference programs based on race and sex.

"Simply telling a defendant to go forth and sin no more does little or nothing to address the unfair advantage it has already gained," Judge Sporkin said recently, in declaring that the settlement did little to help Microsoft's competitors catch up. They had been the victims of what the Justice Department said was Microsoft's anti-competitive practices.

Substitute the words "white males" for Microsoft and "minorities and women" for its competitors, and the judge's words sound remarkably similar to a rationale for affirmative action.

"If you look at it in a broad sense, in terms of a remedy, there are similarities," said David Neely, assistant dean of the John Marshall Law School in Chicago. "The legal definition of affirmative action is a remedy for an illegal act — discrimination."

Whether supporters of affirmative action will seize on Judge Sporkin's reasoning — and more importantly, whether the country will heed them if they do — are open questions. But

the judge's opinion is an example of one little-noticed fact in the current debate: many of the principles underlying affirmative action, including the use of quotas, have been accepted in spheres outside the volatile world of race and sex relations without a peep from conservatives.

Take, for example, the concept of compensation for past injustices: There is the Government's payment of \$1.2 billion to the families of Japanese-Americans who spent World War II in internment. The payment to the Japanese also affirmed the notion of the sons paying for the sins of the fathers. Nearly one-third of those who paid taxes last year and, therefore contributed to the reparations payments, were born after World War II. They could not have supported the Government's policy of putting Japanese-Americans in prison camps.

And what of quotas? In 1986, the Reagan Administration negotiated a trade agreement with Japan under which that country set a goal of American manufacturers gaining 20 percent of Japan's market in computer chips. The policy, though highly contentious, is still in force. Yet conservatives, who are often backers of free trade, saying purchasing decisions should be made solely on quality and merit, have generally not criticized the deal as a manipulation of the market.

The computer chips agreement is rare in international trade negotiations — as are rigid quotas in affirmative action. But the use of numerical goals to measure the success of opening the Japanese market to American goods and services is not. In recent rounds of trade talks the

Japanese have agreed to the use of certain goals like increasing the number of foreign bidders for government procurement contracts or raising the number of American car dealerships in Japan.

Such actions — which encourage the diversification of the Japanese market and the use of numerical goals to determine whether a good faith effort is being made — are the staples of much of affirmative action policy.

"It's kind of a similar model," said John Skretny, a sociology professor at the University of Pennsylvania who is writing a book on affirmative action. "You could say, 'Let the free market happen.' But whether it's trade with Japan or the labor market, Americans expect things to happen. And when they don't, they start to lean on institutions to make them happen."

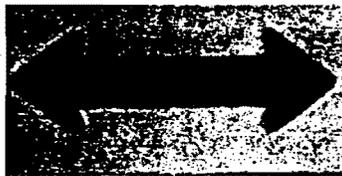
But marshaling examples of the acceptance of some of the precepts underlying affirmative action in no way guarantees the policy will be maintained. Its supporters have to contend with the moral argument that favoring a person — like holding him or her back — because of race or sex is against the modern-day notion of nondiscrimination.

Perhaps more importantly, the issue may no longer turn on legal or even moral notions, but on political ones. Opinion polls show that about 70 percent of Americans oppose extending preferences to people based on race. And, in a democracy, when such a large majority has soured on a given policy, its days are usually numbered, even if the underlying principles have any validity.

# GOVERNMENT EXECUTIVE

GOVERNMENT'S BUSINESS MAGAZINE • NOVEMBER 1996

## NO WAY OUT



BY K.C. SWANSON

**A**rthur Hill, a manager for the Federal Aviation Administration and member of the Federal Managers Association, isn't taking any more chances with equal employment opportunity (EEO) complaints. He's been closely involved in several EEO complaints which, he contends, were unfounded.

As a result he's radically altered his management style, consciously distancing himself from some employees. "You meet a minority or a woman, you keep your conversations to a curt manner and that's it. You don't try to be friendly," says Hill. "Friendliness can be misconstrued, twisted out of context if you're just joking with somebody. You're better off as a manager isolating yourself from that section of the workforce."

As a government supervisor, Hill was held partly responsible for two separate complaints that his office environment was hostile to women. In both cases, employees had made inappropriate and potentially offensive remarks. But Hill said the complainants didn't confront the offenders before filing EEO complaints, and he was disappointed that top management appeared eager to settle the claims without proper investigation. Because remaining in his management position would be "counterproductive," he voluntarily took a reassignment.

Virginia Stiehl-Delgado, a former EEO officer at the Naval Facilities Engineering Command, has testified several times before Congress about her nightmarish experience with the complaint process. In 1983, she filed an EEO complaint against her manager—a Navy admiral, who was the deputy EEO officer—charging that he had created a hostile working environment by withholding *K.C. Swanson is an assistant editor for National Journal.*

information she needed to do her job and by making derogatory comments about the intelligence of women in the office.

"He zeroed in on me because I was the only one who stood up to him," she recalls. "I was called obstreperous and disrespectful." Not long after filing the complaint, Stiehl-Delgado, who had spent 35 years working for the Defense Department, was fired for "nonperformance." Her attorney dropped her case when she ran out of money. During the following five years, she developed heart problems and lost eight teeth due to stress.

Stiehl-Delgado hired another lawyer and a federal court ultimately forced the agency to award her a monetary settlement. However, the offender advanced in his career at the agency and eventually gained a reputation as an authority on sexual harassment.

Hill and Stiehl-Delgado, who represent opposite ends of the spectrum, share a common hatred of the EEO complaint process. They are worst-case scenarios in a system that most agree needs fixing.

1/5  
Already, this year, several prominent cases have drawn attention to the government's occasional failure to provide equal opportunity for employees:

■ In January, the State Department agreed to settle a 10-year-old lawsuit, parceling out \$3.8 million and granting promotions to black foreign service officers who had alleged racial discrimination.

■ In June, a group of women who had won \$2.5 million in back pay and attorneys fees in a 20-year-old class action suit against the Navy filed a motion for summary judgment, seeking interest on their back pay.

■ In July, the Bureau of Alcohol, Tobacco and Firearms settled a 6-year-old class-action discrimination lawsuit filed by black employees by agreeing to pay \$4.7 million in compensatory damages and back pay.

■ In July, the U.S. Court of Appeals paved the way for 1,100 women in a 19-year-old class action sex discrimination suit against the U.S. Information Agency to seek monetary damages.

The sticky issue of EEO complaints is not unique to government, but federal employees are about 10 times more likely to file discrimination complaints than nonfederal workers (including state and local government workers, who use the same process as private sector employees in filing EEO complaints).

Equal Employment Opportunity Commission (EEOC) legal counsel Ellen J. Vargyas says federal employees tend to be more aware of their legal rights and may be more likely to file claims because they can do so within their agency. "It's very easy to file, there's no cost involved—federal employees basically have nothing to lose," says George Nesterzuck, staff director of the House Government Reform and Oversight

2072

# NEW YORK TIMES

ity Solutions, a Nashville company that helps companies design work and family policies, said that today many companies were indeed equating the use of family-friendly policies, like flextime, with a move to the Mommy track.

Family-friendly companies may not, of course, have evil lurking in their hearts. "I don't know if the 'good' companies are doing it on purpose," Ms. Lipman-Blumen said. "I think they think they are doing great things for women. But that's the first step. They need to take the next."

"And," she added, "the other companies need to make life more livable for both men and women who want to get to the top."

But if the reasons are unclear, the lack of progress at the top is not. "We're not better off than we were a few years ago," Ms. Ely said. "It's not happening, except at the margins. Some big companies call me, concerned about high turnover among women. They want me to come and give a talk to senior managers. And then nothing happens."

The message to women is also transparent: "For most working women, for those looking for a family life and to move up the corporate ladder," Ms. Friedman said, "this is not something the corporation is going to make easy for you."

2/5

## AN ALTERNATIVE TO FORMAL COMPLAINTS

Some agencies are attempting to circumvent the formal EEO complaint process with alternative dispute resolution (ADR) methods that can save money and, more importantly, bolster the morale of employees caught in stressful situations. ADR encompasses a wide range of techniques, including mediation, fact-finding and arbitration.

Programs emphasize outcome over process, focusing on the need to get two parties talking and patch up fraying work relationships before they are irreparably damaged.

Early verdicts on ADR are encouraging. An early dispute resolution program established at Walter Reed Army Medical Center in 1994 has resolved 69 percent of potential complaints. By resolving problems early, program director Lawrence L. Nelson estimates Walter Reed has saved more than \$5 million in administrative and productivity costs.

"We try to encourage eye-to-eye contact and direct communications" between the two parties in dispute, says Nelson. By the end of a session, he says, "You often see tears shed. People hug each other because they really like each other; they just didn't have a chance to get past that conflict."

At the beginning of an ADR session at Walter Reed, trained mediators lay out the ground rules: Participants should keep interruptions to a minimum; whatever is discussed will remain confidential; and there are no time limits. Then the employee alleging a problem simply starts telling his or her side of the story, to which the other party will later respond. Nelson sums up the program's philosophy simply: "There are no perpetrators, there are no offenders. There are two people who have a conflict."

Walter Reed now trains all new managers in conflict resolution techniques,

hoping that most disputes will be resolved within individual offices. The facility plans to implement an "early neutral evaluation" program, in which mediators would be dispatched directly to offices to settle disagreements. For more serious conflicts, it is experimenting with using a neutral third party to conduct fact-finding missions.

At the Pentagon, an ADR program run by the Naval Sea Systems Command has proven similarly successful. During its first year, the Early Resolution Unit helped resolve 84 percent of the disputes it handled. Donald Faulkner, who heads the program, attributes its popularity partly to the fact that participants have control over the process. They are allowed to choose among various options, including the

### GET HELP EARLY

For tips on alternative dispute resolution programs, contact the Atlanta Justice Center, a nonprofit consulting group, at (404) 523-8236 or go to the center's Web site at [www.justicecenter.org](http://www.justicecenter.org).

For a referral to a mediation center, contact the American Bar Association at (202) 662-1680 or go to its Web site at [www.abanet.org/dispute](http://www.abanet.org/dispute).

use of a professional arbitrator or a volunteer ombudsman trained in mediation and counseling techniques.

At Naval Sea Systems, as at Walter Reed, ADR is mandatory for managers involved in a dispute. Employees can opt out, but many try the process.

Nelson and Faulkner alike say ADR methods tend to improve the relationship between two parties even when they fail to reach agreement. "With downsizing, morale is a key consideration. We want to intervene at the earliest possible stage, which will hopefully help maintain or enhance working relationships," says Faulkner.

both federal managers and employees—virtually everyone, it seems, who is not steeped in EEO law—and many say the system is a drag on productivity.

### Managers Feel Trapped

Managers and employees have different ideas about the problems with the EEO complaint process and how they can be fixed. While managers, too, need a vehicle to file discrimination or sexual harassment claims, they believe the current system makes their job harder.

In an era of downsizing, managers are under increasing pressure to weed out employees whose performance is below par. Some say fear of being slapped with an EEO complaint discourages them from taking action against poor performers. "What might be a performance problem could come back as some kind of EEO complaint," says Nesterczuk. "We've been hearing from federal managers consistently and we sense that more and more feel intimidated by the process and exposure to false complaints."

Responding to a questionnaire on the EEO appeals process sent out by the National Academy of Public Administration, 44 human resources employees and EEO officers at federal agencies said their leading concern was the system's inability to weed out so-called "frivolous" complaints. While the number of respondents was far too small to be statistically significant, the results seem to indicate a perceived weakness in the system.

A handful of complaints are patently ridiculous. In testimony before Congress, Timothy P. Bowling, associate director of federal management and workforce issues at the GAO, noted two such complaints cited in *Federal Human Resources Week*, an independent newsletter. In one case, an employee said he was fired partly because of his status as an "American-Kentuckian." In another, a spurned lover filed a complaint against a co-worker alleging that she "harassed him by pointedly ignoring him and moving away from him when they had occasion to come in contact."

Outlandish claims aside, does the fear of credible complaints constrain managers? In some cases, yes. In a Merit Systems Protection Board (MSPB) poll of more than 5,000 supervisors, 17 percent said they had decided not to take formal action against poor performers because they feared being accused of discrimination. Another 34 percent said they "lack confidence in the system" in dealing with lax workers. "There's an attitude that, 'I'm a government employee and

subcommittee on civil service.

While it is relatively easy for federal workers to file a claim, the resolution process is complicated. The system for resolving federal EEO complaints encompasses five federal agencies and involves

760 career government employees and 21 presidential appointees. According to a General Accounting Office (GAO) report, the government spent nearly \$100 million in fiscal 1994 on employee complaints and appeals. EEO laws and regulations perplex

## MANAGE WITHOUT FEAR

Here are tips from government supervisors on managing without fear of EEO complaints:

- Maintain accurate, up-to-date position descriptions.
- Set forth clear job standards so that employees understand what they need to do to get top ratings in their appraisals.
- Don't allow performance problems to continue unchecked; document problems when they occur.
- Be aware that outside forces (family or health problems) may be contributing to employees' poor performance; be flexible and keep the lines of communication open.
- Tell employees what they're doing correctly as well as what needs to be changed.
- Do both mid-year and annual performance appraisals and keep them on file for employee reference.
- During appraisals, help employees create career goals by asking them where they see themselves in one year or five years.
- Work to establish an office culture in which top managers support supervisors' efforts to discipline poor performers.
- Be open to the possibility that employees may not be in the job that best suits their abilities; be aware of the need to rotate employees into different jobs.

I've got protections up the wazoo, and you can't get rid of me," says Hill.

Federal regulations do make it difficult to get rid of under-performing employees. Managers must document performance problems and monitor employees' progress

after formally granting them an opportunity to improve. Faced with the cumbersome, time-consuming process, some managers continue to accept substandard work.

Others ultimately take action against poor performers, sometimes going so far as to fire them. Between 1986 and 1994, federal managers fired an average of 12,000 workers a year for poor work performance or misconduct. On average, employees appeal about 20 percent of firings and other disciplinary actions to the MSPB. But most complainants shouldn't expect to get their jobs back. In about 85 percent of such cases, the MSPB upholds managers' actions.

Not surprisingly, employee advocates say managers are too quick to blame the EEO complaint process for inefficiencies. Acting Executive Director Lynn Eppard of Federally Employed Women (FEW), an association of women employees and managers, says supervisors sometimes complain about the process rather than take responsibility for poor management procedures. "The fear comes in when managers know they're not doing things correctly," she says.

But apprehensions about the EEO process are not confined to a handful of bad managers, says FEW President Dorothy Nelms, who conducts sexual harassment and EEO compliance training sessions with managers throughout the country. "In almost every class I have with managers above mid-level, one of the first questions I'm asked is, 'What if I'm falsely accused?' They're beginning to really believe it [can happen to them]."

Part of the fear may stem from confusion about what constitutes inappropriate behavior. On both sides of the issue, attorneys and advocates agree that offenders aren't always aware they've acted in a discriminatory fashion, or in a manner that might be perceived as discriminatory. Federal employees may also face an institutional reluctance to believe that deliberate discrimination exists. "There are very few individual discrimination cases where people can show that somebody set out to treat them badly because they were a woman or were handicapped or a minority, because people don't do that," says G. Jerry Shaw, general counsel of the Senior Executives Association, which represents high-level government managers.

In addition, employee advocates point out that supervisory appointments are sometimes made on the basis of technical rather than managerial skills, and federal managers don't always get training to bring them up to speed on issues like sexual harassment and cultural sensitivity. The government has not set minimum standards for such training, al-

lowing agencies to design programs to meet their own perceived needs.

Even the best-intentioned training sessions can backfire. Sometimes workshop leaders take a heavy-handed approach, which alienates the very people whom training is meant to reach. One federal manager who attended a three-day cultural diversity workshop said a number of white males left after the first day and didn't come back because they believed workshop leaders were "beating up on white males."

### Culture of Discrimination

In any case, training alone won't compensate for an office culture in which discrimination is implicitly tolerated. A 23-year-old employee at the Commerce Department who has experienced ongoing sexual harassment said she had attended a two-hour training session on sexual harassment at work. But while she thought the training was a positive step for the agency, she was inclined to take the advice of seasoned office veterans. They warned her not to file a complaint, lest she "screw herself out of a job."

The number of EEO claims filed annually has risen dramatically over the last few years, up 55 percent from fiscal 1991 to a fiscal 1995 total of 27,472 complaints. Lawyers attribute some of the increase to the 1991 Civil Rights Act, which gave federal employees the right to seek compensatory damages up to \$300,000 in discrimination cases, and to tighter deadlines imposed in 1992 on EEO claims processing.

In 1994, 68,000 employees contacted their agency's EEO office for counseling, the step which precedes the filing of a formal discrimination complaint. In about two-thirds of those cases, the complaint was not filed or the agency resolved the problem.

In some cases, managers grumble, agencies appease complainants to avoid damaging publicity even if complaints are questionable. "Even if there's clearly no discrimination, [the agency's] approach is, 'What can we do to make this go away?'" says Hill. One federal manager was threatened with an EEO complaint when she sought to put a poor performer on an improvement plan. "I had a lot of pressure put on me by the EEO [office] to forget it, so I ultimately did," she recalls. In 1994, about two-thirds of MSPB cases and one-third of EEOC cases were settled before they could be decided on their merits.

Many workers don't settle, though. In fiscal 1994, 24,600 filed formal discrimination complaints with their agencies. At this stage, EEO employees or agency subcontractors investigate and record an incident, explain the EEO process to complainants

4/51

and, ideally, facilitate a resolution.

At this point some complainants notice subtle, or not-so-subtle, shifts in the attitudes of their managers. Reprisals against complainants are not uncommon, say employees, and may include punishments for minor infractions like tardiness, close scrutiny of time-off requests, reduced opportunities for training and arbitrary changes in work assignments. Workers may also notice a change in their work evaluations, says Eppard of FEW. "Their performance [reviews] start going down; there are sometimes dramatic swings that can't be

ment at the American Federation of Government Employees. "There's no great conspiracy; these agencies are just in the business of doing other things."

After completing investigations in discrimination cases, agencies turn over findings to the EEOC field office, and a complainant may attend a hearing to present his or her case before an administrative judge. After reviewing the complainant's investigative file, the judge issues a recommendation—not a ruling—to the agency, which then issues a decision on the complaint. Lawyers who have represented federal em-

discrimination cases. The Merit Systems Protection Board deals with firings and other disciplinary actions. The Office of Special Counsel focuses on prohibited personnel practices like nepotism and Hatch Act violations and also considers reprisals against whistleblowers. The Federal Labor Relations Authority adjudicates disputes between agencies and unions. And the Office of Personnel and Management reviews job classifications.

Some appeals agencies have overlapping jurisdiction, which critics say contributes to systemic inefficiencies. For example, a com-

## MORE LIKELY TO FILE

**Federal employees, especially EEOC workers, are more likely to file discrimination complaints than their private sector counterparts because they are more familiar with their legal rights and can file claims more easily.**

	# of EEO complaints filed by federal employees	# of complaints per thousand federal employees	# of EEO complaints filed by EEOC employees	# of complaints per thousand EEOC employees	# of EEO charges filed by private sector employees*	# of complaints per thousand private sector employees**
Fiscal 1992	19,106	6.1	106	37.9	70,399	.67
Fiscal 1993	22,327	7.6	87	31.0	87,942	.87
Fiscal 1994	24,592	8.4	76	26.8	91,189	.82
Fiscal 1995	27,472	9.7	53	19.0	87,529	.77

\* Figures include state and local employees, but exclude agricultural workers.

\*\* Figures based on totals including employees who are ineligible to file EEO complaints.

Source: EEOC and Bureau of Labor Statistics

reasonably explained." Oscar Eason Jr., president of Blacks in Government, says it is not uncommon for employees to follow up their first EEO complaint with another complaint to protest retaliation.

The investigation process is often perceived as weighted against employees, since agencies investigate their own personnel and practices. EEO employees may fear they could injure their careers by overzealously pursuing claims against the agency, and critics say they lack incentives to dig to the bottom of a case. "The system is tilted in favor of management, because the ultimate report is done by an EEO officer who answers to the head of the agency," says one former federal manager.

Also, EEO employees don't always comply with time limits. "I think agencies attempt to follow guidelines, but there's no way an employee can say, 'Time's up,'" says Joe Henderson, the supervising attorney for the Women's Fair Practices Depart-

ment point out serious limitations in the authority granted to EEOC administrative judges, who can't compel witnesses to testify or require agencies to hand over incriminating documents during hearings.

Perhaps more importantly, agencies are not required to abide by EEOC recommendations, and critics say agencies disproportionately reject findings against them. In fiscal 1994, agencies accepted only 41 percent of the EEOC's findings of discrimination; they accepted 83 percent of findings of no discrimination.

Workers can appeal agency decisions, however, and an increasing number are choosing to. Between fiscal 1991 and fiscal 1994, the number of appeals to the EEOC increased by 42 percent.

### A Tangle of Agencies

There are four agencies besides the EEOC which consider federal workers' appeals, though the commission handles the bulk of

plaintiff alleging he or she was fired because of discrimination would first appeal to the MSPB. If the MSPB upheld the dismissal, the complainant could appeal to the EEOC. Such cases are rare, though. In fiscal 1994, the EEOC considered appeals of 200 MSPB nondiscrimination rulings. It disagreed with the MSPB in only three cases. In each of those cases, the MSPB subsequently adopted the EEOC's position.

Others criticize the system because federal workers, unlike their private sector counterparts, are allowed both a hearing before a judge and an opportunity to appeal their complaint to the EEOC. Some say they're unfairly allowed "two bites of the apple." But federal and nonfederal workers alike can choose whether to pursue their claims in administrative or judicial forums, says Vargyas of the EEOC. "It's important not to isolate out one element" for comparison, she says.

By another measure, government em-

ployees have fewer legal protections than those in the private sector. The 1991 Civil Rights Act gave private sector employees a powerful legal weapon to brandish in discrimination cases: the right to ask for compensatory and punitive damages. Government employees can request only the former. Faced with the prospect of huge settlements, private sector employers may be more likely to deal harshly with discriminatory behavior.

The administrative complaint process was originally conceived as a way to solve problems outside the courts. Ironically,

of the agencies processing cases. The spiraling number of EEO complaints has increased the amount of time it takes to resolve cases. Between fiscal 1991 and fiscal 1994, the backlog of requests for EEOC hearings increased by 65 percent. The most recent statistics reveal the average time from the filing of a complaint to the commission's decision on an appeal was more than 800 days.

The process doesn't end even when appeals agencies rule in favor of complainants. Attorneys for employees contend that agencies don't always comply with settlements.

and solutions. A task force at the EEOC is studying the need for reforms in the federal sector. In February, President Clinton issued an executive order for agencies to review their adjudicatory processes with an eye to speeding up resolution and to encourage the use of alternative dispute resolution (ADR), an increasingly popular mechanism that seeks to defuse workplace arguments before they become formal complaints.

As recently as 1992, some regulations governing EEO complaint processing were modified to streamline and impose time limits on claims processing. Those familiar with the system say the changes, while helpful, didn't go far enough.

The push for more fundamental reforms gained new momentum in 1994, when the proposed Federal Employee Fairness Act won backing from civil rights activists, labor unions and federal managers groups. The bill would give the EEOC primary responsibility for claims processing and grant administrative law judges wider latitude to weed out frivolous cases. It also would encourage the use of alternative dispute resolution. After being voted out of key committees in the House and Senate, the proposal fell by the wayside when congressional campaigns began heating up in 1994. It was reintroduced in the House in July 1995, but hasn't been voted on in committee.

A recent initiative favored by the Administration, the 1996 Federal Personnel System Reinvention Act, would give managers more latitude with a streamlined procedure for firing poor performers. It would also eliminate the right to appeal denials of in-grade promotions and pay raises. The proposal hasn't been voted on in committee.

As originally written, an omnibus civil service reform bill in the House would have made two significant changes in the EEO process. It would have required those alleging discrimination to choose one forum for appeals, and it would have prevented them from repackaging an unsuccessful complaint and attempting to pursue it at a different appeals agency. Both those provisions were dropped last summer, due to lawmakers' objections and the protests of employee groups and unions. The House subsequently passed the bill, but the Senate didn't take it up before adjourning in October.

Nevertheless, those on both sides of the complaint process say there's growing momentum for change. In an era of federal belt-tightening, the expensive, polarizing EEO process is a clear candidate for a makeover. Waves of recent downsizing have highlighted the need to streamline disciplinary procedures for poor performers and make the federal workforce more efficient. □

## DISCRIMINATION COMPLAINTS ON THE RISE

	Fiscal 1991	Fiscal 1995	Percent Increase
Complaints filed with employing agencies	17,696	27,472	55.2
Requests for EEOC hearing	5,773	10,515	82.1
Appeals to EEOC of agency final decisions	4,167	8,152	95.6

Source: EEOC

though, some federal workers now rely on lawyers to help them navigate the complex system. Nelms reported that many FEW members choose to go into debt to pay for a lawyer rather than go through the arduous process alone. Llewellyn Fisher, former general counsel for the MSPB and one-time associate general counsel for OPM, observed in congressional testimony in 1995 that "only a naive employee would proceed without the assistance of an attorney or other counsel."

Finding a lawyer who'll take an EEO case can be difficult, says attorney Joseph Sellers, who heads a coalition of civil rights groups and labor unions pressing for reforms in the process. "There are a number of lawyers in town who will not touch a case with the federal government because they believe the federal government is so immune to market pressures. It can wage a war of attrition." Jane Lang, a Washington attorney at a law firm specializing in class action discrimination cases, recently decided not to take any more federal EEO cases after settling an eight-year case against the Labor Department. During that period, a stream of U.S. attorneys came and went, and Lang was obliged to continually educate newcomers on details of the case.

But time lags are not necessarily the fault

Lang was frustrated by inadequate enforcement efforts. Without a provision for a third-party enforcer, she says, federal employees end up "getting the short end of the stick."

Critics charge, too, that discriminators get off too easy in the federal government. In theory, they risk losing their jobs, but in practice, little happens to them. The EEO complaint process is focused on helping victims rather than punishing offenders. When discrimination or harassment is proven, complainants may be eligible to receive back pay, promotions, or reassignments and recover attorneys fees and costs. However, says Sellers, "Agencies are loath to discipline proven discriminators. They advance in their careers. They thrive." The Commerce Department employee who had been sexually harassed said two female predecessors who had also been harassed simply left their jobs when it became clear that no one would tell the offending manager to leave them alone. The employee recently applied for a transfer.

### Finding a Fix

What can be done to improve the EEO complaint process? There's been no shortage of proposals. Sellers estimates that as many as 12 congressional hearings have been held over the last 10 years to examine problems



## SPECIAL REPORT

*This is the first in a series of articles on the upcoming national election and its possible impact on labor and employment issues.*

### Politics

#### Candidates Drop Affirmative Action As Major Theme In Campaign 1996

Affirmative action, quotas, preferences, and set-asides are politically charged words that once were expected to dominate election-year rhetoric during the 1996 presidential campaign—but so far that has not happened.

But national attention on the emotionally charged issue could be renewed as Californians prepare to head to the polls in November and vote on a ballot initiative to roll back most of the state's affirmative action programs.

The issue also resurfaced briefly in the Oct. 9 debate between Vice President Al Gore and his opponent Jack Kemp. Even so, the anti-affirmative action banner has fallen to the wayside, although just a year ago the issue was a high-profile, divisive topic in state legislatures, Congress, and the White House, with opponents of affirmative action vowing to wipe out national, state, and local programs in the workplace, colleges, and universities.

What happened? Advocates from both sides point to election-year politics, divisions within the Republican Party, and shrewd maneuvering by the White House as factors pushing affirmative action off the radar screen as a national campaign issue.

On the campaign trail, GOP presidential candidate Bob Dole speaks of equal opportunity, but shies away from addressing affirmative action or the bill he introduced while in the Senate in 1995 to prohibit the use of race or gender "preferences" in federal hiring or contracting. President Clinton's election-year rhetoric tends to focus on his policies on taxes, education, and welfare, rather than his "mend it, but don't end it" tack on affirmative action.

The topic figures most prominently in California, and even there the issue is being overshadowed by debate over reforming immigration laws. California voters will decide whether they want to amend the state constitution and prohibit the state from granting "preferential treatment" on the basis of race or gender in state hiring, contracting, or education (see text of the referendum in this section).

No one is ruling out future attacks on affirmative action, particularly from the courts, where several key cases are pending (see box). Observers agree that the pendulum could swing yet again if California voters approve the ballot issue, as many predict will happen.

But for now, the anti-affirmative action rhetoric has fallen quiet on the campaign trail, in Congress, and at the state level, where there had been several attempts

to put affirmative action-related measures on the November ballot.

### Election-Year Politics

"A year ago, everyone was saying affirmative action was a perfect issue for Republicans to use against Democrats [in the 1996 campaign]," according to John J. Miller, vice president for the Center for Equal Opportunity, a D.C.-based organization that has endorsed a re-examination of affirmative action programs.

"Dole and the Republicans are not really talking about it, even in California," according to Faye Anderson, president of the conservative Washington, D.C.-based Douglass Policy Institute. Even Sen. Jesse Helms (R-NC) is not talking about affirmative action in his contest against Democratic challenger Harvey Gantt—who is black and a supporter of affirmative action—as Helms did in the 1990 race, Anderson said.

One theory for the issue evaporating as a campaign issue rests with retired Gen. Colin Powell—a staunch supporter of affirmative action—who Dole tried to woo to accept the vice presidential slot, according to Patrick Cleary, a consultant with the Washington, D.C., Brock Group.

"Dole would have done anything," to get Powell on board, Miller said, including putting affirmative action on the back burner.

When Dole's effort to persuade Powell to accept the vice president's slot failed, Dole turned to Jack Kemp, who also had a long-standing reputation for supporting affirmative action. Even though Kemp reversed himself soon after getting the vice presidential nod and said he opposes preferences in hiring and university admissions, Kemp continues to reach out to minorities, urging "inclusion."

"It's tough to be the party of Kemp and Powell [while] attacking affirmative action," according to Nancy Kreiter, research director for the Chicago-based Women Employed, who said the onslaught "didn't go away by itself."

Proponents of affirmative action say some Republicans—notably Dole—realized that affirmative action programs have broad-based support, and that attacking such programs could cost them votes, particularly from women and minorities.

"There has always been strong bipartisan support in the states and Congress in favor of affirmative action and in improving affirmative action where necessary," Ralph Neas, counsel to the Leadership Conference on Civil Rights, in Washington, D.C., said. The coalition of supporters, he said, also includes businesses and educators, he said.

Anti-affirmative action forces misunderstood the gender issue, both sides said, as women's groups came to forefront to help block any effort to roll back affirmative action. "Women came to the forefront and torpedoed it," Kreiter said.

been in the workplace."

Lawyers for the three employees said the case is clearly sexual harassment, no matter what the sexual orientation or gender of those involved.

The lumber company "would want you to believe that this is the kind of stuff guys do," said the employees' lawyer Timothy Ryan, who argued the case before the high court Wednesday.

Massachusetts law defines sexual harassment as any unwelcome sexual advances" or requests for sexual favors, and makes no distinction for gender.

Federal law also makes no gender distinctions, but federal judges have arrived at differing decisions as to whether someone can be sexually harassed by a person of the same sex, said Elizabeth Bartholet, who teaches employment discrimination at Harvard Law School.

Mary Bonauto, a lawyer with Gay & Lesbian Advocates & Defenders, said she fears same-sex harassment cases will turn into witch hunts if they are permitted to hinge on the sexual preference of those involved.

"When it comes to how men treat women for the most part now, people get it that men aren't supposed to be asking women for sex to keep their jobs," said Bonauto, who filed a friend-of-the-court brief in favor of the employees. "We think the same rules should apply when it's a man against a man."

Last week in Chicago, a federal judge ruled a former convenience store worker who says his male boss kissed and grabbed him while making degrading sexual remarks could not collect damages under civil rights law.

U.S. District Judge Charles R. Norgle said same-gender sexual harassment is not a basis for court action under Title VII of the Civil Rights Act of 1964.

2/2

Anderson, from the Douglass Policy Institute, agreed that GOP strategists failed to realize they were "taking on white women" when they began their assault on affirmative action. "They backed off when it threatened to make the gender gap as big as the Grand Canyon," she said.

Helen Norton, director of equal opportunity programs for the Women's Legal Defense Fund, said Republicans were trying to play the race card by making affirmative action an issue in the campaign, but said they "misread the public climate." Attacking affirmative action is "gender-bashing and race baiting," and candidates were not willing to go that route, she said.

Anderson criticized GOP political consultants—but not Dole—for trying to make affirmative action a wedge issue "akin to Willie Horton," rather than seriously examining whether current affirmative action programs "make good legitimate public policy."

"From the beginning this has been all electoral politics . . . and electoral divisiveness," Kreiter said.

### Dole's Record Challenged

Civil rights and women's groups contend Dole did a complete "flip flop" regarding his position on affirmative action, blaming presidential politics for Dole's transformation.

"Bob Dole knows in his heart of hearts that he believes in affirmative action," according to Peter C. Robertson of the Organization Resources Counselors Inc., an organization that represents some of the largest U.S. companies. Robertson described Dole as "a great beneficiary of affirmative action" because of the support Dole was given following his injuries inflicted during World War II.

Dole's record shows he supported major elements of the civil rights agenda, including the Civil Rights Act of 1964, the Voting Rights Acts of 1965 and 1982, the Age Discrimination of Employment Act, and the Americans with Disabilities Act.

While fighting for the GOP presidential nomination, Dole unveiled sweeping legislation (S 1805/HR 2128) that he introduced with Rep. Charles Canady (R-Fla) that would have ended racial and gender "preferences" in federal hiring and contracting. Modeled after the California ballot initiative, the legislation defined most of what the civil rights community considers legitimate affirmative action programs as preferences (144 DLR AA-1, 7/27/95).

Supporters of affirmative action contend California Gov. Pete Wilson fueled the fire during the Republican presidential primary in which he made ending such programs a focal issue of his campaign. GOP presidential contenders Phil Gramm and Dole fanned the flames both on the campaign trail and Capitol Hill.

As Republican senators in the U.S. Congress, Gramm (Texas) and Dole (Kan) vied to see who could take credit in ending the federal government's role in affirmative action. Dole introduced his sweeping civil rights bill ending "preferential treatment," while Gramm unsuccessfully tried to attach language to an

appropriations bill that essentially would have done the same thing.

Dole announced his support for the California referendum but has not stumped for it during his own campaign. His running mate, Jack Kemp, had voiced opposition to the measure before he was added to the ticket, and now speaks against preferences. And while the Republican party platform specifically endorses the Dole/Canady bill, Dole has not drawn attention to the measure on the campaign trail.

As the GOP presidential candidate, Dole tends to avoid the issue altogether, focusing more on "equal opportunity," although he did specifically address the issue in remarks to a group of black reporters this past summer.

"I supported race-based preferences in the past," Dole told the National Association of Black Journalists. "I've realized that preferences created with the best of intentions were dividing Americans instead of bringing us together." Dole said he defined affirmative action as "aggressive, determined, and persistent recruitment" of minorities and women by government, business, and universities. "Simply put, I believe in outreach to give people the opportunity to compete—not preset outcomes that determine the results of that competition. This is the line I would preserve in our laws," Dole said.

The Dole/Canady bill, among other things, also would have eliminated Executive Order 11246, the executive order program that Dole's wife Elizabeth Hanford Dole had enforced while she was labor secretary and that Dole defended during the Reagan administration, WLDF's Norton noted.

Anderson objected to any characterization that Dole flip-flopped on this issue, pointing out that before introducing any legislation, the majority leader asked the Congressional Research Service to conduct a comprehensive review of federal programs that delineated by class and race. The issue was unfair preferences, not affirmative action, Anderson said.

Norton said she thinks Dole was "surprised and chagrined" that the public opinion polls were not behind him on this issue. A number of polls have shown that Americans generally support affirmative action programs as long as they do not include racial and gender quotas, Neas said. These polls include national surveys throughout 1995-1996 from *NBC/Wall Street Journal*, *The Washington Post*, *Gallup*, *Time* and *CNN*. The poll results "had a significant impact" on politicians running for national office, Neas said, as politicians realized "the votes weren't there" to abolish affirmative action.

"Most Americans believe that discrimination continues," Norton said, "and they are not ready to abandon the principle," she said.

### Gore Spars With Kemp

The GOP position on affirmative action emerged as an issue during the Oct. 9 debate between Gore and Kemp, but it was not brought up during a similar Oct. 6 contest between the presidential candidates.

2/9

During the vice presidential debate, Gore chided Kemp for his decision to move away from Kemp's long-standing support for affirmative action.

"Now I want to congratulate Mr. Kemp for being a lonely voice in the Republican party over the years on this question. It is with some sadness that I refer to the fact that the day after he joined Senator Dole's ticket, he announced that he was changing his position and was thereafter going to adopt Senator Dole's position to end all affirmative action. That's not good for our country," Gore said.

Gore urged the GOP vice presidential candidate to persuade Dole to adopt Kemp's original position on affirmative action "instead of the other way around."

Kemp countered that he had not changed his position on affirmative action, that he is dedicated to equality of opportunity. "Affirmative action should be predicated upon need, not equality of reward, not equality of outcome. Quotas have always been against the American ideal," Kemp said.

Gore gave a strong endorsement of continuing federal affirmative action programs and of "vigorous enforcement of the laws that bar discrimination."

Kemp said a Dole administration would pursue "a new civil rights agenda based upon expanding access to credit and capital, job opportunities, educational choice in our inner cities, . . . and ultimately a type of ownership and entrepreneurship from public housing residents . . ."

#### GOP Divisions Stalled Efforts In Congress

If approved, the California ballot initiative may give new life to a Dole/Canady-like measure in the next Congress, both sides predict, although few thought it would be a top priority for Republicans because the issue continues to divide the GOP.

"Republicans are not comfortable with this issue," according to Miller at the conservative Center for Equal Opportunity. Conversely, "this is an issue that deeply matters to Democrats," he said. During congressional hearings on the Dole/Canady bill, the Republican chairman would be among the few GOP members to show up, Miller said, but on the other side, 14 Democrats would be there in force, Miller said. "Republicans are not comfortable talking about race for fearing of being labeled racists," Miller said.

The WLDF's Norton credited moderate Republicans, such as Sens. William Cohen (Maine), Jim Jeffords (Vt), and Olympia Snowe (Maine), for tempering the enthusiasm of the "extremist" agenda that the Republican leadership brought in following the mid-year elections. The pragmatic Republicans felt the attacks on affirmative action were bad for the party and that they fed into the perception of the GOP being against civil rights, she said.

Neas and Robertson stressed that affirmative action has historically won bipartisan approval, noting that the major civil rights laws would not have passed without support from key Republicans, including Dole.

Senate Majority Leader Trent Lott (R-Miss) and House Speaker Newt Gingrich (R-Ga) both blamed a full congressional agenda for the demise of the Dole/Canady bill, which they support. Anderson said the

Republican leadership tabled the Dole/Canady bill because it had not laid the foundation to get it passed.

Anderson said part of the problem was that Republicans needed to "stop saying what they are against" and instead start tackling "the real challenges that affirmative action was designed to address." Anderson called for more attention to access to capital, school choice, and other "underlying issues."

Gingrich promised to try and push through legislation tackling federal contracting procedures for small businesses, while Canady vowed to press forward with a scaled down version of the Dole/Canady bill that would focus on contracting procedures for small businesses. Neither were acted on before the 104th Congress adjourned.

#### White House Role

Some observers also give the White House credit for squashing the furor over affirmative action. The president's "mend it, but don't end it" stance after an extensive review was a relief to staunch affirmative action advocates, while the administration's decision to launch a program-by-program review of affirmative action in the federal government appealed to those who wanted affirmative action to be reformed, not repealed.

The president's position, laid out in July 1995, "exactly captured the sentiment" that most Americans had regarding affirmative action, Norton said.

Neas said the president did one of the best jobs of explaining affirmative action and the continuing need for it. Equally important, Neas said, the president explained that affirmative action is not about quotas or about hiring unqualified people.

Jeffrey A. Norris, president of the Equal Employment Advisory Council, said the president's approach "hit a responsive chord," as many feel it is important to eliminate the abuses in some affirmative action programs but at the same time preserve the safety net that affirmative action can help provide.

The president's "mend it, don't end it" approach "makes sense," Robertson said.

The Clinton-Gore campaign heralds the administration's review and the series of actions that followed. The president required all federal agencies to comply with the Supreme Court's decision in 1995 in *Adarand Constructors v. Pena* and to apply four standards to make sure that all affirmative action programs are "fair," according to campaign briefing literature.

In *Adarand*, the high court ruled 5-4 that federal affirmative action programs are subject to the same "strict scrutiny" that is applied to state and local programs (57 FEP Cases 1828).

Federal programs cannot be quotas, cannot result in reverse discrimination or preferences for unqualified individuals, or continue after they have met their goals, the administration said when it announced the results of its review (139 DLR AA-1, 7/20/95).

If re-elected, the Clinton-Gore campaign said in a position paper that the administration would build on the progress it has made. This includes "strongly opposing" federal and state initiatives such as the Dole/Canady bill and the California Civil Rights Ini-

tative, which the administration said would turn back the clock on the federal government's "historic bipartisan commitment" to equal opportunity and eliminate affirmative action in California for minorities and women.

On federal procurement, Clinton in a second term would:

- require "race-neutral means"—such as outreach and technical assistance—to increase minority opportunity and participation in federal procurement;
- ensure race is not relied on as the sole factor in procurement decisions;
- provide a set of market-driven benchmarks for each industry—not quotas—to ensure that race-conscious procurement is not used unnecessarily;
- continue the use of several race-conscious contracting mechanisms to promote minority procurement, including the Small Business Administration's 8(a) program; and
- avoid any "undue burden" on nonbeneficiaries of the program.

The Clinton administration, however, is not without an affirmative action controversy. The administration came under fire for its involvement in *Taxman v. Board of Education of the Township of Piscataway*.

In that closely watched case, the Justice Department weighed in on the side of the school board, which had sought to rely on its affirmative action plan to justify the layoff of a white teacher so that the high school business department's only black teacher with equal seniority and qualifications could keep her job.

The controversy stems in part from the Clinton administration's decision to have the Justice Department try to switch sides on appeal. The Bush administration's Justice Department had backed the white teacher in the lower court—a position the Clinton administration perpetuated until 1994.

The attempted switch came a few months after Deval Patrick had been sworn in as assistant attorney general for civil rights and reviewed the case and decided that the school board's action was justified under Title VII.

The school board is seeking Supreme Court review of an August 1996 decision by the U.S. Court of Appeals for the Third Circuit striking down the board's affirmative action policy because it was not remedial and impinged upon the interests of white employees.

David B. Rubin, the Metuchen, N.J., solo practitioner who represents the school board, told BNA Oct. 10 that a petition for certiorari will be filed by early November. Meanwhile, the Justice Department continues to review the impact of the Third Circuit's decision and whether it will affect DOJ's future decisions on supporting similar affirmative action plans.

#### State Measures Die Except In California

Just as affirmative action has stalled in Congress and the campaign trail, the issue appears dead in the states except for California.

Anti-affirmative initiatives surfaced in nearly half of the states, either as legislation or voter ballot drives. Most efforts tried to end state and/or local "preferential treatment" in hiring, contracts, and education. With the exception of California, they all failed.

Groups in Colorado, Florida, Massachusetts, Oregon, and Washington state failed to get the required number of signatures needed to follow California's lead and put proposals on the November ballot. In Arizona, a bill to outlaw affirmative action died in committee, but House Speaker Mark Killian (R) said he intends to appoint a committee to study the issue further and to suggest possible legislation.

State lawmakers also saw anti-affirmative action proposals defeated or wither away as state legislatures adjourned without acting on the measures. Other states in this category include Delaware, Georgia, Illinois, Michigan, Mississippi, New Mexico, Oregon, Pennsylvania, North Carolina, South Carolina, Texas, and Washington state.

California has a track record for being a "bellwether" state, Anderson said, pointing to initiatives such as Prop 13. There could be a "ripple effect," she said, if the initiative is approved in California.

If the ballot initiative is not successful in California, "the main onslaught will be over," Women Employed's Kreiter predicted, but if it succeeds, "it's hard to predict what the more regressive states will do," she said. "That is a harder call to make."

Miller said there is a "potential" for affirmative action to return as a prominent focus of national debate, as it was a year ago, if the measure passes in California. The media also will play a role in whether it becomes a dominant issue, Anderson said.

Recent polls suggest the measure is expected to pass.

Neas said the key in California is understanding the proposed law's intent. On the face, most would approve a referendum that is against racial and gender discrimination and against preferences. "The trick is that they define preferences as almost all affirmative action programs," he said.

Speaking on behalf of ORC, Robertson said "ORC believes that Prop 209 would be a terrible mistake. While the legal language is limited, it could have a chilling effect on legitimate affirmative action, which is designed to eliminate preferences presently granted to whites and males, and does not include quotas or the hiring of unqualified people."

Robertson continued that, "The political pressures being brought on California companies to support the referendum—which they know is not in their best interest—is outrageous."

—By Pamela M. Prah

4 / 9

### Affirmative Action Cases In The Courts

• ***Taxman v. Board of Education of the Township of Piscataway, CA 3, Nos. 94-5090 and 94-5112.***

The Piscataway, N.J., Board of Education will ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals for the Third Circuit that struck down an affirmative action policy under which white high school teacher Sharon Taxman was laid off in 1989 rather than Debra Williams, a black teacher with similar qualifications and identical seniority.

• ***Texas v. Hopwood, US SupCt, No. 95-1173, certiorari denied 7/1/96.***

The U.S. Supreme Court in July 1996 declined to review a decision by the U.S. Court of Appeals for the Fifth Circuit striking down the admissions policy at the University of Texas Law School that used race as one factor among many in its admission decision-making process. The court held that any consideration of racial diversity in higher education admissions is unconstitutional.

• ***Kirwan v. Podberesky, US SupCt, No. 94-1620, certiorari denied 5/22/95.***

The U.S. Supreme Court let stand the U.S. Court of Appeals for the Fourth Circuit's decision that struck down the Bannecker Scholarship program for African-Americans at the University of Maryland.

• ***Builders Association of Greater Chicago v. City of Chicago, DC NIII, No. 96CV-01122, 2/27/96; and Builders Association of Greater Chicago v. Cook County, DC NIII, No. 96 C1121, 2/27/96.***

A construction trade group has filed two federal lawsuits challenging the programs used by the City of Chicago and Cook County that encourage the awarding of public contracts to qualified women and minority-owned business. Organizations representing women and minority-owned building contractors have recently been added as defendants to the lawsuits.

• ***C.S. McCrossan Construction Co. v. Cook, DC NM, No. CIV-95-1345, 4/2/96.***

In April 1996, a federal district court in New Mexico denied a preliminary injunction to a white-owned firm that challenged the process for awarding a \$3 million-a-year contract at the White Sands Missile Range in New Mexico. The suit is seen by civil rights groups as a threat to the Small Business Administration's Section 8(a) program for disadvantaged businesses, including women and minority-owned business.

5 / 9

# The New York Times

## When Principles Get In The Way

By Stanley Fish

**S**UPPOSE you were arguing for something but were told that you would have to make your case without the facts that supported it. This is the situation proponents of affirmative action face when they find themselves defending their position in terms of principle rather than policy.

A policy is a response to actual historical circumstances; it is directed at achieving a measurable result — like an increase in the representation of minorities in business and education. A principle scorns actual historical circumstances and moves quickly to a level of generalization and abstraction so high that the facts of history can no longer be seen.

Affirmative action is an attempt to deal with a real-world problem. If that problem is recharacterized in the language of principle — if you stop asking, "What's wrong and how can we fix it?" and ask instead, "Is it fair?" — the real world fades away and is replaced by the arid world of philosophical puzzles.

The recipe for making real-world problems disappear behind a smoke-screen of philosophizing was given to us years ago by the legal scholar Herbert Wechsler in his enormously influential 1959 Harvard Law Review article "Toward Neutral Principles." Wechsler was trying to justify the Supreme Court's decision in *Brown v. Board of Education*, which declared segregated schools unconstitutional. What troubled Wechsler about *Brown* was that the Justices, in reaching their decision, seemed moved by a practical desire to secure a result they favored (integrated schools) rather than by some general principle whose application would yield that result independently.

Unable to find any such principle spelled out in the Court's arguments,

Wechsler was driven to provide one himself: the "right of freedom of association." But in attempting to make this case, he soon realized that the principle of freedom of association turned out not to justify *Brown* but to make it even more of a puzzle. "If the freedom of association is denied by segregation, integration forces an association upon those for whom it is . . . repugnant," he wrote. And "given a choice between denying the association to those . . . who wish it and imposing it on those who would avoid it," he was unable to find a principle that would justify either the one or the other.

Here in as naked a form as one might like (or not like) is the logic of neutral principle. When Wechsler characterizes the choice as being between the rights of those who wish to associate and the rights of those who wish not to, these two wishes have lost all contact with the issue that made their opposition meaningful — whether the schoolhouse door should be open or shut. Once the historical specificity of that issue is lost, there no longer seems to be any moral difference between the two sides, although the difference was perfectly clear before Wechsler began his tortured analysis.

In other words, the puzzle of *Brown* is only a puzzle if you forget everything that made the case urgent in the first place — the long history of racism and its effects. You have substituted philosophical urgencies for social urgencies. This is

---

Affirmative action  
cannot be  
defended with  
abstractions.

---

what the demand for principle does, and what opponents of affirmative action intend it to do. After all, isn't it convenient to be able to deny a remedy for longstanding injustices by invoking the higher name of principle?

It is a very bad game, but it is alive and well in the phrase "reverse racism," which does in an instant what Wechsler needed an entire essay to do. The phrase makes the actions of college admissions officers who give preference to minority candidates equivalent to the hate crimes of the Ku Klux Klan. It does so by claiming that each is motivated by race-con-

DATE: 12-26-96

PAGE: A-27

sciousness, an argument that makes sense only if the very thought of race, no matter the content or context, is considered the sin. Like the freedom of association in Wechsler's argument, race-consciousness invoked as an abstraction rides roughshod over history while laying claim to the noblest of motives.

That is in effect what Justice Clarence Thomas did in his concurring opinion in *Adarand v. Peña*, in which the Court struck down the policy of

giving incentives to Federal contractors who hired minority subcontractors. "It is irrelevant," he wrote, "whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. In each instance, it is racial discrimination, plain and simple."

But both the plainness and the simplicity are apparent only if the complex facts of history have been suppressed or declared out of bounds. In his dissent, Justice John Paul Stevens returned to history to make the truly plain and simple point: "There is no moral or Constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."

The important word in Justice Stevens's statement is "moral," for it shows that the choice here is not between the principled and the non-principled. It is between neutral principles, which refuse to acknowledge the dilemmas we face as a society, and moral principles, which begin with an awareness of those dilemmas and a demand that we address them.

Those who favor affirmative action are moved by moral principles — principles that recognize the reality and persistence of historical inequities. And yet those who favor affirmative action are often maneuvered into using a vocabulary designed to remove from sight the very realities on which their case depends.

Of course, you could also try to work within that vocabulary and fight over its terms, arguing that "fairness," "equality" and "color-

27

Cont'd

## French Expert Sees Cause Of Crash as Mechanical

Agrees With U.S. Counterpart on Flight 800

By CRAIG R. WHITNEY

PARIS, Dec. 24 — The director of the French Government agency that investigates air disasters has said he agrees with American safety investigators that a mechanical problem probably led to the explosion of Trans World Airlines flight 800.

"It's not my investigation, and I'm not passing judgment on it," the director, Paul-Louis Arslanian, said the other day. "But if I were in charge of the investigation, based on the evidence so far, I don't think I'd be coming to a different conclusion than the one they appear to be drawing."

Mr. Arslanian does not hesitate to take issue with the National Transportation Safety Board in Washington when he thinks it is wrong.

He did so just last summer, when the French agency took vigorous exception to an N.T.S.B. report attributing the 1994 crash of an American Eagle turboprop plane in Indiana to inadequate information from the plane's French manufacturer and French aviation authorities about the difficulty of flying the plane in heavy icing conditions. Those conditions existed on the day of the crash, which took the lives of all 68 aboard.

"We were in complete disagreement on that case, and we did not hesitate to say so," Mr. Arslanian said, recalling that the French agency, the Bureau Enquêtes-Accidents had criticized the American pilots and air traffic controllers for ignoring advice that was available on handling the French-made plane, an ATR-72, in icing conditions.

But in the case of Flight 800, the Boeing 747 that blew up off Long Island on July 17, killing all 230 people aboard — including 42 French passengers — Mr. Arslanian said he concurs with N.T.S.B.

He and his investigators have worked with the American investigators since July, trying to learn the cause of the disaster. Based on their examination of the evidence and his own observations, Mr. Arslanian said that without some piece of the plane proving otherwise, it was probably a mechanical problem that led to the explosion of the plane.

In France, where the powerful American commercial aircraft industry is seen as a ruthless rival, a conclusion of mechanical failure would be seen as a blow to the Boeing Company, which built the plane.

Would Mr. Arslanian be as confident of the integrity of the American investigation if the Flight 800 plane had been an Airbus manufactured in Toulouse instead of a Boeing made in the U.S.A.?

"Accident investigations have nothing to do with national pride," he said. "The sole objective of air accident investigators around the world is improving safety. That doesn't mean we can't disagree at times

about the safety lessons that should be drawn, as we did in the case of the American Eagle plane."

Mr. Arslanian met last month with representatives of the families of French victims of the Flight 800 crash and told them that mechanical failure appeared to be the most likely cause of the disaster. At the time, some of the French families were inclined to believe reports that an American Navy missile had accidentally brought down the plane and that American officials were covering up the incident.

"That wouldn't be possible," Mr. Arslanian said. "Think of how many hundreds of Navy people would have to be involved in a coverup. Americans talk too much for that."

Like his American counterparts, Mr. Arslanian noted that the investigators would keep looking for pieces of the plane, hoping to find one that

finally unlocked the mystery. But, he concluded, "I think that for all practical purposes, the investigation is over."

*An official not shy about disagreeing with Americans is in step, so far.*

With about 95 percent of the plane recovered from the ocean floor and the pieces reassembled in a hangar on Long Island, N.T.S.B. and Federal Bureau of Investigation officials have not formally ruled out a bomb or missile.

But officials of the safety board let it be known that they were leaning toward the theory that the plane was destroyed by an explosion of a nearly empty center fuel tank after fumes were ignited by a spark of static electricity from a fuel line. They recommended to the Federal Aviation Administration ways to prevent such an explosion in the future.

Its French equivalent will wait until the F.A.A. has ruled, Mr. Arslanian said.

A French investigating magistrate, Judge Chantal Perdrix, heads an independent French judicial inquiry into the Flight 800 accident. Judge Perdrix has not made any public statements about the state of her investigation, but Mr. Arslanian said:

"We are, of course, in communication, but our objectives are not the same. A criminal justice investigation looks primarily at who was responsible for the accident, while we look at what happened and what can be done differently to make sure it doesn't happen again."

blindness" really belong on your side. But even if you got good at the game, you would be playing on your opponent's field and thus buying into his position, and why would you want to do that?

It would be far wiser to refuse the lure of "fairness," "merit" and "equality," now code words for ignoring the effects of the long history of racial oppression. Let's be done with code words and concentrate on the problems we face and on possible ways of solving them. Those who support affirmative action should give up searching for theoretical consistency — a goal at once impossible and unworthy — and instead seek strategies with the hope of relieving the pain of people who live in the world and not in the never-never land of theory.

**L**et's stop asking, "Is it fair or is it reverse racism?" and start asking, "Does it work and are there better ways of doing what needs to be done?" Merely asking these questions does not guarantee that affirmative action will be embraced, but it does guarantee that the hell game of the search for neutral principle will no longer stand between us and doing the right thing. □

---

*Stanley Fish, a professor of English and law at Duke University, is author of "Professional Correctness: Literary Studies and Political Change."*

*Richard Cohen*

## Affirmative Action: Speak Plainly

If the first casualty of war is truth, then the first casualty of the debate about affirmative action is language. By way of evidence, I submit the statement of Mark Rosenbaum, a civil rights lawyer who hailed a recent pro-affirmative action judicial decision in California: "This decision . . . defeats the efforts to take government out of the business of eliminating discrimination." In other words, it keeps government in the business of using discrimination to battle discrimination.

Whatever its virtues—and they are not negligible—affirmative action always has been plagued by a reluctance to use the English language as God, Shakespeare and Mr. Traeger, my high school English teacher, intended. The fact of the matter is that about the only way you can ensure that certain minorities get into, say, the California university system in anything approaching their proportion of the general population is to ensure that others are not admitted. This is discrimination, and a lot of people—in fact, a majority of Californians in the last election—said they did not like it one bit.

This reluctance, this downright inability to speak plainly, plagues all sorts of affirmative-action programs and results, even at the highest levels, in some low comedy. We had the example just the other day of President Clinton realizing literally at the eleventh hour that his new Cabinet lacked a Hispanic. The former New Mexico congressman, Bill Richardson, had just been named U.N. ambassador, but that's not quite a

Cabinet post. So at a meeting that lasted until after midnight and into the day when Clinton was scheduled to announce his appointments, the president got a bright idea: Federico Pena for energy secretary.

Does Pena know anything about Energy or energy? Not really. Does he know anything much about being a Cabinet secretary? Here again the answer is not much. He has been the secretary of transportation and was scheduled to leave the administration without, as far as anyone could tell, the White House expressing much regret.

In fact, Pena is best remembered for scurrying down to Florida to praise Valujet after one of its planes plunged into the Everglades. For a moment, you would have thought he represented the airline industry and not—or not also—you and me.

The president now has a Cabinet with the requisite everythings—although it is a bit short of talent. Janet Reno, chosen originally because she is a woman, remains a woman and not much of an attorney general. Civil libertarians will note that she used her one appearance before the Supreme Court to advocate yet greater expansion of police powers—in this case, the right to order all passengers, not just the driver, out of a stopped automobile, including the aged and the infirm. Some members of the Supreme Court were appropriately appalled.

Diversity is a noble goal, but the pursuit of it can get both silly and dangerous. At the start of his first term, Clinton wanted a Cabinet that looked like America. He dropped that language this time around, but not, it seems, the goal. Regardless, the idea is preposterous.

Of the Cabinet's 14 members, African Americans (3) are overrepresented and so are Jews (2). Women (4) are sorely underrepresented and so are Hispanics (1). The Cabinet has no Asians, no Muslims and no acknowledged homosexuals. It's not America. It's a political concoction—and so it should be.

Diversity in politics is not a new idea. In many American cities, tickets had to be balanced—Italians, Jews,

Irish, African Americans, Hispanics, Poles, you name it—and the exercise was supremely cynical. But it never posed as anything other than what it was.

Nowadays, though, a pretense is made about merit, and so we have witnessed President Bush's ludicrous praise of his Supreme Court nominee, Clarence Thomas, or President Clinton's midnight discovery that Federico Pena, lacking any experience whatever in the energy field, is the best person in all the U.S. of A. to run the department.

The result is that language itself gets corrupted. The obvious is denied. The word discrimination gets to be used only one way—majority against minority—and even those labels get used where, as in some local situations, they do not apply. (In Washington, D.C., the majority is a minority.)

As when dictatorships are called people's republics or firings disguised as layoffs, you get the sense that something important and ugly is being obscured. In the case of affirmative action or, often, diversity, it's that certain people are being chosen over other people on the basis of race or sex. That—no matter who does it and for what reason—is discrimination, and it used to be considered wrong. To call it anything else is an abuse of language—in other words, a lie.

TITLE: Workplace Issues: Mediation can cut time, cost of employee lawsuits:  
The EEOC's Detroit office launches process to help reduce tension,  
arrive at solutions.  
BYLINE: Aram Kalousdian  
DATE: 03/03/97  
SOURCE: The Detroit News; DTNS  
(Copyright 1997)

The Detroit district office of the Equal Employment Opportunity Commission has achieved an 80 percent resolution rate with employment discrimination claims in its alternative dispute resolution service. A typographical error resulted in the resolution rate being incorrectly reported in an article in the March 3 edition of Strategies.

The program was created as part of the Administrative Dispute Resolution Act passed by Congress in 1990.

Business and government employers are seeking alternative methods of resolving employment discrimination claims in an effort to lower the costs of litigation.

The U.S. Congress passed the Administrative Dispute Resolution Act in 1990 to allow employers to go to the U.S. Equal Employment Opportunity Commission (EEOC) for mediation in workplace disputes.

The process is designed to eliminate or reduce the tension and adversariness inherent in traditional investigation and litigation, says Rosalie Tucker, the alternative dispute resolution coordinator for the Detroit district office of the EEOC. Alternative dispute resolution methods stress developing a solution rather than attacking the other side. Tucker explained how the program works.

Q:How are employee complaints resolved under the EEOC's alternative dispute resolution program?

A:The commission uses facilitative mediation because it's neutral and unbiased and never cuts off the claimant's access to federal court. A disinterested neutral party, the mediator, draws the disputants toward resolution.

We try to get newly filed charges of discrimination before they get into the normal processing system. Normal charge processing

1/4

## Court Bars Race Bias Claim Filed After Arbitrator Ruled on Discharge

A race discrimination suit against the Coca-Cola Bottling Co. of New York must be thrown out of court because it has already been resolved by an arbitrator pursuant to a collective bargaining agreement, the U.S. District Court for the District of Connecticut has ruled.

Judge Peter C. Dorsey dismissed Victor M. Almonte's claim that he lost his job due to race discrimination in violation of the Civil Rights Act of 1866 (42 U.S.C. 1981), finding that after an arbitrator reinstated him with back pay Almonte could not show that he suffered an adverse employment action (*Almonte v. The Coca-Cola Bottling Co. of New York Inc.*, DC Conn, No. 3:95CV01458, 3/11/97).

"Having prevailed in arbitration plaintiff may not now seek to recover a second time" the court wrote.

Henry A. Platt, an attorney with the Washington, D.C., law office of Schmeltzer, Aptaker & Shepard, who represented Coca-Cola, said the ruling represents "a big move, a big change in the law," because the case arose under an arbitration clause contained in a collective bargaining agreement. Platt said he was not aware of any federal court that has reached a similar ruling.

Arbitration expert and union attorney W. Daniel Boone, of Van Bourg, Weinberg, Roger & Rosenfeld in Oakland, Calif., agreed that the case is novel, but added: "let's hope it's unusual."

"It strikes me as a bad decision," Boone said, because it disregards Supreme Court precedent and "it is prejudicing an individual because that individual is a member of the union."

Burton S. Rosenberg, who represented Almonte, did not respond to telephone calls by BNA's deadline.

**Worker Complains of Race Bias.** Almonte worked as a laborer for the Coca-Cola bottler in East Hartford, Conn., the court wrote, and was covered under a collective bargaining agreement between the bottler and Local 1035 of the Teamsters Union.

According to the decision, Almonte alleged that in 1994 a white employee was allowed to select his work assignment but Almonte was not. When Almonte complained, he was asked by a supervisor to leave and was denied the chance to talk to a union steward, he alleged. The police were called, and Almonte was charged with criminal trespass. He was subsequently fired in October 1994, the decision said.

The matter was arbitrated, and Almonte presented evidence that white employees were given preferential assignments and that two supervisors said they intended to get all the black employees fired, Dorsey wrote. The arbitrator found the bottler and the supervisors engaged in racial harassment and discrimination and reinstated Almonte with back pay and benefits March 1995.

About five months later, Almonte and another employee were suspended and then fired for fighting, dishonesty, and falsifying records, the court said. Almonte brought suit under Section 1981, a Reconstruction-era statute that prohibits unequal treatment due to race, and also brought state claims alleging various torts.

According to Dorsey, Almonte did not distinguish in his case between his 1994 and 1995 terminations. But, "to the extent that plaintiff seeks recovery for the October, 1994 termination itself, his claim is barred and summary judgment is therefore granted to defendants." The court then traced the evolution of Supreme Court cases dealing with arbitration to grant the bottler's motion to dismiss Almonte's remaining Section 1981 claims on grounds that the collective bargaining agreement required such claims to be submitted to arbitration.

**Supreme Court Arbitration Rulings.** Dorsey noted that the high court has treated arbitration clauses negotiated by unions differently than arbitration agreements to which employees personally consented.

Employees required to arbitrate under a union contract have been permitted to also bring a private claim in federal court, the court noted.

In 1974, the Supreme Court in *Alexander v. Gardner-Denver* ruled that an employee who submitted his workplace race discrimination claim to arbitration pursuant to a collective bargaining agreement was not precluded from also suing his employer in federal court under Title VII of the Civil Rights Act of 1964 (7 FEP 81).

The decision was followed in 1981 by a Fair Labor Standards Act case, *Barrantine v. Arkansas-Best Freight System Inc.*, in which the Supreme Court held that employees were not required to submit their claims to arbitration despite a mandatory arbitration clause in their collective bargaining agreement. "[A] union that negotiates a CBA [collective bargaining agreement] or represents an employee in a CBA arbitration may not zealously pursue the employee's rights" if the employee's rights are at odds with the union membership's, Dorsey wrote of the *Barrantine* decision, and therefore the high court permitted the unionized workers to take their FLSA claims to federal court.

In 1991, Dorsey continued, the high court in *Gilmer v. Interstate/Johnson Lane Corp.*, ruled that an arbitration clause barred an employee from bringing an Age Discrimination in Employment Act claim, but distinguished its ruling from *Gardner-Denver*, in part, because *Gardner-Denver* involved arbitration contained within a collective bargaining agreement.

**Austin Cited with Approval.** In his decision, Dorsey cited with approval a 1996 decision of the U.S. Court of Appeals for the Fourth Circuit, *Austin v. Owens-Brockway Glass Container Inc.*, which held that an employee alleging gender and disability bias was required to arbitrate her claim pursuant to her collective bargaining agreement (151 LRRM 2673). The Fourth Circuit wrote that "[w]hether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has been made to arbitrate the dispute" and if the agreement is voluntary, "it should be enforced." The Supreme Court declined review of the case later the same year (153 LRRM 2960).

Dorsey concluded that Almonte "does not dispute that the CBA expressly prohibits discrimination as defined by federal law and provides for arbitration of any violation," Dorsey wrote. Because Congress has encouraged the arbitration of Section 1981 cases, "Plain-

tiff therefore cannot carry his burden under *Gilmer*," the court ruled.

Dorsey also granted summary judgment to the bottler on Almonte's state law claims.

takes more than one year on average. So, obviously, if you can get a case settled in 67 days, which was the average amount of time for a settlement in the EEOC pilot project, you're that much ahead.

As soon as charges are filed, we ask the parties if they would be willing to participate in facilitative mediation. It's important to get them early before people's emotions become even more volatile and they've dug their feet in the ground.

Q:What are your goals for the program?

A:Our program started up just this year. We have had more than 50 requests for mediation from employers this month (February), and 24 of those have been concluded. Eight percent were resolved. We've asked both parties to evaluate the process, and everyone has been overwhelmingly enthusiastic.

I want to provide as many opportunities as possible to employers and employees to reach a mutually satisfactory resolution of their disputes. By doing that, the agency's pending workload will be reduced, so that the investigators can focus on cases that cannot be resolved through the program or with cases inappropriate for this process.

Q:What is the step-by-step process for facilitative mediation?

A:This is an absolutely confidential process. Whatever is said in mediation is not to be repeated, any notes taken are destroyed, and the mediator cannot be called to testify.

The key to facilitative mediation is trust in the mediator. This is crucial. Then each party is willing to confide things they would not want the other side to know. The mediator will hold these things in confidence, but it helps the mediator work toward a resolution.

In order to be absolutely neutral, the Detroit district office does not do its own mediation. I refer the parties to qualified mediation organizations in the community. The parties have to arrive at their own resolution, but they are aided in doing so by the mediator.

2/4

The mediator decides how things will progress. After each side speaks, the mediator will say what he or she understands the issues to be. The parties will agree or disagree. If they disagree, then they will further clarify. Then the mediator will talk about the issues, usually one at a time, until they can get to a resolution. If they can't get resolution, they will move to another issue. They might come back to the first issue.

The mediator may decide that it would be productive to speak to each side privately. This is called private caucusing.

During this private caucus, possibilities for settlement can be raised. The parties can confide things that they don't necessarily want the other side to know. They can confide their bottom line.

This discussion and caucusing will continue with the guidance of the mediator, who will keep communications flowing until a resolution or impasse is reached. The mediator is skilled at bringing the parties to a resolution.

The mediator uses what is called reality testing to deal with unrealistic expectations that people bring to the table. In true reality testing, each side can see the strengths and weaknesses of its case and possible risks that it would be taking if it allowed the matter to go further.

If a resolution is reached, it's put in writing. They sign a settlement agreement, which is a binding legal contract. If a settlement is not reached, at least each side clearly understands where the other side is coming from. So, really it's a win-win, even if it doesn't end up getting settled.

Q:How is the mediation program different from the EEOC's standard method for handling discrimination complaints?

A:In the mediation program, the parties get together with a mediator early on; talk through the dispute; and try to resolve it before a lot of time has passed, a lot of money spent, and people become entrenched.

Normal charge processing is a lengthy process. The commission has the right to dismiss a case at any point if it feels that there doesn't appear to be evidence of a violation. We enforce:

3/4

- \* Title VII of the Civil Rights Act of 1964.
- \* The Age Discrimination in Employment Act.
- \* The Older Workers Benefit Protection Act.
- \* The Equal Pay Act.
- \* The Americans with Disabilities Act.

If we decide that there has been a violation of the statute, we will issue a "cause determination" and ask the parties to voluntarily conciliate. Hopefully, the employer will give whatever remedy is required. If not, the commission either will sue the employer in the public interest and on behalf of the claimant or will issue a right to sue so that the claimant can go into federal court.

They have 90 days to go into federal court to file a private lawsuit. When we dismiss a charge, we always issue a right to sue. A claimant always has access to federal court.

Aram Kalousdian, an Ann Arbor-based free-lance writer, interviewed Rosalie Tucker for The Detroit News.

Rosalie Tucker

Age: 58

Occupation: Alternative dispute resolution coordinator, Detroit district office of the U.S. Equal Employment Opportunity Commission

Experience: Tucker has worked as an investigator and supervisor at the EEOC since 1979. She worked in a law firm for a period in the 1980s where she responded to EEOC and Michigan Department of Civil Rights complaints.

Education: Bachelor of science in humanities with a concentration in English and art history at Wayne State University; master's in education from Marygrove College; post-master's specialist certification in gerontology from Wayne State University

Family: Two sons, two daughters-in-law and one 16-month-old granddaughter.

4 / 4

TITLE: PUBLIX LAWSUITS MAKE ONLY BLIP IN EARNINGS  
BYLINE: Brad Kuhn of The Sentinel Staff  
DATE: 03/04/97  
SOURCE: Orlando Sentinel; ORSE  
(Copyright 1997)

Settling one of the country's largest gender-bias lawsuits put only a small dent in Publix Super Markets Inc. earnings last year.

The Lakeland-based grocery chain reported a 9.5 percent increase in profit to \$265.2 million. That came on an 11.1 percent gain in sales, to \$10.4 billion.

Earnings included a \$46.4 million charge from Publix's \$81 million settlement of a gender-bias class action and separate Equal Employment Opportunity Commission charges of racial bias.

Publix, the state's largest private employer, admitted no wrongdoing in its gender- and racial-bias settlements, announced in January.

The 1996 profit translated to \$1.20 a share, compared with \$1.07 a share, or \$242.1 million, in 1995.

Publix stock, previously valued at \$20.75, was recently evaluated by an independent appraiser and increased to \$21 a share.

Fourth-quarter and other financial details will not be available until the company files its Form 10K with the Securities and Exchange Commission on March 28.

Publix is a privately owned company, but it is required to file its financial results with the SEC because of its employee stock ownership plan.

## Advice for Employers Responding to EEOC Bias Charges

Employers responding to EEOC investigations of bias charges should thoroughly investigate the allegations before submitting a written position statement, a management attorney advises. Hastily prepared responses can come back to haunt employers, warns Douglas L. Williams, counsel to

---

### "Employers get to decide and should decide the scope of EEOC's investigation."

---

the firm of Vorys Sater Seymour & Pease in Columbus, Ohio, and an adjunct professor at the Ohio State University law school, at a recent program on employment and labor relations law in New Orleans sponsored by the American Law Institute and the American Bar Association.

The statements should narrow EEOC's scope of investigation while not being so detailed that employers are later prevented from pursuing certain defenses at trial, Williams maintains.

#### Timely Filing of EEOC Charges

Under federal law, charges must be filed within 300 days of the last adverse employment action. The filing deadline starts to run when an employee is first aware of the adverse action, even though it may actually occur later, Williams says, adding that

employers should determine, therefore, when the employee first received notice.

Since the filing deadline may be extended for equitable reasons, a claim can be pursued even if filed after the 300-day period. Employers should be sure they have put "the right posters in the appropriate place," he says, because one basis for extending the filing time is that an employee was unaware of his or her rights under federal EEO laws. Even if a charge is filed late, EEOC may still conduct an investigation, Williams says, pointing out that failure to meet the 300-day filing deadline only bars the employee from filing a suit in federal court.

#### Written Responses Are Critical

Employers' written position statements in response to EEOC charges are critical because they set the framework for the investigations and the employers' defenses, Williams explains. If little care is put into preparing these responses, they may be used against employers later at trial, he warns.

Employers should conduct their own full investigations of the charges before writing out their reasons for the employment decisions, Williams stresses. If an employer cannot conduct a full inquiry within the time granted by EEOC, it should ask for an extension. If the request is denied, take the extra time anyway, says Williams, adding that employers are better off doing this because "the facts are never as clear-cut" as one phone call to an employer's supervisor might suggest.

In writing the statement, employers should "talk in general terms rather than specific terms" about the reasons for their actions. Several reasons may underlie an employment decision and employers should not narrow their defenses, Williams explains.

Employers "get to decide and should decide" the scope of EEOC's investigation, Williams stresses. For instance, if the charge involves one branch or one supervisor of a company, limit the agency inquiry to that branch or that supervisor's relevant decisions, Williams suggests. EEOC can investigate matters that can "reasonably be expected" to flow from the charge and employers want to keep that investigation as narrow as possible, Williams says.

EEOC has broad access to information and extensive subpoena power, says Williams, which is why employers want to reach agreement with EEOC on the scope of the charges being investigated and the extent of EEOC's investigation.

#### Informal Fact-Finding Conferences

EEOC investigators may schedule informal fact-finding conferences where the parties may bring attorneys. An employer's position paper should be filed before any fact-finding conference, Williams states. Witnesses, if any, should be prepared for the conference, he says, adding that a brief meeting outside the investigator's office is not enough preparation.

After the conference, employers should write a letter to EEOC about any matters which arose in the conference that were not addressed in their position statements, Williams recommends. At this stage in the charge processing, employers should take the stance that they are trying to help EEOC arrive at the truth, he says.

#### Settlements and Releases

If an employer's investigation reveals some factual basis for the charge, a key factor in reaching a settlement is whether the employee currently is working. If so, the employer may be able to settle quickly, says Williams. Employers may also want to quickly settle charges that could lead to class-wide allegations, he adds.

Employers should not use EEOC's settlement form because it only settles the charge filed with EEOC and leaves employers open to other claims by the employee, Williams warns. "The last thing you want to do is to settle a race bias charge only to be faced with a wrongful discharge suit," he says. Employers should secure a general release with the employee agreeing to settle all claims against the employer, he concludes.

Washington Post 9/5/95

# Clinton Defends Immigration, Affirmative Action in California Speech

By William Claiborne  
Washington Post Staff Writer

MONTEREY, Calif., Sept. 4—President Clinton today strongly defended affirmative action and immigrant rights on the home turf of one of his would-be Republican rivals, California Gov. Pete Wilson, who has taken a hard-line stance on both issues.

On a day in which the leading Republican presidential hopeful, Senate Majority Leader Robert J. Dole (Kan.), called for making English the official language of the nation, Clinton decried politicians who he said seek to lay blame for middle-class economic anxieties on immigration policies and programs aimed at ensuring minorities jobs and higher education opportunities through race and gender preferences.

“There are people who will tell you that the real reason middle-class wages are stagnant is

that . . . we have too many immigrants, or that affirmative action is destroying opportunities for the middle class,” Clinton said in a speech commemorating the opening of the new California State University at Monterey Bay.

Later, addressing a Labor Day picnic at Pleasanton, Clinton returned to the theme, assailing “this crazy idea” of trying to convince middle-class voters that their wages are not rising because of affirmative action and immigration.

“This country got where it is because we worked together, we pulled together. . . . This country never got anywhere by being divided against one another,” he said.

Wilson was campaigning out of state today and was represented on the speaker's platform at the new university by Lt. Gov. Gray Davis, a Democrat who praised the administration's base conversion efforts. The university is be-

ing built on the recently closed Fort Ord Army base.

While there may be some problems in both immigration and affirmative action policies, Clinton said, more effort is needed to bring Americans together in correcting the problems instead of divisively attacking the programs and proposing draconian solutions.

Most GOP candidates have attacked affirmative action, which they say often results in reverse discrimination. Wilson has called for denying social services to illegal immigrants and penalizing employers who hire them. Dole, in his Indianapolis speech today, criticized bi-

lingual education as divisive and said all children should be taught in English, but he did not make an anti-immigration speech.

Clinton told his warmly applauding audience of about 12,000 here that “we should never, ever, ever permit ourselves to get into a position where we forget that almost everybody

here came from somewhere else, and that America is a set of ideas and values and convictions that make us strong.”

Similarly, Clinton said, while some affirmative action programs need reform, “we are a better, stronger country because we have made a conscious effort to give people, without regard to their race or gender, an opportunity to live up to their God-given capacities.”

Clinton, who has acknowledged that it will be difficult for him to win reelection without carrying California, said he opposes race- and gender-based quotas and any other form of reverse discrimination.

The last time Clinton weighed in on a major California issue was in 1994, when he opposed the Proposition 187 ballot initiative aimed at cutting off most social services for illegal immigrants. Voters approved the measure by 59 to 41 percent, although it has been blocked by court appeals.

A recent statewide poll by the Field political research group showed that California voters support by a 2 to 1 margin a new ballot initiative to end all race and gender preference programs in hiring and contracting. The Field poll also showed that only 37 percent of California voters are inclined to vote for Clinton.

Clinton said that decisions made in the next 60 to 90 days as Congress resumes “will determine what kind of country we're going to be in the 21st century.”

“Now there will be plenty of things for us to disagree on, but at this moment our national security in the [next] century depends on our agreeing to invest in our people, and to grow our economy, and to pull our country together as we balance this budget,” Clinton said.

He praised the new state university here as a model of such bipartisan cooperation in military base conversion.

## San Diego Officials Brace for Protests Over Abortion

By TONY PERRY, TIMES STAFF WRITER

SAN DIEGO—Mayor Susan Golding said Monday that if anti-abortion protesters attempt blockades at abortion clinics during next week's Republican National Convention here, police will act "swiftly and decisively" and may use the controversial tactic called "pain compliance."

But leaders of Operation Rescue, one of the nation's most aggressive anti-abortion groups, said they would not be deterred by the threat of arrest or the possibility that police will use a martial arts weapon called a *nunchaku* to inflict pain on protesters who refuse to move away from clinics or doctors' homes.

"If the San Diego police want the world to see them torturing Christians who are trying to save babies, then shame on them," said Troy Newman, head of Operation Rescue's San Diego County branch.

At a news conference called to discuss security issues for the convention, which starts Monday, Golding said, "We welcome everyone having the chance to exercise their right to free speech." But she added that if anti-abortion activists "move beyond that to inhibit others from being able to exercise their rights, we will take action, very swiftly and decisively."

Golding's declaration came amid rising tension between the two sides in the abortion controversy, which have been girding for possible conflict during the convention.

The mayor also announced that California Highway Patrol officers will assist San Diego police in keeping order during the convention. Although declining to provide details, Golding said that, in response to the bombing at the Olympics in Atlanta, San Diego officials have decided to increase security at "all public sites in [the city] for the convention."

Operation Rescue members staged protests at abortion clinics during the 1992 GOP convention in Houston. A slow and equivocal response by local authorities was later blamed by the abortion rights movement for encouraging the protests to intensify in the city during the convention and afterward.

For this year's GOP gathering, Operation Rescue leaders opted not to use the official "protest zone" set aside across the street from the convention hall and have mocked the whole idea of such a site.

Operation Rescue has announced it will hold nightly rallies during the four-day convention at a church in nearby Lemon Grove, as well as daily "street activities."

"I can't rule out the possibility of sit-ins or rescues," said Jeff White, California director of Operation Rescue. "Sit-ins are an honorable form of American protest."

Representatives of Planned Parenthood and other health clinics that provide abortions met recently with San Diego police, local prosecutors

and the U.S. attorney's office to request "100% enforcement" of federal and local laws protecting abortion clinics.

A federal law makes it a crime to block access to a clinic offering reproductive health services. A local ordinance requires protesters to stay eight feet away from employees or clients entering or leaving a clinic.

Another local ordinance makes it illegal to picket in front of a doctor's home. And court injunctions remaining from previous clashes require protesters to stay 100 feet or more from certain San Diego clinics.

"We're definitely prepared for whatever might happen," said Ashley Phillips, chief executive officer of WomanCare, a clinic that has been targeted for protests in the past.

Like many big cities, San Diego has seen its share of abortion protesters. In the late 1980s, dozens were arrested while attempting to block the entrances to WomanCare and other clinics. Faced with demonstrators who went limp and refused to move, police used nunchakus.

A nunchaku, which is illegal for anyone other than police to possess, consists of two 12-inch plastic rods connected by 4 inches of braided nylon cord. When applied to the wrist or arm and given a twist, a nunchaku can cause intense pain that is intended to force protesters to move under their own power.

The rationale for using nunchakus is that carrying or dragging protesters could lead to injuries, particularly back injuries, among police officers. Anti-abortion protesters called the weapons cruel, but San Diego courts upheld their use as appropriate.

San Diego police, with the blessing of the City Council, carry nunchakus as part of their everyday gear. San Diego is one of the few departments to use them; the Los Angeles Police Department does not.

San Diego Police Chief Jerry Sanders said Monday that if protesters block access, trespass or otherwise break the law, police officers will first ask them to leave voluntarily.

"We will do everything we can to avoid arrests," Sanders said. "But if we need to, we will arrest people. We give officers the tools they need."

Asked about using pain compliance on anti-abortion protesters, Golding, who supports keeping abortion legal, said: "If they violate the law, the Police Department will take whatever action they deem necessary."

Abortion clinics have been training hundreds of volunteers to help keep clinics open if they are the targets of sit-ins or blockades.

Operation Rescue is arranging motel rooms for followers coming from out of town.

"We're going to pull out all stops to expose the evil of abortion," Newman said. "We're going to show the gruesome truth about abortion in the streets of San Diego."

THE REPUBLICANS

## Platform Unit Acts on Illegal Immigrants' Children

By DAVID E. ROSENBAUM

SAN DIEGO, Aug. 5 — A group of 25 Republicans from across the country, wrestling with issues like abortion and immigration, voted today to endorse a proposed constitutional amendment that would deny United States citizenship to children born to illegal immigrants.

The 25 are members of the individual rights subcommittee of the party's Platform Committee and are charged with writing the sections on abortion, immigration, affirmative action, gun control and several other controversial issues. Five other subcommittees worked today on other issues.

On the question of abortion, the subcommittee's main goal was to write a plank that would not provoke a floor fight at the Presidential nominating convention here next week.

Under the Constitution, anyone born on American soil is automatically entitled to citizenship. Representative Bill McCollum of Florida, the sponsor of the platform's proposed citizenship plank, said he wanted to stop "people coming across the border just to have babies."

Betty Fine Collins, a delegate from Alabama, agreed. "We've carried this 'give me your tired, your poor' to an extreme under Democrat leadership," she said.

Mr. McCollum's position was adopted by a voice vote.

Bob Dole's position on the citizenship question was not immediately clear. His staff's object is not so much to have planks on abortion, immigration and other issues that reflect his own position as to avoid a split over those issues at the convention, where he will get the party's Presidential nomination.

"I'm confident by the end of the week we're going to have a document all Republicans will be comfortable running on," said Paul Manafort, Mr. Dole's convention manager.

But among the delegates here are all shades of opinion on abortion. Those farthest apart on the issue — the ones who favor a constitutional amendment outlawing all abortions, and the ones who support complete legalization — said they were prepared to press their case at the convention next week.

The work of the subcommittees will be considered beginning Tuesday by the full Platform Committee: 107 delegates from every state, territory and the District of Columbia. A final platform will be voted on by all the delegates to the Republican National Convention on the convention's first day, next Monday.

Contrary to the situation in some parliamentary democracies, where elected officials feel obligated to abide by their party's platform, the tradition in the United States is that platforms are not binding and are generally forgotten from one party convention to the next.

But the platforms do serve the purpose of distinguishing the parties broadly from each other. For instance, the Republican platform being drafted today advocates ending affirmative action, relaxing environmental safeguards and allowing Federal money to be spent on private-school tuition. The Democratic platform will doubtless take the opposite side of those issues.

On abortion, the Democratic platform is bound to be unequivocally in favor of legal abortions for all women who choose them, though it will contain vague language expressing respect for Democrats who disagree as a matter of conscience.

Abortion has been a thorny issue for Mr. Dole. Personally he has long opposed legal abortion, but he has never made it one of the top items on his ideological menu.

Since 1976, at the first Republican convention after the Supreme Court made abortions legal nationwide, the party's platforms have endorsed a constitutional amendment that would outlaw abortions in all circumstances.

That is a much more rigid stand than is taken by most Republican officials, including Mr. Dole and George Bush. They favor permitting abortions when the life of the pregnant woman is at stake or when pregnancy was a result of rape or incest.

But anti-abortion forces are so strong within the party that Presidential candidates have been willing to go to great lengths to avoid offending them. These are enthusiastic Republicans who will raise money, knock on doors, run telephone banks

and otherwise round up votes for the party's candidates in November.

Four years ago President Bush accepted the plank on the constitutional amendment and avoided an open debate at the convention in Houston by appealing to the loyalty of leaders of pivotal state delegations who themselves favored abortion rights.

In June, Mr. Dole made a pitch to the moderate elements of his party, especially women, by declaring that this year's anti-abortion plank should include what he called tolerance language, recognizing that some Republicans in good conscience favor abortion rights.

But opponents of legalized abortion rebelled, and Mr. Dole backtracked somewhat. Recent versions of the platform drafted by the Dole campaign separated the tolerance language from the abortion plank and mentioned abortion as only one of several issues on which Republicans disagreed.

This has proved unacceptable to both extremes in the abortion debate, and both sides said they would try to take the matter to the full convention for debate next week if they did not get their way.

Ralph Reed, executive director of the Christian Coalition, argued in the hallway today that abortion was immoral and said he could not accept even mention of the word "abortion" in the tolerance language.

On the other side, two of the most prominent Republican governors, Pete Wilson of California and William F. Weld of Massachusetts, have said they will press for a full-scale abortion rights plank.

To bring a platform issue to the floor of the convention for debate, Republican rules require the sponsors to have the votes of one-quarter, or 27 members, of the Platform Committee or a majority of the convention delegates from each of six states.

Surveys of delegates have shown that both sides have the strength to provoke a floor fight if they choose.



DATE: 10-4-96

PAGE: 4-B

## Civil rights groups cite bias in mortgage lending

From wire reports

Two civil rights groups Thursday launched a first legal strike against what they said was a nationwide pattern of racial discrimination in home mortgage lending.

The American Civil Liberties Union and the National Association for the Advancement of Colored People said they had filed a complaint with the Pennsylvania Human Relations Commission alleging a subsidiary of finance company PHH Corp. discriminated against blacks in

the Philadelphia area.

"Owning a home is part of the American dream. Unfortunately ... all too often African Americans have been prevented from participating in that dream because mortgage companies discriminate," Stefan Presser, legal director of Philadelphia ACLU office, told a news conference.

Filing the state complaint automatically triggers a federal investigation, Presser said. Both organizations said the complaint was just the start of a national legal campaign.

The case against PHH was based

on data lenders are required to submit under a 1990 federal law aimed at fighting lending discrimination.

A PHH spokesman said the firm had just learned of the complaint and was preparing a statement.

The complaint said lending data for 1994 and 1995 showed that PHH denied loans to African Americans in far greater proportion than it did to whites. In 1994, 5% of whites seeking loans from the company were denied, vs. 18% of blacks. In 1995, 3.7% of whites and 6.7% of blacks were denied, the ACLU said.

## PERSPECTIVE ON AFFIRMATIVE ACTION

# Why Business Can't Support 209



The deceptive state initiative talks of a colorblind society, but its effects would be anything but egalitarian.

By RALPH C. CARMONA

Proposition 209 on the Nov. 5 ballot, the "California civil rights initiative," reads like an equal opportunity fairy tale. Its supporters speak of colorblind individualism and oppose public sector "preferences" of race, sex, color, ethnicity or national origin. Underlying these noble thoughts, however, is an ideological bias against these very ideas.

Proposition 209 assumes that critical aspects of affirmative action, characterized as "preferences," mean quotas for employment, education and contracting opportunities. Nothing could be further from the truth. Public quotas are illegal and wrong and any semblance of such should be corrected.

California's corporate community, central to any state campaign, has been reluctant to embrace Proposition 209. The reason is simple. When stripped of its false quota premise, the proposition would ban practical integration efforts aimed at women and minorities. The result would be an all-or-nothing public policy that would undermine the way that corporations make use of their affirmative action programs. By prohibiting use of those business programs and practices in the

public sector, Proposition 209 would cast a dark shadow over collaborative work in such areas as economic development and education.

The corporate community, for example, relies on public higher education to diversify its work force and better market its products. To remain profitable, businesses must take account of ethnic, racial and gender factors to enhance employment pools, services and products—this is because California has become a nonwhite market composed of women as well as men. These factors, or "preferences," are everywhere: bilingual bank teller machines, and cultural, gender and racial distinctions depicted in billboard advertising, featured on TV or the objects of telemarketing.

Obsessed with colorblind notions, Proposition 209 supporters urge a one-size-fits-all policy in place of these practical factors. They would evade the realities of a diverse California by inefficiently expanding limited public education resources to all social segments for "natural integration." Yet in a society that uses race, gender and ethnicity in corporate marketing and recruitment, is it wrong to use these factors for public integration and equal opportunity? Should voters support a state proposition that would prohibit public institutions like the University of California from specifically reaching out to an excluded body of people or a segregated community?

This is why Proposition 209 has failed to garner corporate support and why last

year's UC regents decision on affirmative action was opposed by the university's president, campus chancellors and faculty. As a regent, I opposed the decision and predicted that the number of underrepresented minorities at UC campuses would drop dramatically. This week, a study commissioned by the university confirmed that minority enrollment at UCLA and UC Berkeley could drop 50% to 70% once the rollback of affirmative action takes effect—while white and Asian American enrollment would grow.

As our economy enters a knowledge-based era in which collaboration, education and diversity are critical to success, there is growing concern that Proposition 209 will create a "separate but equal" public sector that locks out a major portion of California's population. Many legal scholars believe that Proposition 209 also contains a clause justifying existing gender discrimination, leaving women's potential to the whim of stereotype.

The reality is that we live in a world in which relationships, connections and, yes, preferences, matter in providing opportunity. Informal procedures, segregated relationships and cultural biases too often determine these opportunities. In effect, the passage of Proposition 209 is an open invitation to make government an arbiter for a private morality determined by those who currently rule the roost.

The bottom line is this: Self-interest need be the only guide for California's corporate community in examining Proposition 209's potential effects.

Many of us remember how Branch Rickey broke major league baseball's race

barrier when he persuaded a courageous black young man named Jackie Robinson to join the Brooklyn Dodgers. At one point in their negotiations, Robinson poignantly asked: "Mr. Rickey, why are you doing this?" "Mr. Robinson," answered Rickey, "I just want to win me some ball games."

As a young Bank of America executive more than 10 years ago, I observed senior management's opposition to bilingual teller machines because of an "English-only" political climate. The bank's policy changed as a matter of business necessity, in order to break the language barrier. This fallen blockade symbolizes a forgotten time in our history when Amadeo Giannini, a young Italian immigrant,

founded a bank to cater to California's redefined ethnic communities by establishing bilingual bank branches. Giannini's Bank of Italy eventually became the nation's largest financial institution, known around the world as—you guessed it—the Bank of America.

If Proposition 209 passes, it is unlikely that similar barriers—racial, ethnic, gender, cultural—will continue to be lowered in California's public world and in the private sector affected by it.

*Ralph C. Carmona works for a Northern California electric utility. He recently ended a term on the UC Board of Regents.*



# Subtle racism on trial 'Code words' cloud issue of discrimination at work

By Del Jones  
USA TODAY

Words spoken at work that aren't literally racist — such as "you people," "poor people" and "that one in there" — now can be grounds for employment discrimination lawsuits.

They're called "code words."

In overturning a lower court ruling, the 3rd Circuit Court of Appeals in Philadelphia said code words have become the bigot's weapon of choice in the '90s.

The appeals court ruled that a jury should decide whether a pattern of code words used by white workers and managers at a Maple Shade, N.J., furniture rental store was enough to create a workplace so hostile that credit manager Carol Aman, who is black, resigned in 1992.

The case, Aman vs. Cort Furniture Rental, is destined to go down as a landmark in the three decades of employment discrimination law, legal experts say.

Cort Furniture CEO Paul Arnold denies any discrimination at the company and two weeks

ago instructed his lawyers to appeal the decision to the Supreme Court. If the Supreme Court decides to hear Cort Furniture's appeal, it wouldn't determine whether discrimination took place, but only if the case should be heard by a jury.

But the 4-month-old appeals court ruling already is having workplace repercussions, pressuring companies to police more diligently. Corporate lawyers say it will stifle communication by creating an atmosphere of caution just when employees are urged to work more cooperatively.

Civil rights groups see the opposite: an atmosphere more conducive to teamwork. They say the decision was necessary because bigots have figured out how to get their message across and stay out of court.

"Discrimination in this day and age is not blatant. It is almost always sub-

tle," says John Reiman, a lawyer who represented Secret Service agents in a high-profile discrimination lawsuit settled against Denny's in 1993.

The law "does not prohibit racist thoughts," wrote Circuit Judge Timothy Lewis in his opinion. But Cort Furniture's defense clearly expresses concern that the ruling will open the door to lawsuits on the basis of mind reading. Aman merely perceived rude co-workers and demanding managers as racists, lawyers for Cort Furniture argue.

"We're on a collision course with the First Amendment," says lawyer Edward Katze, representing Cort Furniture.

But author Lawrence Otis Graham, who is black, sees no danger of that. "People who use (code words) are well aware of what they mean," says Graham, who has written about his experience posing as a busboy at a country club. "They do all the things that Archie Bunker did."

Few deny there is a perception chasm between black and white workers, and interviews with those who worked alongside Aman at the Cort Furniture store in Maple Shade bear that out.

Jeanette Johnson, a black woman who was Aman's immediate supervisor and is a co-plaintiff in the lawsuit, says white workers would reprimand black workers by saying things such as "if this continues, we're going to have to come up there and get rid of all of you."

Yet, white workers don't seem to remember any code words used at

all. Pascale Rodriguez, a white woman who still works at the Cort Furniture store in Maple Shade, says there was a "closely knit" atmosphere among all workers, although she sensed Aman was unhappy before her resignation.

"I remember times when she snapped at me," Rodriguez says. But she says she never sensed racial undertones and was on good terms with Aman. "She had a stressful position."

But Aman recalls, "The first day I walked onto the job (1986), they deliberately snubbed me."

Black workers say today's workplace bigots operate by making subtle racist remarks and, when confronted, feign surprise and dismay that offense was taken. During another trial last month in Los Angeles, former Pitney Bowes salesman Akin-tunde Ogunleye, who has a Nigerian accent, testified that a co-worker taunted him with "ooga-

booga, jungle-jungle."

The co-worker, who has a French accent, testified that it was all a misunderstanding of accents and that he really said, "bonjour, bonjour."

"You can tell if it's an honest mistake. He was lying," Ogunleye told USA TODAY after the trial. The jury awarded Ogunleye \$11.1 million.

Pitney Bowes officials declined to comment.

Ogunleye said that half the discrimination he faced at Pitney Bowes was blatant. The other half might fall into the appellate court's definition of code words.

For example, Ogunleye says his supervisor asked him four times in two months: "Where are you from?" And when Ogunleye returned from a

63

three-month, stress-related disability leave, the same supervisor said: "You're no good, you're just like Darryl Strawberry," referring to the black professional baseball player who has been in and out of the sport due to substance abuse.

But Ogunleye's case may have been dismissed without getting to a jury, except for the alleged taunts such as "jungle, jungle." The Aman vs. Cort Furniture ruling will let juries decide whether a pattern of more subtle comments are enough to pass the legal test of making a reasonable worker feel threatened.

"I think it's carrying it too far," says Steve Cabot, a white Philadelphia labor relations lawyer, who is advising 8,000 companies in a news-

letter to take precautions. "We need to be sensitive. But workers will be walking on egg shells."

Companies expect a rash of litigation. Cabot says that four of his clients, all *Fortune* 200 companies, began rewriting policies two weeks ago, sending memos to warn workers and planning sensitivity training courses.

Any company with a healthy fear of lawsuits will at least let employees know that code words are not to be tolerated and complaints will be investigated, Cabot says. However, he said one company with \$750 million in annual revenue has decided to do nothing because it fears that workers who find out that more subtle action is grounds for lawsuits will wind up filing more of them.

"I have some problems with every little thing being grounds for a suit," says Shelby Steele, a black critic of affirmative action and author of *The Content of Our Character*.

Steele says he has been the target of code words, but finds that confronting bigots usually shuts them up. When the courts are used for minor grievances, then they lose their effectiveness, he says. "What happens when I'm denied a house or a promotion" because of race, he says.

But many Hispanic workers are afraid to say, "that bothers me," says Dan Cortez, a Hispanic employee with a *Fortune* 500 company in Phoenix. Those who complain often get reputations as malcontents.

Cabot says recent sexual discrimination decisions have left men wondering whether it's OK to compliment a woman on her wardrobe and questions whether Aman vs. Cort Furniture Rental will confuse ethnic and racial workplace relations as well.

But while there may be an innocent misunderstanding when a man comments on a woman's hairstyle, there is never an innocent reason for categorizing minority groups with code words, says Reiman, the lawyer who represented black Secret Service agents in the Denny's case.

However, Cortez says there is a confusing gray area. An Anglo co-worker, who also is a good friend, may be able to tease Cortez about his fondness for Mexican food, while it might be offensive coming from a co-worker who is a stranger, he says.

Few believe racism can be extinguished. The debate has shifted to what is actionable at the workplace.

It's not just the words, says Herman Cain, the black CEO of Godfather's Pizza and author of *Leadership is Common Sense*. "It's body language. Tone of voice. How people talk to you. Over the years you can develop a sixth sense."

# Letting Workers Keep the Faith

1/2

*Employers Find Ways to Accommodate Religious Beliefs on the Job as the Work Force Becomes More Diverse*

Elizabeth Castillon was suspended from her job as a customer service representative at an Office Depot Inc. store in Santa Clara, Calif., last month because, her managers told her, she had violated the company's dress code.

What had Castillon done to merit what the office supply store managers called "administrative leave"? She refused to remove her hijab, a head scarf worn by many Muslim women because of their religious beliefs.

After a local chapter of the Washington-based Council on American-Islamic Relations (CAIR) intervened, Office Depot reinstated Castillon, offered her back pay and told her she could wear her hijab at work.

## WORKPLACE

Heather Salerno

Castillon is happy with how the situation was resolved, and says Office Depot

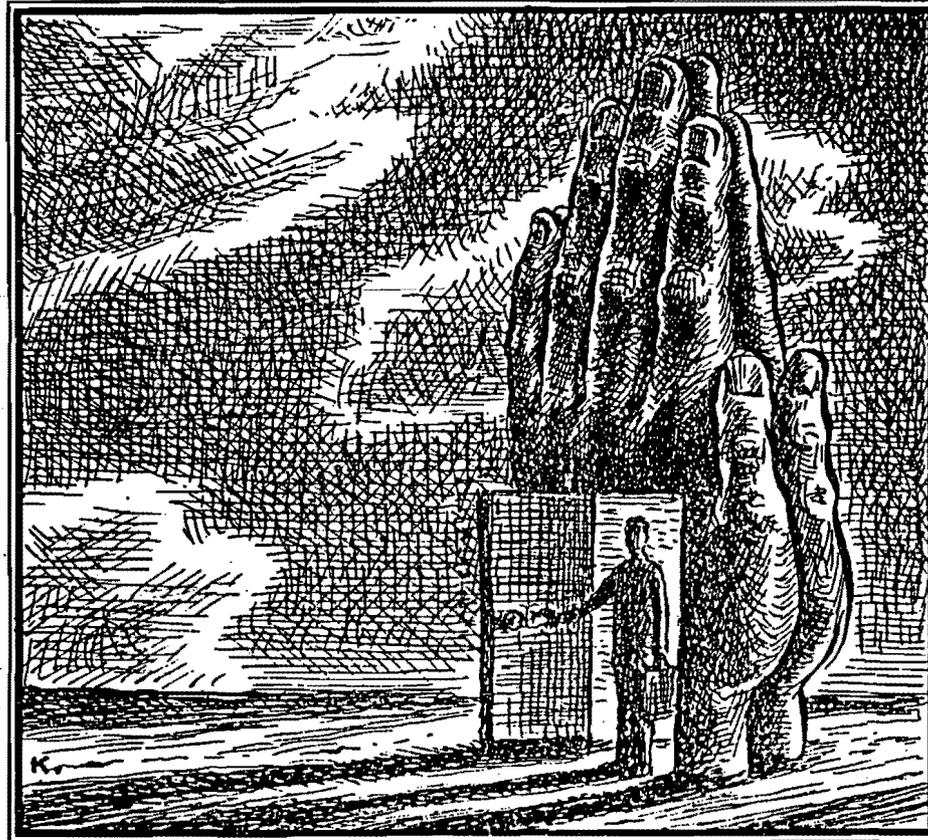
managers were guilty only of misunderstanding company policy and the scarf's significance, not intentional discrimination.

"They said they thought [the hijab] was out of dress code, but that they would check with corporate," said Castillon, 22, who was out of work for two weeks. "If they'd been a little smarter, maybe they wouldn't have told me to go home so quickly and gotten on the phone with corporate right away."

Castillon represents a new wrinkle in the American workplace's changing fabric. As their customers and workers become more ethnically and racially diverse, companies are encountering differences among their workers more often—particularly in matters of faith.

Advocacy groups, employment law experts and diversity consultants say most companies are mindful of federal law prohibiting job discrimination based on religion—but that many do not know the law also requires employers to accommodate employees' religious practices unless doing so would cause undue hardship.

"The second prong of this law is not well known, especially among smaller employers," said Martin List, a partner with Duvin, Cahn &



BY THOMAS M. KERR FOR THE WASHINGTON POST

Hutton, a Cleveland law firm that specializes in labor relations and employment law. "It's intuitive to know you can't discriminate on the basis of religion. It's not intuitive to know you have to accommodate someone's religious practices."

Besides urging exceptions to corporate dress codes for religious garb, many diversity consultants and human resource managers are encouraging companies to adopt such practices as flexible work schedules for employees who would

like to take time off for prayer, and rotating holidays, so non-Christian workers can celebrate a holiday other than Christmas.

Race and sex discrimination cases far outnumber cases alleging religious discrimination, but the Equal Employment Opportunity Commission (EEOC) says allegations of religious discrimination have been rising. More than 1,560 cases were reported last year, up from 1,192 cases in 1991.

CAIR has helped resolve a number of cases similar to Castillon's, involving such major companies as J.C. Penney Co. and McDonald's Corp.

Mohamed Nimer, director of CAIR's research center, said a rise in complaints from Muslims in the past year led the organization to publish a 16-page guide for employers on Islamic dress, diet, prayer requirements and other tenets. Several Fortune 500 companies have called to ask about the booklet, he said.

"We noticed a tremendous lack of knowledge on the part of employers as to what legitimate practices are," Nimer said. "The booklet is not designed to preach; it's designed to be practical and give tips on how to accommodate the needs of Muslim workers."

CAIR officials say that incidents such as the one at Office Depot usually reflect ignorance of the law or corporate policy, generally on the part of lower-level or local managers. According to CAIR, when a Muslim telephone operator at a Philadelphia Marriott hotel asked permission to wear her hijab with her uniform, managers initially resisted until they checked with company officials and found there were exceptions to the rules.

"In the diverse workplace that Marriott has, there are specific and unique cases that come up that aren't everyday cases. They aren't something you can go to an operating manual and find out," said Geary Campbell, a spokesperson for Marriott International Inc. "To my knowledge, this hotel hadn't encountered something like this previously and they found out there were exceptions based on religious beliefs."

However, retailers, hotel companies and other service businesses, as well as companies that focus on consumer products, traditionally have been more creative and aggressive in handling diversity issues because of the impact on business, said Patricia Digh, senior diversity consultant for the Society for Human Resource Management, an Alexandria-based trade association with more than 77,000 members.

Digh also noted that when employers do not

2/2

view race, gender, age, physical ability and other characteristics as issues to address, they are less likely to focus on "less visible" matters such as religion and sexual orientation. Clearly, experts say, the more diverse the workplace, the more accommodation is made for religious belief.

Businesses such as Lucent Technologies Inc., the New Jersey company that until recently was part of AT&T Corp., recruit workers internationally and say that multicultural training is crucial to work force stability. Lucent employees are required to attend a minimum of 10 to 15 hours of diversity and affirmative action seminars per year and can choose from a variety of topics.

Tom McFaul, professor of ethics and religious studies at North Central College in Naperville, Ill., has given six presentations on world religions to Lucent employees whose offices are near the school's campus. McFaul gives an overview of major religions, without referring to specific workplace issues. He says people must understand the religion itself before they can accept how it affects a worker's behavior. "Without that, people can't move to the next level."

More companies are slowly embracing diversity, but it's because of societal and political pressure rather than because it is "the right thing to do," said Michelle Smead, vice president at A.T. Kearney Executive Search, a consulting practice in Chicago. In a December survey of Fortune 500 companies conducted by A.T. Kearney, almost three-fourths of the respondents said diversity programs were in place because they were good business, not good ethics.

"For a company to make sure their employees are respected because of their differences really takes a major investment and a CEO who truly believes in it," Smead said. "But of course, there are a lot of corporate benefits to diversity training—anytime you make employees feel valued, productivity goes up and loyalty increases. When you multiply that throughout an organization, it has a lot of impact."

# **EEOC News Clips**

*for*

*March 15 - 17, 1997*



*Compiled by*

*The Office of Communications and Legislative Affairs*

# News

## Civil Rights

### Advocacy Group Calls Clinton Record 'Mixed'; Professor Suggests More EEOC Rulemaking

The Clinton administration achieved only a "mixed" record in civil rights enforcement during its first term and must revitalize its efforts during its second four years, a bipartisan advocacy organization of former government officials has warned.

"Discrimination is still rampant in American society and the Clinton administration has yet to develop an effective program to combat its effects—which are especially severe for poor people," said the Citizens' Commission on Civil Rights in its biennial report, *The Continuing Struggle: Civil Rights and the Clinton Administration*.

The comprehensive, 280-page report contains a series of general recommendations to "reaffirm a commitment" to civil rights, "revitalize" federal agencies, and "use affirmative remedies" for civil rights laws. Along with the boilerplate suggestions, however, are detailed working papers on 13 civil rights topics by outside experts, who delve into more specific issues and, in some cases, call for major changes.

**Rulemaking Before Litigation.** In assessing the state of the Equal Employment Opportunity Commission, for example, Rutgers University law professor Alfred Blumrosen offers a blueprint for reform that would redirect the enforcement agency's policy emphasis toward rulemaking rather than litigation.

The internal reforms initiated by the task forces of the Casellas commission were "well thought out and long overdue," observed Blumrosen, who served as a top EEOC official in the agency's formative years. Those changes—which include priority charge processing and litigation effort—"will improve the implementation of EEO laws and free substantial resources," if they are implemented carefully, he suggested. A second series of commissioner-led task forces currently is evaluating the effectiveness of the 1995 reforms (48 DLR A-5, 3/12/97).

Now, Blumrosen suggested, EEOC should turn its emphasis to rulemaking as the best way to develop its legal policies.

"The commission should begin to develop and assert its policies through well thought out rules and guidelines which are issued after public notice and comment proceedings, rather than leave policies to be decided by unfriendly courts," the law professor wrote. "Litigation should be carried out in support of—not in lieu of—commission policies adopted after public participation."

EEOC, he suggested, should become more proactive, by issuing guidelines and rules, rather than relying on a strategy of litigation. "As a litigant, the commission is on the same level as any other party," he wrote, "As a

rulemaking regulatory agency it has been endowed with significantly more influence."

Blumrosen suggested a possible rulemaking agenda that would consider reductions in force that may have a disparate impact on protected groups; the scope of permissible affirmative action programs of state and local governments; the use of selection procedures; the interpretation of "ambiguous" provisions in the 1991 Civil Rights Act, and the appropriate role for private arbitration in resolving discrimination disputes.

**'Promising Developments' at Commission.** Assessing the administration's overall EEO performance during the first term, Helen Norton, an attorney with the Women's Legal Defense Fund, gave high marks to the "promising developments" in the policy changes at EEOC, the "spirited defense" of affirmative action by the Justice Department's civil rights division, and "impressive initiatives" by the Labor Department's Office of Federal Contract Compliance Programs.

EEOC, she suggested, should take "more real action" to back up its promise to increase attention to charges of systemic discrimination. "More specifically, the commission should actively use evidence developed by employment 'testers' as an additional tool for uncovering systemic discrimination," Norton wrote.

EEOC and OFCCP also should develop a memorandum of understanding that would allow the Labor Department agency to negotiate for damages under the Civil Rights Act of 1991, she said. By designating OFCCP as the commission's agency when it identifies intentional discrimination by federal contractors as part of a compliance review, OFCCP would be able to negotiate for compensatory and punitive damages. Such a memorandum would parallel an existing agreement between the two agencies with respect to the Americans with Disabilities Act and Section 503 of the Rehabilitation Act "and would create an important interagency means of maximizing enforcement resources," Norton wrote.

The Citizens' Commission on Civil Rights was formed in 1982 to monitor civil rights policies and practices of the federal government and to seek ways to accelerate progress in the areas of civil rights. The bipartisan commission was started by the late Arthur Flemming after he was fired as chairman of the U.S. Commission on Civil Rights by Ronald Reagan. Flemming headed the independent commission until his death last year. William L. Taylor, a Washington, D.C., attorney and long-time civil rights activist, is vice chair of the commission and Corrine Yu is director and counsel.

BY NANCY MONTWIELER

Copies of the report are available free of charge from the Citizens' Commission on Civil Rights, 2000 M Street N.W., Washington, D.C. 20036.

# Conference Report

## ABA EEO Committee

### EEOC

#### Flood of Bias Cases in Court Means Big Changes for Employers, Attorneys

**O**RLANDO, Fla.—An “explosion” of employment discrimination cases filed in federal courts nationwide over the past five years is prompting employers to step up their emphasis on internal resolution of disputes and is bringing a flood of new attorneys from other disciplines into the field of EEO law, according to a prominent civil rights lawyer.

Examining trends in fair employment litigation at an American Bar Association session March 19, Richard Seymour, director of the employment discrimination project of the Lawyers' Committee for Civil Rights Under Law, said the practical implications of the litigation explosion will be “fairly stark” for experienced employment litigators on both the plaintiffs' and defense side.

The “stable range” of new EEO cases filed in federal district courts from 1982 through 1991 went from “about 8,000 to the high 9,000s,” according to statistics that Seymour compiled from the Administrative Office of the U.S. Courts.

But, in the five years after that, following passage of the Civil Rights Act of 1991, the number of new EEO case filings has increased markedly. At the same time, however, both the number and percentage of cases filed by the federal government (either the Equal Employment Opportunity Commission or the Department of Justice) has dropped off sharply (53 DLR A-2, 3/19/97).

Seymour presented the following statistics at a session of the ABA's Equal Employment Opportunity Committee's mid-winter meeting:

- In the 12 months ended Sept. 30, 1992, 10,771 job bias claims were filed, including 440 filed by the federal government;
- In the 12-month period ended Dec. 31, 1993, 13,650 claims were filed, 501 of them by the federal government;
- In the 12 months ended Sept. 30, 1994, 15,965 claims were filed, 439 by the federal government;
- In the 12 months ended Sept. 30, 1995, 19,059 claims were filed, 410 by the federal government;
- In the 12 months ended Sept. 30, 1996, 23,152 claims were filed, 289 by the federal government.

Over the 1992-1996 period, the rate of increase in new EEO filings from each previous year ranged from a low of 17 percent in 1994 to a high of 32.3 percent in 1992. By comparison, he said, the 270,000 new civil cases—of all kinds—filed in federal district court in the year ending Sept. 30, 1996, was only an 8.4 percent increase over the prior year.

**Practical Implications Broad-Based.** Seymour told the gathering, composed largely of management attorneys, that the flood of litigation will have a series of practical implications for them and their clients.

Employers, he suggested, will face “even stronger pressure” to develop internal complaint systems. More of them “will go the next step and adopt mandatory arbitration procedures,”—an approach, he suggested, that “paradoxically will create opportunities for plaintiffs' attorneys,” who will challenge the procedure.

The “continued flood of cases will bring a continued flood” of personal-injury and white-collar defense and other new attorneys into the labor and employment law field on both the plaintiffs' and defense side. The inexperience of these attorneys with the nuances of employment and EEO law will bring significant difficulties to experienced employment lawyers, Seymour suggested.

For example, inexperienced plaintiffs' attorneys “will fail to recognize problems in cases, bringing more bad cases to court and refusing to settle cases because of unrealistic expectations,” while inexperienced defense attorneys will have similar misperceptions on the other side of the table.

“Settlement,” he suggested, “will be complicated for both sides, because the training of personal-injury lawyers does not lead them to place a high enough value on injunctive relief or the value of reinstatement or a promotion to the client”—concerns that are frequently key to employment cases.

By NANCY MONTWIELER

### EEOC

#### EEOC's Reduced Docket Reflects Agency Refocus of Litigation Efforts

**O**RLANDO, Fla.—The reduced docket of active cases pending in the office of the Equal Employment Opportunity Commission's general counsel reflects the civil rights enforcement agency's deliberate decision to refocus its litigation efforts and to pursue more class actions, according to EEOC's top attorney.

“The decline in litigation activity was inevitable” after the commission issued a directive in February 1996 setting enforcement priorities and delegating new authority to commission attorneys (27 DLR AA-1, 2/9/96), General Counsel C. Gregory Stewart told an American Bar Association meeting of employment lawyers March 20.

“The current, active docket is 300 cases,” Stewart said, and the newly targeted, “more strategic” cases are beginning to get to court. Although he projected that EEOC attorneys would eventually be handling a docket

of cases within the 300-to-350 range, Stewart said the new priorities and the monetary constraints make it unlikely that EEOC would return to the days when agency attorneys handled a docket of 500 or more cases.

Under its new, directed approach, Stewart said, the emphasis for commission attorneys has changed. "They no longer engage in repetitive litigation, like a prosecutor would," he observed. Attorneys are engaging in more exchanges with civil rights groups to determine which cases they should take. Now, with the delegation of authority for individual cases sent to the local offices, attorneys in the field are making decisions on "truly egregious cases—or ones so unique to the region—that they warrant prosecution."

EEOC officials, including Chairman Gilbert Casellas, have expressed concern over the drop-off in litigation activity, which fell to 161 new substantive case filings during the last fiscal year, compared with 322 a year earlier (53 DLR A-2, 3/19/97).

EEOC Vice Chairman Paul Igasaki acknowledged those concerns at the mid-winter meeting of the ABA's Equal Employment Opportunity Committee here, but added that the change was expected.

"Some drop was anticipated with the new approaches," he told the meeting of some 250 attorneys. The reduction, he said, "is not necessarily fatal" and "hopefully, it's temporary in nature."

**EEOC and Private Cases.** Stewart said that despite the commission's limited resources, the agency finds it "critically important" to become involved in some employment discrimination cases where private attorneys have taken the lead. During the past year, for example, the agency has taken an active role in highly publicized cases against Mitsubishi, Texaco, and Publix Supermarkets.

Those cases and others are of "such significance because of the issues and scope that it is critical for EEOC to participate," Stewart said. Commission officials are cautious, he and Igasaki both asserted, that private cases are assessed carefully, that efforts are not duplicated, and that coordination with plaintiffs' attorneys is clear.

Expanding on EEOC's determination to get involved in a private case, Stewart said that EEOC is more likely to intervene in cases where "public interest issues are significant and dramatic" and where private counsel has requested commission intervention. The decision is made on an ad hoc, case-by-case basis and litigation decisions involving "significant issues" or major financial outlays continue to go before the commission.

By NANCY MONTWIELER

## EEOC

### **EEO Legislation Is Unlikely Concern Of This Congress, Says EEOC Commissioner**

**O**rlando, Fla.—The 105th Congress is unlikely to act on any significant equal employment opportunity legislation during this session, Equal Employment Opportunity Commissioner Reginald Jones predicted.

Emphasis in the full House and Senate on nonlabor issues and other priorities by the committees with jurisdiction over EEO matters make any movement in civil rights legislation unlikely, Jones told a gathering of employment lawyers March 20.

"EEO legislation is not a priority of the Republican leadership," he said, and even the committees—the Senate Labor and Human Resources Committee and the House Education and the Workforce Committee—will "virtually ignore" EEO bills, with their priorities turned to job training, health care, and education reform.

Jones, who served as a top aide to Senate Labor Committee Chairman James Jeffords (R-Vt) before coming to EEOC last year, observed that any renewed push for last session's Dole-Canady bill, which would bar preferential treatment and reopen the affirmative action debate on Capitol Hill, "will come later rather than sooner."

Jones suggested to the audience, composed primarily of management attorneys, that the lack of interest by the business community in the Dole-Canady measure was a significant reason for its demise and the reason it "sputtered to a halt" in the last Congress.

"The business community has embraced the concept of affirmative action," he said, and that support "has put the issue out of the national debate."

**Issue Will Play Out in California.** Although Rep. Charles Canady (R-Fla) has expressed his intention to reintroduce the legislation this year, Jones predicted that Congress is unlikely to give serious consideration to the measure. "Congress will allow the issue to be played out in the states, especially California" where a challenge to the constituent-approved Proposition 105 barring preferential treatment is currently in court.

Other bills in the EEO area include ones barring mandatory arbitration of discrimination cases and another—still to be reintroduced—that would bar discrimination on the basis of sexual orientation, which was narrowly defeated in the Senate last year.

Another measure, co-sponsored by Sen. John Ashcroft (R-Mo) and Sen. Daniel Patrick Moynihan (D-NY), would amend the Age Discrimination in Employment Act to allow mandatory retirement for certain tenured college and university professors. The legislation (S 153) "might see some action," Jones said. A similar measure, re-establishing legal mandatory retirement for police and firefighters under the ADEA was approved in the last Congress.

By NANCY MONTWIELER

## EEOC

### **EEOC's Miller Says Enforcement Plan Puts Focus on High-Impact Litigation**

**L**OS ANGELES—The Equal Employment Opportunity Commission's national enforcement plan gives priority to discrimination cases that are likely to have an impact beyond the immediate lawsuit as well as to cases that could establish new law or precedents in employment discrimination, EEOC Commissioner Paul Steven Miller told a conference March 19.

Speaking to BNA after his address at a symposium sponsored by the Labor and Employment Law Section of the Los Angeles County Bar Association, Miller said

that despite continued underfunding, EEOC is not cutting back on litigation but rather re-directing it to maximize the impact.

EEOC's involvement in a sex harassment class action against Mitsubishi Motor Manufacturing of America is an example of the commission's strategy of targeting cases that could affect entire industries and not just the plaintiffs in a particular action, Miller said.

Miller, who currently heads a task force examining the agency's approach to litigation (32 DLR A-8, 2/18/97), told BNA that he is comfortable that EEOC has adopted the correct "vision" by establishing a strategic plan for litigation. He added, however, that he hopes to improve the operational side of the agency's enforcement efforts.

EEOC also must do more to overcome a surprising reluctance on the part of employers to take advantage of mediation services offered by the commission, Miller said in his presentation at the conference. While discrimination charges submitted for mediation enjoy more than a 90 percent resolution rate, employers in general have not yet embraced the idea, he said.

Miller told BNA he was not sure why employers are reluctant to use EEOC's mediation services but he suggested that employers might not fully understand that mediation is voluntary. EEOC remains opposed to mandatory arbitration agreements in employment contracts, he added.

Alternative dispute resolution, however, is now an integral part of EEOC, and some local offices, including the one in Los Angeles, have their own mediators, Miller said at the conference.

**Greater Discretion To Field Offices.** As part of what Miller termed "nothing short of a paradigm shift for our agency," EEOC is giving its field offices and its general counsel greater discretion and responsibility.

EEOC's charge-processing reform, which calls for the quick dismissal of charges that lack merit or fall outside the commission's authority, has cut the backlog of charges from 120,000 in early 1996, to about 78,000 currently, according to Miller.

Miller used the address to remind his audience of the continued need for a federal agency devoted to protecting equal employment. "There is still a long way to go before equal employment is a reality in the United States," he asserted.

By TOM GILROY

**UPS Release -- page 2**

Department of Transportation (DOT) regulations permit drivers with monocular vision to operate vehicles which are rated at less than 10,000 pounds. Most UPS facilities have a number of driver positions which utilize these types of vehicles, and the EEOC lawsuit challenges the refusal of UPS to allow drivers with monocular vision to drive such trucks. The lawsuit also challenges similar restrictions placed on monocular mechanics who are unable to drive, do road tests or make road service calls on these trucks.

William Tamayo, Regional Attorney of EEOC's San Francisco Office, said that the Commission believes UPS discriminated against the subject workers and others because of a disability, or perceived disability, and in violation of ADA law. "There is simply no legal or factual justification for excluding individuals with monocular vision as drivers of lightweight vehicles. This case helps to send the message that discrimination will not be tolerated." EEOC District Director, Susan McDuffie added that "EEOC is committed to protecting the rights of employees. Qualified individuals with or without disabilities are protected under the law. We believe that UPS' policy and practice clearly violate the law."

The EEOC seeks injunctive relief, enjoining the defendant, its officers, successors, assigns, and all persons in active concert or participation with them, from engaging in any employment practice which discriminates on the basis of disability.

The EEOC seeks an order requiring defendant to institute and carry out policies and programs which provide equal employment opportunities for qualified individuals with disabilities and which eradicate the effect of its past and present unlawful employment practices.

The EEOC also seeks an order to make the subject employee whole by providing compensation for past and future non-pecuniary losses resulting from the unlawful employment practices complained of above, including pain and mental and emotional distress, in amounts to be determined at trial. The EEOC also asks the court to grant such further relief as determined necessary and proper.

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act; the Equal Pay Act; sections of the Civil Rights Act of 1991; the Rehabilitation Act, which prohibits discrimination affecting individuals with disabilities in the federal sector; and Title I of the Americans with Disabilities Act, which prohibits discrimination in the private sector, and in state and local governments, against people with disabilities.

###

## Potential Abuse Of Gene Tests by Employers Cited

Associated Press

Tests for the genetic risk of disease eventually will improve health care, but the technology can also be used in the workplace to deny employment, promotions and medical insurance benefits, a group of experts said yesterday.

Members of the National Action Plan on Breast Cancer urged Congress to pass legislation barring employers from discriminating against workers on the basis of genetic information and from gathering genetic information without the consent of employees.

"Genetic information can be a triple threat for employees," said group member Karen H. Rothenberg, director of the Law and Health Care Program at the University of Maryland School of Law. The potential risks are the loss of jobs, health insurance and privacy, she said.

Rothenberg said that a known genetic risk of disease can cause an employer to fire a worker to protect the company's health insurance. It also can cause the worker

to be denied health insurance because of the potential for high treatment cost and can lead to a loss of medical privacy that affects the ability to find work elsewhere, she said.

Genetic tests exist to help determine the inherited risk for such diseases as breast cancer, colon cancer and Huntington's disease. Many patients want to know their risk in order to seek treatment or make other important decisions.

But the tests also identify in advance people who are likely to have high medical expenses for hospitalization and treatment.

Francis Collins, director of the National Human Genome Research Institute, said that protecting the privacy of genetic test information and prohibiting discrimination based on such tests "is an issue of civil rights."

He said it is illegal to discriminate in the workplace on the basis of race or sex, and asked: "Why should we permit something in our genetic code to be used in the same way?"

Collins said genetic information privacy will affect everyone. Researchers are rapidly sorting out the human genetic code and eventually may know the function of every gene.

THE NEW YORK TIMES NATIONAL FRIDAY, MARCH 21, 1997

## Ban Sought on Employers' Use of Gene Tests

WASHINGTON, March 20 (Reuters) — Employers should not be allowed to use genetic tests to discriminate on the job, deny health insurance or violate employee privacy, several top geneticists, ethicists and health advocates said today.

The groups made the recommendations at a news conference about restricting an employer's access to information about a worker's genetics and protecting the worker from job discrimination. The recommendations, in an essay being published on Friday in the journal *Science*, say these laws or regulations should be uniform nationwide.

At least two bills on genetic privacy issues have been introduced in Congress this year, although no action has yet been taken.

"The use of genetic information in the workplace poses societal risks

that have an impact on employment possibilities, health insurance and privacy," the group, which includes Francis Collins, director of the National Human Genome Research Institute at the National Institutes of Health, wrote in *Science*.

"Individuals who might otherwise believe that they can benefit from genetic testing may decline it because of their fear of employment discrimination and lack of privacy in the workplace," the group said today.

Several tests have become available, either in clinical research settings or in the medical community at large, that tell if a person has a gene that predisposes toward a certain disease like breast or colon cancer.

There is already anecdotal evidence that some employers are using this information to squeeze out those employees and limit their insurance.

# Experts Urge Safeguards for Workers' Genetic Information

■ **Ethics:** DNA tests should not be used to deny employees jobs or benefits, group recommends.

By MARLENE CIMONS  
TIMES STAFF WRITER

**W**ASHINGTON—A prestigious coalition of health experts and ethicists Thursday called for legislation or other measures to protect against abuse of an individual's genetic information in the workplace—for example, using the data to deny jobs, promotions, insurance coverage or other benefits.

In recent years, rapidly growing technology and other advances have enabled geneticists to find disease-related genes in human DNA and to develop new tests to detect who carries them. At the same time, health officials say that many people who might otherwise benefit from knowing about their inherited risks for certain diseases have chosen to avoid these tests out of fear that such information will be used against them.

"Genetics is giving us our best hope yet of understanding what goes wrong at the most fundamental level when disease occurs," said Dr. Francis Collins, director of the National Human Genome Research Institute, part of the National Institutes of Health. "But if people are worried . . . they will be unable to take advantage of the enormous opportunities genetics research offers."

The recommendations to provide protection against abuse of genetic data were published in today's issue of the journal *Science* and come from experts representing the federal government and the private

sector convened to explore the social, ethical and legal ramifications of the research.

The group was organized by the Genome Project, an international research effort to analyze the structure of human DNA and determine the location and makeup of the estimated 100,000 genes in the human body. In the United States, the work is being funded by NIH and the Department of Energy.

Under the group's recommendations, employers would be forbidden from using genetic information to affect the status of a worker unless a specific job-related connection to obtaining such information could be proved.

Also, the group recommended that employers be restricted access to genetic information contained in medical records released by individuals in claims filed for reimbursement of health care costs. Such information should be released only with an individual's written permission, the group said, and violators should be subject to "strong enforcement mechanisms."

**G**enerally, the business community has opposed federal efforts to impose workplace policies on the private sector.

Mary Reed of the National Federation of Independent Business, a lobbying group that represents the interests of small businesses, said that she prefers to wait until specific legislation is drafted before commenting on the recommendations. She noted, however, that small businesses—which generally shoulder the economic burden of such federal mandates—traditionally have argued that employers should be free to work out individual arrangements with their employees regarding these kinds of issues.

An example of the expanding use of genetic information in disease detection involves breast and ovarian cancer. Scientists recently discovered that crucial alterations in the genes known as BRCA I and BRCA II are responsible for many of these types of cancer that run in families. A test is now available that can detect the abnormality, and there has been considerable debate over whether women should take it.

Mary Jo Ellis Kahn, an official with the National Breast Cancer Coalition, was among those welcoming the recommendations on use of genetic information.

"Fortunately, Congress has been very supportive of funding medical research, including genetics research, to find a cure and prevention for breast cancer," she said. "It is equally important that they support legislation to protect research participants and patients from misuse of genetic information."

**A**ccording to the group convened by the Genome Project, some courts have allowed employers to require the genetic examination of workers or prospective employees, and employers who do not perform tests directly still could have access to an employee's medical records. "Yet, most observers agree, genetic information should not be used to deny someone a job or a promotion," the group said in its article.

Several states have passed legislation to address these concerns, including Oregon, Wisconsin, Iowa, New Hampshire, New York and New Jersey.

Today's set of recommendations are the second issued by the group; the first was directed at health insurance providers, urging no discrimination in coverage based on genetic information.

**No objections raised to Texaco settlement**

By JIM FITZGERALD

Associated Press Writer

WHITE PLAINS, N.Y. (AP) - No objections were raised at a last-chance hearing today on the proposed \$176 million settlement of a race discrimination suit against Texaco.

Federal Judge Charles Brieant reserved his decision on final approval. But the plaintiffs and their lawyers said they expect the judge will closely follow the proposal.

"This is historic for everybody, not just African-Americans, anybody who has suffered discrimination," said Bari-Ellen Roberts, one of the original plaintiffs.

The class-action settlement was reached soon after the disclosure last November of secret tape recordings on which Texaco executives belittled black employees and plotted the destruction of evidence sought by the plaintiffs in the discrimination suit.

Of the \$176 million in the proposed settlement, \$115 million was designated for lump-sum compensation and damages to salaried black employees. A total of 1,348 workers will get an average of more than \$60,000 each.

Plaintiff lawyer Michael Hausfeld told the judge the settlement was "one of the most publicly scrutinized and acclaimed."

"This settlement is the most effective means of assuring that what justice dictates ... is achieved."

Lawyers for Texaco and the Equal Employment Opportunity Commission said they did not oppose the settlement. Texaco lawyer Andrea Christensen urged Brieant to approve it "because it focuses on the future and ... Texaco's commitment to become a model corporation."

Though the civil case is nearly ended, the case has found its way into the criminal courts. Retired Texaco executive Richard Lundwall, who recorded and came forward with the incriminating tapes, has been indicted on a charge of obstruction of justice for his alleged role in the destruction of evidence.

## EEOC Aims To Use Best EEO Practices in Business To Spur Compliance, Says Jones

The Equal Employment Opportunity Commission plans to offer employers a "roadmap" of the private sector's best practices to direct them toward both compliance with legal mandates and growth in economic productivity, said Commissioner Reginald Jones, chairman of EEOC's new task force on the best equal employment opportunity (EEO) practices in the private sector.

The task force intends to focus on companies that use innovative EEO practices that foster compliance and productivity, and the panel will issue these findings for both "recognition and instruction," Jones told *FER* Feb. 28. The task force plans to examine exemplary business practices in areas including re-

---

*"I don't believe business has abandoned affirmative action as a viable goal."*

*Commissioner Reginald Jones,  
Equal Employment Opportunity Commission*

---

ruitment and hiring, promotion, terms and conditions, termination, alternative dispute resolution (ADR), and other matters.

In large part to consider the "impacts of [business] practices," the task force plans to assemble an advisory group of outside experts including representatives from companies and business groups, diversity organizations and civil rights groups, the commissioner added.

### A.A. Viable for Business, Says Jones

The task force also will consider affirmative action issues, which have been under heavy attack in political arenas but not nearly so much in business circles. Rather, Jones believes many business leaders remain interested in gaining benefits from affirmative action. "I don't believe business has abandoned affirmative action as a viable goal," the commissioner told *FER*. The task force is comprised of EEOC officials from headquarters in Washington and certain field offices throughout the country.

During a commission meeting March 11 in Washington, Jones explained the focus of the task force regarding its selected study areas. For recruitment and hiring, the task force will examine affirmative recruitment programs designed to create a diverse work force. Such private sector programs by companies would include internships, recruitment strategies, and education and training programs used for hiring, the commissioner said.

Moreover, in the promotion area, the panel will concentrate on business programs that have eliminated barriers to the advancement women, individu-

als from diverse ethnic and racial groups, and people with disabilities.

In terms and conditions, the task force will focus on disability and religious accommodation programs, sexual harassment, pay equity, insurance, employee benefits, and work-life and family friendly practices and policies.

Further, in considering best practices in termination policies, the task force will delve into nondiscriminatory early retirement programs, insurance, and retraining and placement programs for employees dismissed in downsizing efforts.

The task force also intends to review ADR programs that provide early resolution of employment discrimination complaints and to look at voluntary and effective ADR programs.

The task force also plans to examine business practices such as diversity training, general EEO commitments and networking for purposes of recruitment, hiring and promotion. For each of the study areas, the task force will examine tools such as performance appraisals, compensation incentives, and other evaluation measures to reflect a manager's ability to establish high standards and show progress.

### Task Force Seeks Much Information

The task force seeks to identify those programs, practices and policies considered to be "best" by their users, said Jones. In this light, the task force has inquiries for companies such as: What management officials and employees are involved?; What was the practice, program or policy designed to achieve?; How does the practice or policy work?; Can the practice or policy be easily duplicated? The task force also will ask participating companies to provide supporting and quantitative data about the results of their best practices, programs or policies, including a before-and-after comparison.

The task force is scheduled to present an interim report to the full commission July 16, and its final report is due Sept. 15. Corporate managers, business officials and other parties interested in communicating with the task force should contact: Wallace Lew, special assistant to Commissioner Reginald Jones, EEOC, Washington, (202) 663-4026.

### Texas Lawmakers Consider Job-Reference Bill

— The Texas legislature is expected to consider a bill this spring to provide employers a liability shield for controversial or negative job references for current or former workers. The bill would protect companies and other employers from civil damages for job references unless a worker who has complained could establish that the employer knowingly provided false information to a prospective employer. State Rep. Brian McCall, R, of Plano, is sponsoring the proposed legislation in the Texas House.

# **EEOC News Clips**

*for*  
*March 19, 1997*



*Compiled by*  
*The Office of Communications and Legislative Affairs*

**EEOC****EEOC Culls Backlog, Reaps More Benefits, But Litigation Down During Last Fiscal Year**

**T**he Equal Employment Opportunity Commission eliminated a large slice of its charge backlog and marked a substantial rise in the amount of benefits for victims of discrimination during the last fiscal year, according to preliminary agency statistics provided to BNA.

During the same time frame, however, commission attorneys filed significantly fewer court actions—a trend that has prompted concern among EEOC officials, including Chairman Gilbert Casellas.

**Backlog Down, Money Up.** With a new charge-processing system firmly in place, the commission achieved a significant downturn in its backlog of unresolved discrimination charges between Oct. 1, 1995, and Sept. 30, 1996—the federal government's fiscal year.

A backlog that had climbed steadily over the past five years—with much of its growth attributed to the passage of the Americans with Disabilities Act and the Civil Rights Act of 1991—reached a high of about 98,000 at the end of fiscal 1995, more than double the inventory of charges only five years earlier.

By the end of last September, however, agency investigators brought the inventory down to a targeted reduction of just under 80,000 cases—a trend, officials say, they hope will continue this year.

Benefits obtained during the administrative process—that is, before the cases go to the general counsel's office for litigation—totaled \$145.2 million, up from the \$136 million recovered a year earlier and nearly matching the \$146.3 million record high obtained by the agency in fiscal 1994.

Benefits obtained from litigation efforts also registered a significant jump to \$51.2 million. The recovery marked a turnaround following three years of decreased benefits from litigation: \$18 million in fiscal 1995, \$29 million in fiscal 1994 and \$34 million in fiscal 1993. During fiscal 1992, a \$35 million resolution of a suit involving IDS Financial Services in Milwaukee brought that year's total to a record \$71.1 million.

**Litigation, Charge Intake Decline.** Commission attorneys filed significantly fewer court actions over the course of the last fiscal year than they had a year earlier.

The 161 substantive lawsuits included 105 under Title VII of the 1964 Civil Rights Act, 36 under the Americans with Disabilities Act, 12 under the Age Discrimination in Employment Act, two under the Equal Pay Act and six under more than one statute. Another 20 subpoena enforcements were filed.

The litigation activity amounted to a sharp drop-off from the 322 substantive suits filed in fiscal 1995 and the 373 a year earlier.

The number of class actions also decreased significantly, accounting for only 32 of the substantive lawsuits filed by commission attorneys, compared with 79 a year earlier. The remaining lawsuits were filed on behalf of individual plaintiffs, although in practical terms, they may have greater impact than the benefits sought or recovered for the individual plaintiff.

Chairman Gilbert Casellas expressed concern over the downturn in litigation activity during an interview in late December and has assigned a task force, led by Commissioner Paul Miller, to examine the litigation strategy (32 DLR A-8, 2/18/97).

Preliminary agency data also showed a significant drop-off in charges filed for the second year in a row. Some 78,000 charges were filed—a drop from 87,500 a year earlier and 91,000 the year before that. Commission officials attributed the drop in filings to better initial screening of the charges and more in-depth intake interviews with charging parties, among other factors.

An EEOC breakdown showed disability complaints under the ADA constituting 23.1 percent of the commission's intake, and reflecting a continuing rise over the past five years. Charges filed under the age discrimination statute remained largely unchanged from a year earlier at around 20 percent. Race bias charges have edged downwards, from 40 percent of the commission's docket of new charges in fiscal 1992 to about 34 percent today. Sex discrimination charges continue to be about 30 percent, national origin, around 8 percent, and religious discrimination 2 percent, according to commission data.

BY NANCY MONTWIELER

# The New York Times

DATE: 3-29-97  
PAGE: 7

## Rule Adopted To Prohibit Secret Tests On Humans

By MATTHEW L. WALD

WASHINGTON, March 28 — President Clinton has established new rules meant to preclude any more Government-financed secret experiments on unwitting human subjects using radioactive, chemical or other dangerous materials, the White House announced today.

Officials of the Departments of Justice and Energy also said they had made progress in settling some cases involving such experiments. In those cases, dating from the 1940's and 1950's, Government researchers injected civilians with plutonium or uranium without their informed consent.

Nearly all the subjects of the experiments, who were adults when the doses were given 40 years ago, are long dead, and the settlements have taken the form of payments to their families, generally in the hundreds of thousands of dollars. Scores of other victims or their families are still trying to collect damages.

"Compassion and concern are at the core of our response to human radiation experiments," Energy Secretary Federico F. Peña said in an announcement at the White House.

Sixteen cases have been settled; one is in the late stages of settlement; one family declined to participate, and one subject could not be found, Government officials said. That means, Mr. Peña said, that the Government is nearly finished with what he called the most egregious cases, the ones in which the experiments had been kept secret from the public and the victims "for the purposes of avoiding liability or embarrassment to the Government."

But the Government is still defending at least five lawsuits, with about 80 victims identified and hundreds of others who may come forward.

Under the new rules, Mr. Peña said, informed consent will be required; the sponsor of the experiment will be identified to the subject; the subject will be told the experiment is classified, and permanent records will be kept. The advisory committee also wanted external reviews, and that process is being developed, Mr. Peña said. Government

agencies will report annually on whether such experiments are in progress; none are now, "as far as we can determine," he said.

The cases that are still outstanding include studies at Oregon State Prison and at Washington State Prison from 1963 to 1971, in which prisoners' testicles were irradiated to learn what doses made them sterile. They also include experiments involving mentally retarded children at the Walter E. Fernald State School in Waltham, Mass., who, from 1946 to 1956, were told that they were joining a "science club," and were given radioactive material in cereals.

Another lawsuit involves Vanderbilt University, where 820 pregnant women were given small doses of radioactive iron from 1945 to 1947. And during the 1960's and 1970's, subjects at the University of Cincinnati and three other universities were exposed to radiation over their entire bodies to measure the effects.

The latter case, which extended into the early 1970's, includes 45 "active living plaintiffs," said E. Cooper Brown, a lawyer who represents them, and another 45 yet to be discovered.

Government officials divided the experiments into three categories: studies like the ones with retarded children and pregnant women, in which researchers added traces of radioactivity to foods or minerals so they could study metabolism or organ function; radiation studies like the one in Cincinnati in which researchers may have thought the exposure would benefit the patient, as well as providing valuable military

information on the effects of radiation exposure, and injection experiments, which could not conceivably benefit the subjects, but might help Government officials set exposure limits for workers in nuclear bomb plants and related industries. It is this last category that the officials now say they have put behind them.

But Mr. Brown and others put some of the irradiation experiments in the category of exposures that could not help the patients, because doses were not delivered to parts of the body where patients had cancers.

Mr. Peña, announcing the new rules, said they adhered closely to the recommendations of an advisory panel on human radiation experiments that Mr. Clinton appointed in 1994, after Hazel R. O'Leary, the Energy Secretary then, announced that she would declassify millions of pages of documents on the experiments.

The steps were taken by an inter-agency working group, including the Departments of Health and Human Services, Defense and Veterans Affairs, the Central Intelligence Agency and National Aeronautics and Space Administration.

## Clinton Decries Chicago Racial Attack

*In Radio Talk, President Urges End to 'Constant Curse' of Hatred*

By Dan Balz  
Washington Post Staff Writer

Condemning the "savage, senseless" racial attack in Chicago that recently left a 13-year-old black boy in a coma, President Clinton yesterday urged all Americans to overcome the "constant curse" of racial divisions and "find kinship in our common humanity."

In his weekly radio address, the president used Easter and Passover season to reiterate his hope that people can begin to put aside the enduring tensions among the races to fulfill the promise of America as a diverse country bound by common ideals.

"The divide of race has been America's constant curse," Clinton said.

But he counseled that the nation's future "depends upon laying down the bitter fruits of hatred and lifting up the rich texture of our diversity and our common humanity."

Clinton's second inaugural address and his most recent State of the Union address included similar appeals for racial harmony, which the president has said he hopes will become part of his legacy in office.

Aides said Clinton decided to use the radio address to renew that appeal in the wake of the brutal beating of Lenard Clark that has created an uproar in Chicago, where it has raised racial tensions.

Clark and two friends were returning home March 21 after playing basketball when they were attacked by three white teenagers, according to Chicago police.

Clark's head was rammed against a wall by his attackers and he was felled by repeated kicks and punches that left him unconscious. He emerged from the coma Friday, but doctors said he faces a long and uncertain recovery.

The three white teenagers have been arrested and charged with attempted murder.

"This kind of savage, senseless assault, driven by nothing but hate, strikes at the very heart of America's ideals and threatens the promise of our future, no matter which racial or ethnic identity of the attackers or the victims," Clinton said.

"We must stand together as a nation against all crimes of hate and say they are wrong. We must condemn hate crimes whenever they happen.

"We must commit ourselves to prevent them from happening again. And we must sow the seeds of harmony and respect among our people."

Aides said Clinton spoke to Clark's family Friday to express his concerns about the attack, and he called on all Americans to join him and first lady Hillary Rodham Clinton in praying for the young boy's full recovery.

As in earlier speeches on race, Clinton's radio address contained words aimed at both black and white Americans.

He called on white America to recognize the reality that "racism is not confined to acts of physical violence" but also includes the daily discrimination and indignities suffered by minorities, from bigoted remarks to discrimination in housing and at the workplace. "These acts may not harm the body, but when a mother and her child go to the grocery store and are followed around by a suspicious clerk, it does violence to their souls," Clinton said.

But he called on the African American community not to use the attack as an excuse to condemn all white Americans as racists. "Black Americans must not look at the faces of Lenard Clark's attackers and see the face of white America," he said.

"The acts of a few people must never become an excuse for blanket condemnation, for bigotry begins

with stereotyping, stereotyping blacks and whites, Jews and Arabs, Hispanics and Native Americans, Asians, immigrants in general. It is all too common today, but it is still wrong."

Calling spring a season of renewal, Clinton asked Americans to "reaffirm their commitment to this central ideal: that we are many people, but one nation, bound together by shared values, rooted in the essential dignity and meaning of every American's life and liberty."

Saying the holidays of the season teach everyone "that hope can spring forth from the darkest of times," Clinton added that in the aftermath of the Chicago beating, Americans must "find the strength to reach across the lines that divide us on the surface and touch the common spirit that resides in every human heart."

Many of the most powerful rhetorical moments of Clinton's presidency have come when he has discussed the issue of race, from his speech to a group of black ministers in Memphis in 1993 to his address on affirmative action in Austin in 1995.

A White House official said the president spent nearly an hour reworking the draft of the brief radio address in an effort to strike the right balance in his message.

## Undoing Diversity

A bombshell court ruling curtails affirmative action

By S.C. GWYNNE AUSTIN

IT HAS BEEN ALMOST 47 YEARS SINCE a black man named Heman Sweatt and his lawyer, Thurgood Marshall, brought a case before the Supreme Court that forcibly integrated the University of Texas. So it was oddly appropriate last week that the University of Texas at Austin was once again the defendant in a sweeping, precedent-setting court ruling on the subject of race. This time, though, the university was chastised for promoting racial diversity, not racial exclusion.

In blunt and remarkably plain language, the 5th U.S. Circuit Court of Appeals declared that the University of Texas law school could not use different admission standards for minority students than it does for white applicants. The court's decision was a frontal assault on the current law of the land—embodied in the Supreme Court's 1978 Bakke decision—which prohibits quotas but allows schools to consider race as a factor in college applications.

The ruling stunned officials at the university, who had been loudly supportive of affirmative action and were in the midst of a multimillion-dollar campaign to boost minority enrollment. University president Robert M. Berdahl warned that the decision could lead to "the virtual resegregation of higher education," and the entire 15-school system of the University of Texas temporarily suspended admissions. Texas A&M, the other large state system, later announced that it would follow suit.

They reacted swiftly in part because the court's decision included a sharp warning that "if the law school continues to operate a disguised or overt racial classification system in the future, its actors could be subject to actual and punitive damages." Says Berdahl: "That gets your attention real fast." Other state schools in the circuit, which includes Texas, Louisiana and Mississippi, are bound by the decision. Private schools may also be affected because many receive federal funds, and campuses nationwide are studying the ruling as a possible harbinger of things to come.

The circuit court ruled on the 1992 case of *Hopwood v. State of Texas*, in which

Cheryl Hopwood and three other students disputed their rejection by the law school. One of the strengths of the case, says Terrel Smith, the Austin lawyer who filed it, is that Hopwood is "a real victim, the sort of person affirmative action should help." According to Smith, Hopwood, who comes from a blue-collar family, was offered a couple of partial scholarships—including one to Princeton—but still could not afford to go. Instead she attended California State University, married a serviceman,

the cello, make a downfield tackle ... [his] relationship to alumni ... or [his] economic or social background." But, concluded the court, schools must "scrutinize applicants individually, rather than resorting to the dangerous proxy of race."

Minority groups argue that screening for special skills or family connections amounts to affirmative action for white students. In fact, a day after the Hopwood ruling, the *Los Angeles Times* reported that UCLA routinely gives preference to the sons and daughters of "major donor prospects," admitting the rich kids over thousands of applicants with higher grades. Other papers charged that several of the University of California regents who had voted to end affirmative action—including Governor Pete Wilson—had used their



**MAKING THE EFFORT:** Minority recruits embark on a tour of the Texas campus last year

worked as an accountant and was raising a disabled child when she applied to the University of Texas law school at age 29. Her LSAT scores were good enough to qualify for the pool of minority and disadvantaged applicants. But, charges Smith, "they take the last 60 white kids and make places for minority students."



**CHERYL HOPWOOD**

The court agreed that Hopwood is "a fair example of an applicant with a unique background ... Her circumstances would bring a different perspective to the law school." Significantly, this statement endorses the idea that "diversity" is a valid goal for universities. And later in the decision, it states that "a university may properly favor one applicant over another because of his ability to play

influence to get the children of relatives, friends and business partners into the school of their choice.

All of which raises the tension level as the University of Texas decides how to proceed. It will certainly appeal the ruling, either to all 16 federal judges in the 5th Circuit or to the Supreme Court. But some civil rights activists such as Al Kaufman of the Mexican American Legal Defense and Education Fund worry that although the decision is "inconsistent with Supreme Court rulings," Hopwood's appealing story and prevailing political winds could carry the day. Student leader Gilberto ("Tito") Garcia, who helped organize a campus rally, says, "Affirmative action is not a handout. It's an opportunity. The window of opportunity has only been open for 20 years. Discrimination has existed for 300 years." —Reported by Dan Cray/Los Angeles and Hilary Hyton/Austin



To the barricades: Despite protests at Berkeley and elsewhere, California voters may abolish all affirmative action come November.

AFFIRMATIVE ACTION

## The Backlash Wars

Clashes over race and preferences flare up—just in time for the campaign

BY TOM MORGENTHAU  
AND GINNY CARROLL

**F**ROM 1953 TO THE MID-1970s, the high-water mark of the judicial activism inspired by the Warren Court, the Fifth U.S. Circuit Court of Appeals in New Orleans effectively remade the South. In ruling after ruling, its judges used law, reason and a fierce passion for justice to bury Jim Crow across the Old Confederacy. But the glory days are over, and Judge John Minor Wisdom, the Fifth's intellectual leader, is now 90 and in semiretirement. Last week, in a decision some saw as a reversal of the court's proud

tradition, a three-judge panel of Reagan and Bush appointees took dead aim at the long-established use of racial preferences to achieve diversity in university admissions. "This is the A-bomb," said Mark Yudof, former dean at the University of Texas Law School, the defendant in the case. "Once you say race can't be taken into account, what is the law?"

The affirmative-action debate, smoldering for years, is flaring up again—just in time for the 1996 election. Although the new ruling affects only Texas, Louisiana and Mississippi, few doubt that it poses a direct challenge to the U.S. Supreme Court's decision in the 1975 Bakke case

(chart). Bakke said universities could use race and gender as factors in admissions. But the majority was only 5-4, and the Supreme Court has since moved steadily rightward. In recent years, moreover, conservative critics have chipped away at the very idea of race-based policies: politicians, sensing rising white resentment, have repeatedly attacked the use of quotas in any context. Affirmative action is now being dragged into politics in an electorally crucial state: California, whose voters will almost certainly get the chance to eliminate the state's race- and gender-preference laws this November. If the Supreme Court follows the election returns, the Cali-

MNT-D

ifornia vote may be a prelude to a full-dress review of affirmative action's constitutionality—making it an event of national proportions.

The controversy will go presidential as well, since Bill Clinton and Bob Dole are taking opposite sides. To cite one specific, Clinton gingerly backs continuing minority preferences in federal contracts, while Dole has cosponsored a pending bill to eliminate them entirely. Backers of the California initiative, known as the California Civil Rights Initiative (CCRI), said Dole would campaign for their cause at a weekend rally in Orange County. The Clinton administration, meanwhile, reacted to last week's decision with notable caution. Although Associate Attorney General John Schmidt said the ruling was simply "wrong," another senior official told NEWSWEEK that the case "will spark a lot of nervous discussion" at Justice and the White House. "Any big news about affirmative action is bad news for Bill Clinton," said Terry Eastland, a conservative intellectual who served in the Reagan Justice Department. "It brings to the surface an issue on which a majority of Democrats—not just a majority of Americans—disagree with Clinton."

Despite its disarming title—a "civil rights initiative" could fool unwary voters—CCRI is an attempt to end 20 years of painful progress toward equal opportunity. It would repeal affirmative-action rules for state and local government employees, and it would end the practice of "setting aside" a share of government contracts for business firms owned by blacks, Latinos and women. It would also end the mandate to promote "diversity" in the sprawling state university system. Its most conspicuous champions are Gov. Pete Wilson and Ward Connerly, a Wilson ally on the board of regents of the University of California, whose nine campuses include Berkeley and UCLA. The UC regents have already outlawed racial preferences; CCRI would extend the ban to the 21-campus Cal State system and community colleges. Connerly, an impassioned critic of race-based policies, is black. "This debate about affirmative action is not just about preferences," he says. "It's about that raw nerve of America we call 'race.' Are we going to continue to believe that blacks by definition are disadvantaged? As a black man, I say no."

Connerly admits that ending racial preferences will probably lead to a "precipitous" drop in black enrollment within the UC system. (UC's student body is now 4 percent black and 14 percent Latino; Asian-American kids would be the likely big winners.) But the debate is turning nasty. The Los Angeles Times recently disclosed that some regents—Connerly was not among them—for years have used their VIP status to help applicants get into UC, and Conner-

ly has been attacked in bitter terms. "He's married to a white woman," state Sen. Diane Watson complained recently. "He doesn't want to be black." Connerly called Watson "a bigot."

"Reverse discrimination is inescapably unfair, and it is, quite naturally, bound to engender resentment," Pete Wilson says. But if conservatives hope to use affirmative action as a wedge issue in '96, the political questions are: how many whites are mad and how mad are they? The evidence is mixed. A Field Poll in California suggests that CCRI will pass easily in the fall. On the other hand, polls also suggest that California voters don't care much about affirmative action, which last year ranked 25th out of 27 potential issues. The Los Angeles

Times recently showed that Clinton, who now leads Dole by 21 points in the state, is not likely to lose many votes because of his support for preferences. But it's early.

How the Supreme Court will read the California returns is anybody's guess. The real issue in the Fifth Circuit's decision, according to Robert Berdahl, president of the University of Texas, is nothing less than "the virtual resegregation" of American higher education. That may be overstatement. But the courts' dilemma is the country's: how to move from the moral clarity of the civil-rights era to the painful ambiguities of its denouement.

With ANDREW MURR in Sacramento, DANIEL KLADMAN in Washington and THOMAS ROSENSTIEL with the Dole campaign

## The Assault on Affirmative Action

After the abolition of legalized segregation in the '60s, governments, schools and businesses turned to quotas and preferences to give minorities a hand up. Then came the backlash.



Bakke opened a long-running war

**June 1978:** Rejected by a University of California medical school to make room for blacks, Allan Bakke alleges "reverse discrimination"—and wins when the Supreme Court orders his admission. The deci-

sion outlaws quotas, but preserves race and sex as "positive factors" in deciding who gets in.

**October 1994:** Signaling that past discrimination does not justify special

financial aid, a federal appeals court throws out a University of Maryland blacks-only scholarship.

**June 1995:** The Supreme Court undercuts minority set-asides, ruling for contractor Randy Pech, who claimed that a road-building job in Colorado was unfairly awarded to a Hispanic-owned business. Now businesses will get special treatment only when there's specific evidence of old wrongs—not blanket assumptions about racial inequity.



Pech's claim hobbled minority preferences

action. Meanwhile, Wilson abolishes all state preference programs under executive control.

**March 1996:** In *Hopwood v. Texas*, a fed-

eral appeals court totally rejects race as a factor in admissions, even for "the wholesome practice" of producing racial balance. The case will likely go to the Supreme Court.

**Spring 1996:** A bill heading for debate in Congress would ban all federal preferences, including minority hiring targets that now guide contractors. Sponsored by Dole—and opposed by Clinton—it would reverse a Nixon presidential order.



Dole is on board for a ban

**November 1996:** The California Civil Rights Initiative—sure to be on the ballot—would bar preferences at state universities and in government. Wilson and the Republican National Committee are championing the drive, which will be a key issue between Clinton and Dole.



In the West, a Wilson rollback

## IS TIME RUNNING OUT FOR AFFIRMATIVE ACTION?

With the Supreme Court's blessing, universities for nearly two decades have promoted classroom diversity by giving minorities an admission break. The court declared in 1978 that although the University of California at Davis had illegally barred white medical-school applicant Allan Bakke, colleges could weigh ethnicity to attain "a heterogeneous student body." Now, the *Bakke* precedent may be on the ropes. A federal appeals panel last week invalidated a University of Texas law school program that favors minorities. Agreeing with rejected white applicants, the judges ruled that "the use of race to achieve diversity undercuts the ultimate goal of the [Constitution's] 14th Amendment: the end of racially motivated state action."



Holding on. A California demonstrator

The court's ruling is binding only in Texas, Louisiana and Mississippi. A final decision for the entire nation will likely rest with the Supreme Court, more conservative now than in '78. Meanwhile, California's universities are already halting racial preferences in admissions. At the University of California law school in Los Angeles, which admits 40 percent of its class using "diversity criteria," Admissions Dean Michael Rappaport asks, "How could the only public law school in Southern California end up with few or no minorities?" So far, he says, "No one has a good answer."

*/Straight to the Supremes?*

## UT Ponders Appeals Options in

### Hopwood Case

BY JANET ELLIOTT AND GORDON HUNTER

The U.S. Court of Appeals for the 5th Circuit sent shock waves through academia and the civil rights community last week with its ruling directing the University of Texas to stop considering race as a factor in making admissions decisions.

In the aftermath of a three-judge panel's ruling in *Hopwood v. Texas*, all eyes are on UT, which is weighing whether to ask for a rehearing of the case *en banc* or to press straight ahead to the Supreme Court.

If the school decides to seek an *en banc* rehearing and the entire court agrees, the panel's decision that race has no place in deciding who gets admitted to the UT School of Law would be withdrawn. That would leave in effect the 1994 ruling by U.S. District Judge Sam Sparks that the school could continue its affirmative action efforts.

Such a move to an *en banc* hearing would give the law school some leeway to consider applicants' race in completing its fall 1996 class. But Dean Michael Sharlot says it also could expose the law school to extra liability if the entire circuit eventually adopts the panel's ruling.

If the school follows the other appellate strategy—petitioning the U.S. Supreme Court directly—the panel's ruling will remain in effect.

"Then we know we can't [consider race]," Sharlot says.

The U.S. Justice Department is considering joining a UT request for an *en banc* or Supreme Court hearing. Earlier this month, the U.S. Department of Education's Office

of Civil Rights completed a seven-year investigation of the affirmative action program at the University of California at Berkeley, finding that the program, which considered race as one factor among others, did not discriminate against white applicants.

The fate of UT's next move could well shape affirmative action policy into the next century. The *Hopwood* ruling rejects the U.S. Supreme Court 1978 ruling in the controversial reverse discrimination case

*Regents of University of California v. Bakke*. In *Bakke*, the high court recognized diversity as a compelling state interest in higher education. There have been no pronouncements from the Supreme Court on higher education affirmative action programs since then, although the Court has become increasingly wary of other affirmative action programs, such as minority set-asides for government contracting work.

Michael Rosman, general counsel for the Washington, D.C.-based Center for Individual Rights, says *Hopwood* puts all of the nation's colleges and universities on notice. The center provided financial and legal assistance on the suit.

"The University of Texas law school defended its program in part by putting on other deans who said everyone else is doing the same thing," says Rosman. "If they are, presumably they are going to stop."

#### 'APPALLING'

The *Hopwood* ruling drew a strong reaction from Carl Monk, executive director of the Washington, D.C.-based Association of American Law Schools. The 160-member group joined in filing an amicus brief with the appellate court on behalf of the UT law school, one of its members.

"I find it appalling," says Monk when talking about a portion of the opinion that gives a thumbs-up to the relation of a law school applicant to alumni as a factor in considering admission, while prohibiting race as a factor.

UT System General Counsel Ray Farabee says staying the circuit panel's ruling is a strong consideration as the school plots its next move. The system froze all of its admissions programs for one week, beginning March 19, to assess the decision in *Hopwood*.

The state has 14 days from the March 18 ruling—until April 1—to file motions for the case to be heard *en banc*.

Even if UT decides to go the *en banc* route, *Hopwood* is certain to end up at the Supreme Court eventually. Farabee and other lawyers representing the state and the university were stunned by the breadth of the opinion written by Circuit Judge Jerry Smith's opinion and its rejection of former Supreme Court Justice Lewis Powell Jr.'s opinion in *Bakke* as precedent.

"Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case," Smith wrote. "Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection."

Smith was joined by Judge Harold DeMoss, while the third member of the panel, Judge Jacques Wiener, declined to overrule *Bakke*, but said he would find that the law school's affirmative action program was not tailored narrowly enough to meet the *Bakke* standards. He criticized his two colleagues for boldly declaring *Bakke* dead.

While the appellate court grants *en banc* review only rarely, a longtime 5th Circuit-watcher thinks *Hopwood* would have a good chance of getting placed on the *en banc* calendar, possibly as early as June.

Sidney Powell, name partner in Dallas' Powell & Associates, who has done 5th Circuit appellate work exclusively for 17 years, says *Hopwood* is a likely candidate for *en banc* treatment, in part because both Smith and DeMoss are considered among the most conservative members of the court.

Some of the newer Democratic appointees to the circuit, including Robert Parker and Fortunato "Pete" Benavides, may want to take a closer look at such an emotional issue, Powell says. Any active member of the court can request an *en banc* hearing; a majority of the active judges must approve a full hearing.

But Lino Graglia, the conservative UT law professor whose railings against the

school's affirmative action program helped inspire the *Hopwood* suit, doesn't foresee an *en banc* hearing.

"My feeling is that the majority probably feels the case was correctly decided," says Graglia. Some observers believe the circuit, widely considered to be the most conservative in the country, has been inching toward the center thanks to President Bill Clinton's four appointees, who join two Carter holdovers. But the 17-member court remains a Republican bastion, with Smith and six other Reagan appointees and four Bush appointees.

The panel's ruling provided the first real relief for the four *Hopwood* plaintiffs since the suit was filed in September 1992. All four were denied admission into the fall 1992 law school class.

Although Judge Sparks found that the separate screening committees used to evaluate white applicants and African-American and Mexican-American applicants were unconstitutional, he awarded each plaintiff only \$1 in damages and waived their application fees if they wanted to reapply.

The one plaintiff who did reapply, Kenneth Elliott, was rejected again. Lead plaintiff Cheryl Hopwood has moved to Columbia, Md., with her husband, who serves in the military, and no longer wants to go to UT, her lawyers say.

Douglas "Wade" Carvell is attending law school at Southern Methodist University in Dallas, where he says tuition is more than two-thirds higher than at UT—money he would like to recoup now that the panel has remanded the case to Sparks for reconsideration of damages.

The fourth plaintiff, David Rogers, co-owner of a Relax the Back Store franchise in Arlington, Texas, says he might reapply to UT law school.

The plaintiffs' lawyers also now have hopes of getting some attorney fees. Theodore Olson, a partner in the D.C. office of Los Angeles' Gibson, Dunn & Crutcher, who was brought in for the panel arguments, says he likely will seek his fees.

The 1994 trial shed light on the law school's often haphazard method of deciding who to admit. Austin solo practitioner Terral Smith, the lead trial lawyer for the plaintiffs, says it also exposed the significant differences in numerical scores between white and minority entrants.

The four plaintiffs all had scores that would have guaranteed automatic entrance had they been African-American or Mexican-American.

Instead, they joined several hundred other whites in a discretionary zone where they were passed over in favor of African-Americans and Mexican-Americans with lower GPAs and LSAT scores.

Evidence presented during the trial showed that the school in 1992 enrolled 41 African-Americans and 55 Mexican-Americans, representing 8 percent and 10.7 percent of the class, respectively. Without the affirmative action program, only nine African-Americans and 18 Mexican-Americans would have been admitted, according to the law school.

Of 512 students admitted in the fall of 1995, 38, or 7.4 percent, were African-American and 64, or 12.5 percent, were Mexican-Americans.

The panel said Sparks was wrong to put the burden on the plaintiffs to show that they would have been admitted to the law school but for the affirmative action program. The university had argued that the students were marginal despite their scores because of their college majors or undergraduate schools.

Terral Smith says the panel's shifting of the burden to the law school is the key to the whole case and exposes the university to hundreds of other reverse discrimination suits.

"It was an impossible burden," Smith says. "UT created a system in which no one could tell who the very next student would be. It's their system. They ought to have to prove it."

The law school, represented by a pro bono team from Houston's Vinson & Elkins, argued that some minorities were boosted to ensure diversity at the school and to remedy the effects of past discrimination. Blacks were barred from attending the law school until Heman Sweatt sued and won admittance in 1950. After enduring severe harassment, he dropped out after one year.

But the panel dismissed Sweatt's ordeal in one sentence and said the state did not prove lingering effects from that past discrimination. The panel also rejected Sparks' finding that discrimination in the state's elementary and secondary education should be remedied through the law school's affirmative action.

Those rulings were particularly bitter for Galveston solo practitioner Anthony Griffin, who represented a group of black law students and pre-law students who tried unsuccessfully to intervene in *Hopwood*. Griffin argued that the university would fail to stress its past record of segregation and current reputation as a hostile environment for blacks.

Although the university did present some testimony of racial problems encountered by blacks at UT, Griffin says it wasn't enough. "Why were the black students excluded from participating in a case of so fundamental a nature?" Griffin asks. "Something's wrong with that picture."

The plaintiffs' lawyers say that there was no evidence that the school had discriminated against African-Americans in recent years or had ever discriminated against Mexican-Americans. The arguments that the affirmative action program was redressing the past segregation also rang hollow when it was pointed out that about half the black students were coming from out of state, the lawyers say.

The Association of American Law School's Monk also took exception to Judge Smith's suggestion that "it is no more rational to consider that race would contribute to diversity of viewpoints than would height or blood type."

"It ignores *Sweatt*," he says of the ruling. "It demonstrates a total lack of understanding of past discrimination."

Monk says the only good news is that the impact—for now—is limited to the 5th Circuit.

Terral Smith believes that the UT law school will be able to avoid a significant drop in minority students by considering economic criteria and doing more inter-

views with applicants. He says that had anybody bothered to talk to plaintiff Cheryl Hopwood, they would have learned about her background of economic disadvantage and current problems caring for a severely disabled child.

"They're stuck over in this numbers game. They might need to put more money into the recruiting and admissions process," he says.

But Professor Graglia says Terral Smith, is trying to "soft-pedal" *Hopwood's* impact.

"The result is it will very much lower the number of blacks and Mexican-Americans because they have been letting in people with far lower standards," Graglia says.

Because the case seems destined for the Supreme Court, lawyers are wondering if Justice Clarence Thomas would recuse himself because of his prior involvement in UT's affirmative action dispute.

As director of the Department of Education's Office of Civil Rights in the 1980s, Thomas signed a consent decree that resulted from the department's investigation of the university's low enrollment of minorities. University officials argued that the consent decree was one impetus for the law school's affirmative action program.

Thomas now is one of the high court's staunchest opponents of affirmative action.

—Janet Elliott is a reporter and Gordon Hunter is associate editor at Texas Lawyer. This article was distributed by the American Lawyer News Service. The decision in *Hopwood v. Texas* is available on Counsel Connect in the Hot Docs section of the Library.

## EEOC to Join Suit Against Home Depot Alleging Bias Against Female Workers

By OSCAR SURIS  
And BARBARA MARTINEZ

Staff Reporters of THE WALL STREET JOURNAL

The U.S. Equal Employment Opportunity Commission said it will join a lawsuit against Home Depot Inc. that alleges the retailer discriminated against women in awarding promotions, pay raises and selected jobs.

The lawsuit, originally filed in U.S. District Court in New Orleans in January 1995, is seeking class-action status for employees of all Home Depot stores east of the Mississippi River. That would involve around 22,000 female employees in about 310 stores, according to EEOC attorneys.

The EEOC said yesterday that it had been approached by the plaintiffs' attorneys to support their fight. By winning the EEOC's aid in the lawsuit — one of the largest sex-discrimination cases in terms of numbers of employees in which the agency has immersed itself — the plaintiffs will gain considerable legal firepower, including EEOC attorneys.

The federal agency said it decided to join the lawsuit because of its interest in so-called glass-ceiling practices.

"Many businesses today have a glass ceiling past which women cannot climb," said EEOC General Counsel C. Gregory Stewart in a statement. "Home Depot's glass ceiling began with a glass basement."

But at Home Depot's headquarters in Atlanta, the company said it was "outraged" by the EEOC's decision. "Had the EEOC bothered to consider Home Depot's position," the company said in a statement, "it would not have decided to embark on an action which is a flagrant waste of taxpayer money."

Home Depot added that it would "vigorously oppose" the EEOC's intervention.

In interviews, attorneys for the home-improvement chain said the EEOC's move was especially baffling, given that the plaintiffs involved in the case, according to

agency more than two years ago — complaints that never resulted in any action.

"We are just puzzled at why" the EEOC would join the case, said Larry Smith, Home Depot's vice president of legal affairs.

One of the four plaintiffs in the New Orleans lawsuit, Carrol Lee Griffin, yesterday discussed the alleged discrimination that she had encountered. Ms. Griffin, a former floor clerk, said that she had been excluded from daily shop talk with male counterparts and added that she was passed over for higher-level sales jobs that were held primarily by men. Ms. Griffin said that, as a Home Depot employee in Louisiana, she endured a job review by a male boss that included the remark, "No, Carol, I like you. I think of you as my mother."

The case supported by the EEOC isn't the only legal challenge Home Depot faces on this front. Set for trial this fall is a California case, already certified for class-action status, that involves allegations of gender discrimination in 150 Home Depot stores in 10 Western states. Like the New Orleans case, the lawsuit in California alleges that the \$18 billion a year retailer reserves its most "desirable" jobs and work assignments for men.

Mr. Smith and Home Depot's senior corporate counsel for employee relations, Marian Exall, said they are looking forward to defending the company's employment record in the California lawsuit. The Home Depot attorneys said it will be the first case of its kind to go to trial since federal civil-rights laws were changed in 1991 to allow for jury trials of Title VII cases of discrimination.

"We heard from numerous [Home Depot] women who didn't want us to settle that case. It would have demeaned their efforts," Ms. Exall said.

In composite trading on the New York Stock Exchange, Home Depot shares rose 37.5 cents to close at \$57.875.

## U.S. Intervening in Home Depot Bias Suit

By Reuters

The United States Equal Employment Opportunity Commission said yesterday that it had moved to intervene in a private sex-discrimination suit against Home Depot Inc.

The suit, first filed in 1995 in United States District Court for the Eastern District of Louisiana, focuses on 310 stores east of the Mississippi. The commission said it was the largest private sex-discrimination case in which it has sought to intervene.

The Federal agency contends that women were hired at low-level positions with no opportunities for advancement. C. Gregory Stewart, its general counsel, asserted that "while Home Depot has a glass ceiling," it

"traps its female employees into what amounts to a glass basement with glass walls."

He added that women were hired for jobs like cashier but were not hired or considered for promotion to sales or managerial positions.

Mr. Stewart said the commission would assist the private lawyers bringing the Louisiana case in every aspect of litigation. He said the suit was one of three pending against the Atlanta-based Home Depot, whose stores sell building material and home-improvement products in the United States and Canada.

Home Depot shares declined 37.5 cents yesterday, to \$57.875, on the New York Stock Exchange.

# Home Depot fights U.S. in bias lawsuit

USA TODAY • TUESDAY, MARCH 25, 1997

By Chris Woodyard  
USA TODAY

Federal anti-discrimination lawyers moved to intervene Monday against retailer Home Depot in what they believed would be their largest action ever against a retailer.

The home-improvement chain discriminated against about 35,000 female employees in hiring, placement, transfer and promotion, the Equal Employment Opportunity Commission (EEOC) alleges in seeking to join a private lawsuit.

"Many businesses today have a glass ceiling past which women cannot climb. Home Depot's glass ceiling began with a glass basement," says EEOC General Counsel Gregory Stewart.

Lawyers for Atlanta-based Home Depot say they are "puzzled and outraged" by the EEOC action. The company vows to vigorously fight EEOC involvement.

EEOC lawyers say they hope their involvement will aid certification of the case as a class action covering all female employees east of the Mississippi. At present, only four women

are listed as plaintiffs in the 1995 case.

John Wymer, the women's lead lawyer in the case, could not be reached for comment.

The lawsuit followed another bias lawsuit filed on behalf of female Home Depot workers in San Francisco. That lawsuit has been certified as a class action. It covers more than 17,000 former and current female employees in the West and an unspecified number of job applicants. Trial is set for Sept. 22.

The leader of one women's rights group hailed the EEOC decision.

"This is exactly the kind of case the EEOC ought to be investing in," says Judith Lichtman, president of the Women's Legal Defense Fund in Washington.

But Home Depot lawyers say the case lacks merit. They say the retailer is anxious to hire women, especially those with a background or interest in the construction trades.

"We're hungry for talent and are looking for qualified men and women," says Marian Exall, senior corporate counsel for Home Depot.

# **EEOC News Clips**

*for*  
*March 25, 1997*



*Compiled by*  
*The Office of Communications and Legislative Affairs*

# Home Depot Targeted By EEOC

## Agency Seeks to Join Gender Bias Lawsuit

By Margaret Webb Pressler  
Washington Post Staff Writer

The Equal Employment Opportunity Commission yesterday sought to intervene in a gender discrimination lawsuit against Home Depot Inc., angering the home improvement chain and pleasing women's rights groups.

The EEOC asked a federal court in New Orleans for permission to join a case seeking class action status on behalf of about 22,000 women employees at Home Depot's 312 stores east of the Mississippi, including 18 in the Washington-Baltimore area. The plaintiffs in the case allege that the Atlanta-based company steers women into lower-paying jobs and has denied them promotions and training.

It is one of three gender discrimination suits pending against the chain, including one in New Jersey and a class action suit on the West Coast.

If a judge allows the EEOC to intervene in this case, it would be the largest gender discrimination suit the agency has ever joined, according to officials, and further evidence that the EEOC has grown more aggressive in pursuing employment discrimination cases.

"We believe that the facts will show that there's widespread discrimination on the part of Home Depot against women," said James Lee, regional attorney for the EEOC in New York, which is working on the case jointly with the agency's office in New Orleans. "We feel it's the sort of case with national importance that the agency needs to bring its resources to bear on."

Home Depot reacted swiftly and angrily to the EEOC's request, releasing a statement calling the move a "flagrant waste of taxpayer money" and vowing to fight both the agency's involvement and the case itself.

Company officials argued that Home Depot is built on a philosophy of good customer service, which it would not be able to accomplish if it discriminated against its female employees.

Larry Smith, Home Depot's vice president for legal matters, said in an interview yesterday that the company is dismayed that it was not given an opportunity to respond to the EEOC before the agency sought to join the case. "We would've proved our case with our female employees. We have hundreds, if not thousands, of people that want to testify on our behalf," he said.

Now, though, the chain is more resolved than ever to fight, he said. "We are P.O.'d at this whole process," Smith said. "Every time they come at us, we're going to come back harder. We're not going to buckle under."

Women's rights advocates said the EEOC's decision to join the case is important in raising the profile of the issue of gender discrimination.

"I think it's a really good sign that sexual discrimination is being taken seriously, as it should be," said Judith Lichtman, president of the Women's Legal Defense Fund. "We need serious government action that says: 'We're not going to tolerate it anymore.'"

Employment attorneys said this case is fraught with difficulty for both sides. Gender discrimination suits are difficult and expensive to prove, and the biggest ones can be particularly troublesome.

That's because those with class action status and thousands of potential plaintiffs often rely heavily on statistics to prove their cases, and statistics sometimes can be more easily defended than specific allegations of discrimination, said Barbara B. Brown, an employment lawyer in Washington.

"The nondiscrimination explanation for that is, 'that's what people choose,'" she said. "That defense has been asserted in a number of cases . . . to counter the arguments about statistical disparity."

Further complicating the case is that Home Depot, in the West Coast suit, will be the first company to face a case under a 1991 law allowing a jury trial in a gender discrimination suit. The East Coast case likely would be equally groundbreaking, Brown said. "As a result, it will be very susceptible to appeals, I would imagine, from both sides," she said.

# **EEOC News Clips**

*for*

*March 26, 1997*



*Compiled by*

*The Office of Communications and Legislative Affairs*

## Texaco Settlement In Racial-Bias Case Endorsed by Judge

By ANNE REIFENBERG

Staff Reporter of THE WALL STREET JOURNAL

A federal judge endorsed the \$176 million settlement in the Texaco Inc. racial-bias case, but reserved judgment on a plan to allot \$29 million in fees to the plaintiffs' legal team and \$800,000 in "incentive awards" to the six African-Americans who filed the discrimination lawsuit in 1994.

U.S. District Judge Charles Brieant said in a ruling issued Friday and made public yesterday that the class-action settlement "is fair and reasonable, and highly beneficial" to the more than 1,300 current and former Texaco employees who will receive payments averaging more than \$63,000 each. He didn't, however, similarly bless the proposed formula for doling out lawyers' fees and special awards to the original plaintiffs, saying "this matter requires further study."

The lawyers suggested that they receive about 25% of the \$115 million Texaco deposited into an escrow account last fall for eventual distribution to the blacks eligible to participate in the payout. The rest of the \$176 million—the largest racial-bias settlement in U.S. history — is earmarked for a task force on diversity and other programs the oil company agreed to fund.

Also recommended by the lawyers was special compensation, also to be doled out from the \$115 million, of \$200,000 each for the two chief plaintiffs and \$100,000 each for the other four who brought the suit. Daniel Berger, a member of the legal team, said these plaintiffs' "assistance in prosecuting the case was invaluable." Mr. Berger also said that he and his colleagues believe the lawyers' fees sought are "reasonable and justified."

"Obviously, it's up to the judge," he said. "Whatever he does will be appropriate."

In his ruling in White Plains, N.Y., Judge Brieant said he had received several "form letters" objecting to the "amount and disbursement of fees." He said he would resolve the matter in a separate decision.

The lawsuit against Texaco, based in White Plains, claimed the company denied promotions and raises to blacks. Texaco decided to settle after the release of transcripts of secretly taped conversations that appeared to show white officials belittling black employees and considering the destruction of documents sought by plaintiffs in the suit. The man who made the audiotapes and who is also quoted in the transcripts, former personnel coordinator Richard Lundwall, has since been indicted on a criminal charge of federal criminal obstruction of justice. He has pleaded not guilty.

## Mitsubishi Told Not to Meet With Possible Plaintiffs

U.S. District Judge Joe B. McDade of Peoria, Ill., has ordered Mitsubishi Motor Manufacturing of America Inc. not to meet privately with possible plaintiffs in a class action sexual harassment lawsuit.

The judge also ruled Monday that the U.S. Equal Employment Opportunity Commission may communicate by mail with potential plaintiffs.

The EEOC had alleged to the judge that Mitsubishi officials had conducted such meetings, without lawyers in attendance to represent the women, to gain informa-

tion that could be used against them when the case comes to trial. But the company had countered that such meetings were necessary to investigate possible incidents of continuing sexual harassment.

In his ruling, McDade said that all other contact between the company and potential plaintiffs about the alleged harassment should occur with EEOC attorneys present.

The judge also said that the EEOC must give Mitsubishi a list of the potential plaintiffs' names within five days of the mailing.

## LEGAL BEAT

# Old Law Firm Is Being Accused In Age-Bias Suit

By ANN DAVIS

Staff Reporter of THE WALL STREET JOURNAL

Facing increased competition in the early 1990s, the proud old California law firm Pillsbury Madison & Sutro wanted to enhance its image.

It merged with a firm known for its youthful, go-getter culture and set out to cultivate Silicon Valley clients. But the first face clients saw back then usually wasn't young: Six of 11 receptionists in the firm's main San Francisco office were over 60.

The 123-year-old firm's effort to cut its receptionist and secretarial staff by terminating, reassigning or offering early retirement to older workers is now the subject of an age-discrimination trial set for April 1 in San Francisco County Superior Court.

Pillsbury needed a "perkier" look, an administrator repeatedly said, according to court papers filed by two current secretaries, a former secretary and a former human-resources manager. Shirley McCarley, the former human-resources manager, also says in an interview that receptionists of all ages in Los Angeles were summoned one weekend for makeovers, new hairdos and clothing consultations.

Ms. McCarley contends in court papers that she was asked to help force out aging secretaries on a series of "hit lists" by delivering "artificial negative reviews" and switching their assignments. When she questioned the legality of such steps, she says in an interview that her supervisors repeatedly answered, "We have the best and brightest lawyers in the nation here, and if they say it's OK, it's OK."

Pillsbury, which has more than 600 attorneys and such clients as Chevron Corp. and Pacific Telesis Group, denies the allegations. Its lawyer, Barbara A. Caulfield of Latham & Watkins, says it cut receptionists by giving them the choice of training for new jobs or taking enhanced severance packages. The firm also says that its 1994 early-retirement program was entirely voluntary. Firm spokesman Stephen Stublarec acknowledges that the firm has been trying to market itself more aggressively but says there was never an effort to push out older workers. Today, he adds, "one certainly sees mature workers from the moment one walks in the door."

These days lots of law firms are trying to shed their stodgy images. But the suit



Shirley McCarley

against Pillsbury suggests that in doing so, firms risk looking harsh instead of hard-driving. The plaintiffs, who are seeking unspecified damages for lost wages and emotional distress, have picketed Pillsbury's San Francisco offices and aired their grievances in the local press, prompting the firm to seek a delay in the trial because of pretrial publicity.

If proven, the allegations could prompt an especially strong rebuke from jurors. In 1994, a San Francisco jury awarded a legal secretary \$7.2 million in her sex-harassment case against Baker & McKenzie, the world's largest law firm; the award was later reduced. "A jury reacts very negatively when a law firm—an institution that is supposed to know and apply the laws properly—is found to violate the law," says New York attorney Michael Delikat, co-chair of the employment law practice at Orrick, Herrington & Sutcliffe.

In Pillsbury's case, the chairman of its labor practice when the retirement plan was approved was Fred W. Alvarez, a former assistant U.S. labor secretary and member of the Equal Employment Opportunity Commission during the Reagan administration. T. Neal McNamara, who was chairman of the firm at the time and is a defendant in the suit, helped to draft landmark federal legislation in the 1970s protecting retirement benefits. Both men have since left the firm and say they have no knowledge of discrimination at Pillsbury. Mr. Alvarez says he wasn't involved in reviewing the retirement plan.

No matter what happens at trial, papers filed in the case may provide a rare glimpse at how a powerful law firm both views and provides for its older workers. Pillsbury allows lawyers who turn 65 to stay on as "advisory" partners in a special annex in San Francisco, often referred to as "Leisure World" or "an old folks' home." In a deposition, a firm official described a large common room where the advisory partners "play dominoes, read the newspaper [and] have personal meetings." Firm chairman Alfred L. Pepin said in a deposition that "some literally nap there."

Pillsbury's lawyer, Ms. Caulfield, says the Leisure World nickname comes from several retirement communities by that name and "was not meant pejoratively." She adds that none of the plaintiffs worked at the annex for older partners.

But Ms. McCarley says her former bosses seemed obsessed with older secretaries who worked there. She contends that San Francisco office administrator Patty Rock and other managers regularly discussed the need for secretaries at the annex to quit or retire. She says another supervisor remarked that secretaries there "were out getting suppositories for their attorneys," a remark Ms. Caulfield says she is investigating.

Ms. Rock has left Pillsbury and didn't return calls seeking comment. Ms. Caulfield says Ms. Rock didn't mean any of her comments to be derogatory.

The case will proceed in stages, focusing first on Ms. McCarley, now 62 years old. In addition to age bias, she alleges the firm retaliated against her for protesting its treatment of secretaries and for documenting a secretary's complaints of sexual harassment against a rainmaking partner. The firm denies any retaliation.

Ms. McCarley joined Pillsbury in 1991, after leaving a similar position at the Richmond, Va., law firm McGuire, Woods, Battle & Boothe and moving to California to remarry. McGuire Woods had just gone through a merger itself, and Ms. McCarley says she thought her experience had prepared her to counsel employees whose jobs would be eliminated.

But Ms. McCarley says she wasn't prepared for Ms. Rock's "hit lists." Pillsbury denies the term "hit list" was ever used but acknowledges that Ms. Rock used the term "hit parade" in a memo proposing a staff reduction. The firm says she meant it as a reference to a musical term, similar to a "Top 10 List," not to be derogatory. Pillsbury adds that most of the women on at least one document identified by plaintiffs as a "hit list" are still with the firm.

One secretary allegedly on a list was plaintiff Janice Davis. Pillsbury says she had a spotty attendance history but the firm continued to pay her during lengthy absences. When the attorney she worked for left and she was on leave, Ms. Davis was designated a "floater" secretary. She was later terminated because, the firm says, she was unwilling to interview for positions in the office where she had worked. She had complained about "fumes" there.

Soon after Ms. Davis was terminated, the firm offered its early-retirement plan. The proposal that was presented to the executive committee before the plan was approved said that "many of the firm's older workers can not meet the increased demands of their assignments" and called retirement a "positive alternative" to disciplining or firing the firm's "disproportionate number of underperformers who are 60-plus years old," according to a copy provided by the firm.

1 of 2

## Old Law Firm Faces Age-Bias Suit

2 A 2

The other two plaintiffs, who still work at the firm, contend that their performances have been wrongly criticized. One of them claims she was twice offered early retirement in 1994 and that she declined both times, despite being told her job would become "more difficult in the coming months" and "consequently she may have problems with her performance." The firm denies that anyone made those statements but claims that the secretary had a longstanding performance problem.

Ms. McCarley says she found herself closing her office door and crying at her desk. She informed the firm in January 1995 that she was going on disability leave due to job stress. She later joined seven secretaries preparing the age-bias suit. (The claims of four women were dismissed because they took early retirement; they are appealing.)

"In retrospect," says Ms. McCarley in an interview, "I was hired . . . to deliver very harsh messages in a nice way."

# Judge Upholds Dismissal Of Gay Man

By MELODY PETERSEN

A Federal district judge in Philadelphia ruled today that Air Force Reserve officials did not have to rehire a man they dismissed from his civilian job after he told his supervisor he is gay.

The man, John Hoffman, had worked as both a civilian aircraft mechanic and a weekend reservist at the Air Reserve station in Willow Grove, Pa.

Lawyers from the Pennsylvania chapter of the American Civil Liberties Union, who represented Mr. Hoffman, had said that Air Force officials might have been within their rights in discharging Mr. Hoffman from the Reserves because he had voluntarily disclosed his homosexuality. But, they contended, the Air Force discriminated against Mr. Hoffman when it dismissed him from the civilian post.

Judge Joseph L. McGlynn Jr. said Air Force officials had acted properly because military policy required Mr. Hoffman to be a reservist to hold his civilian job.

Stefan Presser, a lawyer for the A.C.L.U., said that he planned to appeal the case, which he said was a test of the Pentagon's treatment of civilian employees who acknowledge that they are gay. The Pentagon has no policy that bans discrimination against civilian employees because of their sexual preference.

Mr. Presser said that Mr. Hoffman had recently applied for other jobs at the Willow Grove station, which do not require the employee to be a reservist, but officials told him that he was not qualified.

Air Force Reserve officials said they did not want to comment because of the continuing litigation.

In September 1995, Mr. Hoffman, 51, told his supervisor, a longtime friend, that he is gay. In April 1996, officials stripped him of his weekend military pay and his uniform and told him that, pending the completion of an investigation, he would be discharged from the Reserve.

Because he did not want to lose his pension, Mr. Hoffman decided to retire from the Reserve before he could be discharged. But no one explained to him, he said, that he would lose his civilian job if he did so.

Mr. Hoffman, who is married and has eight children, has "been made destitute by this," Mr. Presser said.

Discrimination**EEOC Files Pair Of Class Actions  
Against Janitorial Firms In Chicago**

**C**HICAGO—Targeting alleged race and sex discrimination at the “first rung” of the country’s economic ladder, the Equal Employment Opportunity Commission filed two class actions March 25 against a pair of Chicago-based contract cleaning services companies.

The suits were filed in the U.S. District Court for the Northern District of Illinois (*EEOC v. Admiral Maintenance Services L.P.*, DC NIll, No. 97 C 2034, 3/25/97); (*EEOC v. Capital Services Inc.*, DC NIll, , No. 97 C 2035, 3/25/97).

EEOC General Counsel C. Gregory Stewart said the litigation represents an important step under the agency’s national enforcement plan because it seeks relief for individuals who have been discriminated against at the base level of economic opportunity.

“Discrimination of the type involved in the EEOC cases filed today is particularly troublesome—as well as being illegal—because it saws through the first rung on that ladder of success,” Stewart said. “Keeping that ladder in good repair is absolutely critical to the success of all of us, our communities and our country.”

The suits were filed under Title VII of the Civil Rights Act of 1964 against Admiral Maintenance Service L.P., and Capital Services Inc. The government alleged that Admiral discriminates against African-American job applicants and that Capital discriminates against women and Hispanics.

**Spotlight On Applications, Recruitment.** Jose Behar, an EEOC trial attorney, said the suit against Admiral resulted from a commissioner’s charge and investigation. Admiral employs approximately 1,000 people and provides maintenance services on a contract basis to several large companies in Illinois. The suit charges Admiral with discriminatory hiring practices between 1988 and 1992, when its percentage of African-American employees dropped precipitously, according to Behar. He noted that in 1986, 49.1 percent of Admiral’s workforce was African-American, but that figure dropped to 2.7 percent by 1991.

Behar said that EEOC is aware of at least 96 qualified African-American job applicants who were not hired by Admiral during the period covered by the suit. During the same period, the company hired 261 white applicants who had no prior cleaning experience.

Behar asserted that EEOC’s investigation has been hampered by the company’s destruction of relevant records including job applications. On at least four of the applications obtained by the government, the word “black” was written in one corner. “Race coding applications is usually a telltale sign of intentional employment discrimination,” he said, adding that EEOC is asking for an award of punitive damages in this case.

Stewart noted that EEOC also alleges that Admiral engaged in discriminatory recruitment practices. While the company has contracts with companies in predominantly black neighborhoods, Admiral advertised job openings in newspapers circulated primarily to white readers, according to EEOC. One such batch of advertisements was printed in Polish and appeared in a

Polish-language newspaper. Stewart noted that the Admiral case represents the only active litigation in which the EEOC is alleging discriminatory recruitment.

Admiral’s president Richard Fiedler could not be reached for comment on the allegations.

**Dispute over Project Worker Position.** Ethan Cohen, an EEOC trial attorney working on the Capital suit, said that Capital is a much smaller janitorial company, employing fewer than 100 workers. EEOC’s suit stems from a charge filed by a woman who was denied a “project worker” position. EEOC found that at least between 1991 and 1994, Capital had a policy against hiring women for the project worker position because it involved the use of “heavy cleaning equipment.”

The suit also alleges hiring bias against Hispanics. During the relevant years, Capital had a 22 percent Hispanic hiring rate, but a 59 percent rate of hiring non-Hispanics.

Tom Herbick, president of Capital, disputed the government’s allegations, claiming that his company had no project worker job classification and had no policy of barring female applicants from specific jobs. Herbick said he was also perplexed by the government’s allegations of discrimination relative to Hispanics. He noted that Hispanics made up more than two-thirds of his workforce when the company’s primary contract was with the Fermi Nuclear Laboratory.

By MICHAEL J. BOLOGNA



U.S. Equal Employment  
Opportunity Commission

# NEWS

**EMBARGOED:**  
DO NOT RELEASE UNTIL  
TUESDAY, MARCH 25, 1997  
10:00 A.M.

**CONTACT:** José J. Behar  
EEOC Trial Attorney  
(312) 353-7722

Ethan M.M. Cohen  
EEOC Trial Attorney  
(312) 353-7568

**ATTENTION: PUBLICATION, BROADCAST OR ANY OTHER  
DISSEMINATION OF INFORMATION IN THIS RELEASE BEFORE  
10:00 A.M., TUESDAY, MARCH 25 IS STRICTLY PROHIBITED**

-----

## **EEOC SUES CLEANING SERVICE COMPANIES; GENERAL COUNSEL TELLS OF DISCRIMINATION ON "FIRST RUNG OF LADDER OF SUCCESS"**

-----

**PRESS CONFERENCE TODAY: EEOC, 500 WEST MADISON ST.,  
SUITE 2800, CHICAGO; TUESDAY, MARCH 25, 10:00 A.M.**

Chicago, Illinois. C. Gregory Stewart, General Counsel of the U.S. Equal Employment Opportunity Commission ("EEOC"), announced here that the federal civil rights agency has filed two class action lawsuits challenging hiring discrimination in the contract cleaning services industry. The suits, filed this morning in federal court in Chicago, charge that two services discriminated in hiring against African-Americans, Hispanics, and women. Stewart said the cases further the objectives of EEOC's National Enforcement Plan developed under Chairman Gilbert F. Casellas.

Noting that a federal court in Chicago has described such businesses as "the first rung on the ladder of American success," Stewart, who was appointed by President Clinton in 1995, said that "Keeping that ladder in good repair--free of employment discrimination--is absolutely critical to the success of all of us, our communities, and our country."

--MORE--

One EEOC lawsuit charges Admiral Maintenance, a Lincolnwood, Illinois janitorial service company, with discriminating against African-Americans in recruiting and hiring for cleaner positions. The other suit cites Capital Services, Inc., formerly located in Waukegan, Illinois, for discriminating against women and Hispanics. Both suits are brought under Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race, sex, national origin, or religion.

EEOC's Complaint against Admiral alleges discrimination dating back to 1988 and continuing through at least 1992. Jose Behar, the EEOC Trial Attorney leading the Admiral litigation, said that EEOC's investigation indicated that, although Admiral claimed to be seeking experienced workers, it failed to hire almost 100 experienced Black applicants but regularly hired Whites with no experience. Behar added that some Admiral employment applications obtained by EEOC had the word "Black" written on them. "Race coding applications," Behar said, "is usually a tell-tale sign of intentional employment discrimination." He continued, "It is that kind of intentional discrimination that makes employers liable for punitive damages, and EEOC is asking for an award of punitive damages in this case."

Ethan Cohen, the EEOC Trial Attorney responsible for the Capital Services case, said that EEOC expected to show that, from at least 1991 through 1994, the company excluded women from positions involving the use of heavy cleaning equipment. He said that, although Capital Services received numerous jobs applications from Hispanics, it hired non-Hispanics in far greater proportions.

EEOC Regional Attorney in Chicago, John C. Hendrickson, said that the two suits filed today "reflect the vigor of EEOC's litigation program." Hendrickson added, "These are the fourth and fifth employment discrimination lawsuits we have filed in federal court in Chicago in less than 30 days. We expect to file a sixth case in a few days and to be filing additional suits throughout the spring and summer. Employers should understand that EEOC's National and Local Enforcement Plans are in place and that we are now in the process of implementing them."

John P. Rowe, Director of EEOC's Chicago District Office, said that the suits filed today further the agency's National and Local Enforcement Plans in that "they both involve violations of established anti-discrimination principles and challenge broad-based employment practices affecting many applicants for employment." "These cases and others we are bringing," Rowe said, "indicate our steady determination to stick with our mission."

EEOC is the agency of the federal government responsible for the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Equal Pay Act, Title I of the Americans with Disabilities Act.

# News

1/2

## Sex Harassment

### **Court Awards \$8.1 Million In Damages To Former Recruiter for Waffle House**

**A** federal judge in Dallas has awarded a female former personnel recruiter \$8.1 million in damages after finding that top executives of Waffle House Inc. engaged in severe and pervasive sex harassment, that the company did nothing to stop it, and that the plaintiff was fired for complaining about the harassment.

Judge Jerry Butchmeyer of the U.S. District Court for the Northern District of Texas ruled in favor of Therese Scribner on her claims of sexual harassment, retaliation, sexual discrimination in pay, and tort law claims, including defamation (*Scribner v. Waffle House Inc.*, DC N.Texas, No. 3:91-CV-2667-R, 3/7/97).

The \$8.1 million award to Scribner and Resource Recruiters Inc., the firm that she established after her discharge by Waffle House, included \$7.4 million in punitive damages. The court awarded actual damages of \$70,250 for pay discrimination, \$139,963 for lost income, and \$477,500 for mental anguish. Punitive damages were warranted because of the egregious conduct of Waffle House, Butchmeyer wrote.

**Company Plans to Appeal.** J. Michael Upton, general counsel for Waffle House, said the company plans to appeal but he declined to comment further while the case is in litigation.

Butchmeyer wrote that the length of his 194-page opinion was primarily due to the "incredible extent of the severe, unrelenting sexual harassment," and the "lies" told by the alleged harassers, and the number of valid claims in the case.

Scribner worked for Waffle House for more than three years as a personnel recruiter, primarily responsible for recruiting new trainees for unit management positions in Dallas-Fort Worth and other locations in the company's Western Area, including Phoenix, Denver, Tulsa, Okla., and Shreveport, La. She also planned special events such as an awards banquet for top operators—called "Top Op"—and the Santa Sleigh holiday party.

**Frequent References to Plaintiff's Body.** Scribner cited numerous incidents from 1986 through 1990 in which she was subjected to offensive references to her body. Assistant Vice President Steve Wright introduced Scribner at a "Top Op" party to other managers as "our Dolly Parton," referring to the size of her breasts.

During interviews with potential new recruits while Scribner was present, Wright routinely said that a bonus for joining Waffle House would be a weekend with Scribner, who would wear a bikini, the court said. Although Scribner objected to the statement many times, Wright would just laugh, according to the court. Joe Rogers, the president and chief executive officer of

Waffle House, heard the "bikini" comment but never reprimanded Wright. On one occasion in a hotel courtyard in front of another executive, Wright grabbed Scribner's blouse and looked down her shirt.

Steve Oswald, a regional manager and vice president, also subjected Scribner to harassment, the court found. The court credited Scribner's claims that Oswald "constantly interjected filthy comments during a business conversation" and made references to oral sex. When Scribner asked Oswald to stop the offensive comments, he ignored her request.

**'Sterling Examples.'** With Wright and Oswald "setting such sterling examples—by their open and pervasive sexual harassment . . . it is not surprising that Wright and Oswald were soon joined by other Waffle House managers" in harassing Scribner, the court said.

District manager Tim Mercer, while at the annual "Santa's Sleigh" program, stuck a Polaroid camera under Scribner's dress and took a photo of her crotch, according to the court. The court discredited Mercer's explanation that he meant to "put the camera down to her leg" and it faulted an area vice president who observed the "repulsive, demeaning conduct" but did not reprimand Mercer.

In late 1988 and early 1989, Scribner considered quitting because of several things, including the ongoing sex harassment. She met with Lib Julian, senior vice president of operations, to complain about the harassment and documented their discussion in a memo that she also sent to Wright. When she met with Wright, he persuaded her to stay. Scribner also complained to her supervisor, Donald "Skip" Nau, director of a newly created department that handled recruiting, in late 1989. Nau documented her complaints and reported them to Rogers, the president and chief executive officer. When Nau asked Wright about the allegations, he denied any mistreatment of Scribner.

**Fired For Alleged Poor Performance.** The company fired Scribner in early 1990, alleging that she was a poor employee and recruiter. The court called the company's explanation of her discharge "preposterous," noting that she had a good performance record, received pay increases, and recently had been persuaded not to quit.

Two years after filing her sex harassment suit against Waffle House, Scribner started her own recruiting company. Waffle House interfered with a significant recruiting contract obtained by Scribner's firm by lying about the reasons for her discharge, the court found.

The court also found that Waffle House had paid Scribner less than male employees who had the same duties and responsibilities. She was hired for \$28,000 per year with a bonus potential of \$8,000. Shortly after beginning work, Scribner learned that her male predecessor had earned \$38,000 with a potential bonus of \$10,000.

When she questioned the difference, Wright allegedly replied that he had hired her because he had seen Scribner "in a halter top and shorts"; that the pay difference was justified "because you're not a bread-winner"; and that Scribner did not need to make as much as a man because "yours is second income."

Dallas attorney Michael P. Metcalf represented Scribner.

BY NADYA ASWAD

## Discrimination

### Judge Calls for Law Changes or New Court To Meet Rising Flood of Job Bias Litigation

In an unusual plea from the federal bench, a Washington, D.C., judge calls for changes in civil rights legislation or the creation of a new court to meet the rising flood of job discrimination cases.

Trial judges "are becoming personnel czars of virtually every one of this nation's public and private institutions," wrote Judge Stanley Sporkin, in a plaintive call for reform of the current approach for resolving EEO disputes in the workplace. "The point is, some change is urgently needed."

Sporkin, a judge on the bench of the U.S. District Court for the District of Columbia since 1986, made his call for change in an otherwise routine opinion where he dismissed the age and sex discrimination claims of a 60-year-old employee of the Labor Department's Occupational Safety and Health Administration on summary judgment (*Tschappat v. Reich*, DC DC, No. 96-1032, 3/18/97).

The court found "no support through affidavit or other documentary evidence" to show that William Tschappat—one of eight candidates for the job of director of the Washington district office of OSHA—was rejected for the position in favor of the selected, 42-year-old female candidate because of his sex or age.

**'Urgent Need' for Change.** "This case shows once again the need to adjust our anti-discrimination laws," Judge Sporkin observed.

"It seems that almost anyone not selected for a job can maintain a court action. It is for this reason that the federal courts are flooded with employment cases. We are becoming personnel czars of virtually every one of this nation's public and private institutions," he wrote.

"The drafters of the original legislation could never have intended the resulting consequences from what they deemed to be necessary, progressive legislation. It is obvious that amendatory legislation is required.

"What is needed is a better screening mechanism as a prerequisite for gaining access to this nation's federal court system. If an appropriate screening mechanism cannot be devised, then at a minimum a new Article I court should be created to hear this flood of cases. The point is some change is urgently needed."

**'Explosion' of EEO Cases.** In a presentation to an American Bar Association seminar last week, a prominent civil rights lawyer also expressed concerns about the litigation explosion in the field. The escalation of EEO cases will have broad-based practical implications for employers and employment attorneys on both sides

of the table, said Richard Seymour of the Lawyers' Committee for Civil Rights Under Law (55 DLR C-1, 3/22/97).

Over the past five years, EEO filings in federal court increased from each previous year at a range from a low of 17 percent in 1994 to a high of 32.3 percent in 1992. In 1996, about 23,000 job bias claims were filed in federal court.

By comparison, Seymour said, the 270,000 new civil cases—of all kinds—filed in federal district courts in the year ending Sept. 30, 1996, was only an 8.4 percent increase over the prior year.

The flood of employment litigation will bring greater pressure for alternative dispute resolution and an increase of personal injuries into employment law on both sides, Seymour predicted.

BY NANCY MONTWIELER

# Conference Report

ABA EEO Committee

1/2

## Discrimination

### Tax Law Change Called Most Significant Development of 1996 Affecting Bias Accords

**O**RLANDO, Fla.—The most significant development of 1996 regarding employment discrimination settlements was a change in federal income tax law that means most recoveries will be taxed, a management attorney told audience members at an American Bar Association conference session on March 22.

Congressional passage of the tax change as part of the Small Business Job Protection Act of 1996 in August 1996 set off a "frantic move to settle all cases" before the law took effect, according to Stephen D. Wakefield of Baker, Donelson, Bearman & Caldwell in Memphis, Tenn.

The tax change arguably makes it more difficult or expensive to settle employment discrimination cases because more of the money paid by employers will go to the federal government in taxes rather than to the plaintiffs. The change is significant, Wakefield noted, because a high percentage of such cases have traditionally ended in settlement. The bottom line is that "tax-free money" is no longer available to settle employment discrimination cases, he commented.

Only damages specifically associated with "physical" injury—as opposed to the former "personal" injury language—are excluded from taxable income, Wakefield explained. Emotional injury is not recognized as the same as physical injury, he pointed out. Absent physical touching or common law torts that involve physical injury, all of the recoveries will be taxed, he said. However, out-of-pocket medical expenses for non-physical injury remain untaxed.

Wages are subject to income tax and payroll withholding taxes while compensatory and punitive damages are only subject to income tax, Wakefield explained. He suggested asking the plaintiff for an indemnification agreement as part of the settlement to protect the employer if the Internal Revenue Service later penalizes it for failure to withhold sufficient taxes.

**Revisiting Physical Distinction.** A member of the audience commented that it is unfortunate that Congress drew a distinction between physical and emotional injury at a time when medical researchers are discovering more and more physical causes and manifestations for psychological problems.

Attorneys can argue about what the effects will be and whether the tax change was a good idea, Wakefield said, wondering whether the issue will be "revisited as a result of outcry from trial lawyers."

An audience member asked about cases in which there has been an expert diagnosis of psychological injury with physical effects. Wakefield recommended allocating a portion of the settlement amount as physical injury damages in such cases, but cautioned that there are no court decisions allowing such damages to be excluded from gross income.

In addition to expert testimony, it would help to have a judge make specific findings of fact as to physical injury, Wakefield said. He stressed the need to create documentation to back up allocation decisions.

Defendants used to just cut the check, Wakefield said. Now there is a more interactive process as the parties decide what portions of the total settlement amount will be attributed to wages, damages for nonphysical and perhaps physical injury, out-of-pocket medical expenses, and attorneys' fees.

### Spreading out the settlement payments could benefit certain plaintiffs by keeping them in a lower tax bracket, Wakefield explained.

In order to facilitate settlements with plaintiffs who are still employees, employers can grant a period of authorized leave and continue to provide health, life, and disability insurance, Wakefield suggested. The premiums would not be taxable to the plaintiff as income if there is still an employment relationship, he explained.

Spreading out the settlement payments could benefit certain plaintiffs by keeping them in a lower tax bracket, Wakefield explained. Employers should also consider providing tuition reimbursement or interest-free loans.

**Mediation Recommended.** Plaintiffs' attorney Gary Phelan of Garrison, Phelan, Levin-Epstein & Penzel in New Haven, Conn., agreed that entering into a creative, interactive process regarding tax and nonmonetary issues can give value to plaintiffs and facilitate settlement. However, he told the audience that the best way to settle employment disputes is mediation, which he uses frequently.

Using mediation enables employment attorneys to get a second opinion—from the mediator—about the strength of the case, enables the plaintiff to "vent" directly to the employer, costs a lot less than litigation, and has a success rate of 85 percent to 90 percent, Phelan said.

Mediation benefits both clients and employment attorneys by producing fast results and avoiding the frus-

2/2

trating delays of litigation, Phelan asserted. He predicted that logjams of court cases will only get worse as the post-World War II "baby boomers" grow older and bring age and disability discrimination suits.

The average hourly rate charged by mediators varies around the country and is about \$300 an hour in New York, according to Phelan. He never asks the employer to pay the entire cost because he believes that plaintiffs need to feel invested in the process and the result. If the employer suggests mediation and offers to pay for it, he will agree to reimburse half the cost if the process results in a settlement. A typical mediation costs \$1,000 to \$3,000, which is equivalent to paying for two depositions, he said.

**Mediation Called Win-Win.** What is most beneficial about mediation is that both sides feel they win, because they participated in crafting the result, Phelan asserted. Court-ordered mediation, like mandatory arbitration, is not as effective because the parties did not choose the process, he opined.

Phelan thinks it is counterproductive for a settlement judge to suggest an amount and demand that the par-

ties agree or go to trial. "Threats are not effective," he said. Judges, who are often former litigators, are not trained in the problem-solving skills needed for mediation, he observed.

Mediation is more effective early in the process, Phelan said. "It takes more money to get a plaintiff to settle the longer a case goes on" because the litigation process is polarizing and plaintiffs get increasingly angry, he explained.

One problem is there are not enough mediators with good problem-solving and listening skills, which Phelan ranks ahead of EEO experience as necessary qualifications.

In response to an audience question, Phelan said he has never tried mediation to resolve a class action. "A lot of the value of mediation is the psychic benefit of face-to-face discussions," which would be difficult to accomplish in class cases, he explained.

By SUSAN J. MCGOLRICK

# Peering Into The Shadows of Corporate Dealings

## Nike Turns to Andrew Young To Review Its Labor Practices

By DANA CANEDY



Associated Press

### In Good Company

Andrew Young, the former mayor of Atlanta and United Nations representative, will work with Nike to bring about change in working conditions at factories in Thailand, right, and other developing countries. "I don't see myself as a spokesman for Nike at all," he said. Mr. Young is not the first high-profile consultant to be brought in by a company to address problems that have tarnished its image. Here are some others.

As an outspoken civil rights leader, crusading United Nations representative and mayor of Atlanta whose oratorical skills were honed in the pulpit, Andrew Young has rarely been short on words. Yet in his private business dealings, Mr. Young says he can be more effective out of the limelight.

Even so, Nike Inc., masterful at putting its spin on a sweet public relations opportunity, eagerly fired off a news release last month announcing that Mr. Young and his newly created consulting firm, Goodworks International, would review the company's recently updated international labor code of conduct.

Nike — which has sought to shake off claims that its products are manufactured in Asian sweatshops — says that Mr. Young's involvement adds a level of oversight to its commitment to being a leader in international workplace standards. The company's critics take a more cynical view, contending that just as Nike pays Michael Jordan to sell its basketball shoes, Mr. Young has been hired to promote Nike's image.

And while Mr. Young insists on his independence — "I don't see myself as a spokesman for Nike at all," he said in a brief, reluctant interview — the mixed reception underscores the obstacles to the venture's success.

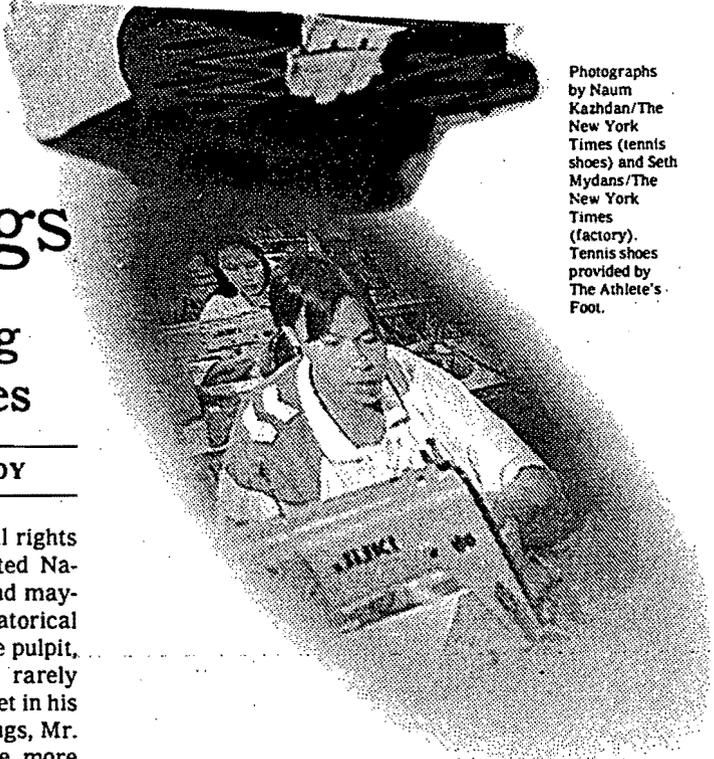
A growing number of corporations have hired high-profile lawyers or former government officials to conduct what the companies say are independent investigations into their affairs; besides Nike, the list includes Mattel, Bausch & Lomb

and Mitsubishi Motor Manufacturing of America. But the appointments often just become one more source of skepticism, doing little to appease the critics they are intended to answer.

"Your first inclination from a public relations standpoint is to hire somebody whose credibility will convince the public that in and of itself the conclusion they reach is the right conclusion," said Edwin H. Stier, a lawyer with offices in Bridgewater, N.J., and Washington, who specializes in independent investigations.

But appointing a fact-finder is never enough, he added. "The public has got to be reassured that the process you went through is one that is effective at getting the bottom-line information you need," Mr. Stier said. "If you take the position that 'we'll let you know what the results are but we're not going to tell you how we got there,' then you run into a serious risk that the whole effort will backfire."

When, for instance, Mattel Inc. was in the market last year for a consultant to look into accusations that it had overstated its earnings, the toy maker hired Gary G. Lynch, the former director of enforcement for the Securities and Exchange



Photographs by Naum Kazhdan/The New York Times (tennis shoes) and Seth Mydans/The New York Times (factory). Tennis shoes provided by The Athlete's Foot.

Continued on Page 6

1/2

Commission.

In public life, Mr. Lynch was the scourge of Wall Street, bringing cases against prominent traders like Michael R. Milken and Ivan F. Boesky. But Mattel's accusers objected that among other things the toy maker declined to release Mr. Lynch's report, saying only that he had uncovered no wrongdoing on the part of company executives.

Last May, a month after the Equal Employment Opportunity Commission sued Mitsubishi Motors contending that women at its plant in Normal, Ill., had been subjected to widespread sexual harassment, the company hired Lynn Martin, who served as Labor Secretary in the Bush Administration, to address workplace issues there.

Last month, though, at the end of the nine-month review, a lawyer for 28 women suing Mitsubishi in a private lawsuit questioned the company's commitment to enacting the sweeping changes called for in Ms. Martin's report, though the company insisted that it would.

Mitsubishi, Nike and other companies say that inviting outsiders to look into their affairs signals their commitment to improving their operations or resolving claims of wrongdoing. The corporations note that such inquiries hold them accountable to experts with reputations as staunch opponents of impropriety and say that the reviews give them fresh insights into their businesses.

Yet the companies' critics contend that all too often the corporations are simply looking to cash in on well-known and highly respected names.

In Nike's case, human rights organizations charge that by hiring Mr. Young, the company is mainly trying to deflect criticism that its foreign subcontractors — particularly in Southeast Asia — use child labor, pay abysmally low wages and subject workers to sweatshop conditions.

"Nike all too often looks for superficial solutions," said Medea Benjamin, executive director of Global Exchange, a human rights group in San Francisco that has been critical of the company. "It seems again like Nike looked for someone that would give them some good public-relations play rather than hiring an organization that has a track record."

Nike considers such criticism off point. For one, the company said that by regularly updating its code of conduct for contractors, it demonstrates its continuing commitment to the fair treatment of workers. And few people, Nike said, can match Mr. Young's tenure as an advocate for working people. Coupled with his experience as a diplomat and big-city mayor, that qualifies him as a labor authority who brings a great deal to the table, Nike argued.

"I think he is just without a doubt the foremost leader in this area," said McClain Ramsey, a spokeswoman for the company, which is based in Beaverton, Ore. "I would say that Andrew Young is far more than a name: he is a man with a reputation that goes along with his well-earned stature."

Mr. Young said that his motivation for working with Nike was the poten-

tial to bring about change in working conditions at factories in developing countries. The outcome of his investigation, he said, would depend on information from both Nike's most vocal critics and the company's top executives, as well as from his own assessment of conditions after he tours the plants and talks to workers.

His hope? That his involvement will prompt Nike to set even higher standards that other international corporations will endorse. "I don't know whether that will satisfy Nike or the human rights agencies, but if it creates a lively discussion that keeps the issue alive, I think it will help," Mr. Young said.

Neither Mr. Young nor Nike would say how much the company was paying Goodworks, which was set up in January and is billed in Nike's release as "dedicated to promoting positive business involvement and investment in developing countries and America's inner cities."

Mr. Young, who would not say if Nike was his only client, said it would be up to the company to decide what to do with his report. But, he added, "if I found glaring violations and problems that they are unwilling to

## Are investigators hired for their reviews or for their publicity value?

correct or address, then I would certainly have to say something about those."

For its part, Nike stopped short of guaranteeing full disclosure of Mr. Young's findings. "We haven't yet determined how his findings will take shape," Ms. Ramsey said, though she added that she did not see a reason why Mr. Young's conclusions would not be made public.

Even so, said Mr. Stier, the lawyer who specializes in such investigations, companies that announce the results of investigations often do so only after sanitizing the findings to present management's version of the facts. Companies "try to rig the outcome," he said, though he was not specifically referring to Nike.

Some observers who question Nike's intentions say that in hiring Mr. Young, the company has opened itself to a potentially harsh review. "Nike is trying to put its best foot forward, but they have chosen a man whose whole life has been directed at helping people," said Richard Ray, secretary-treasurer of the Georgia A.F.L.-C.I.O. "He will give them an honest opinion."

More skeptical critics say that Mr. Young should have done more to preserve his independence. "I would think he sees this as a critical, new and growing area that needs diplomatic expertise," Ms. Benjamin of Global Exchange said of Mr. Young's interest in international labor standards. "In that case, he should not be hired by Nike. He should be a mediator that is being paid by some foundation, so he would not be beholden to the company. When he is under the

pay of the company, how is he ever going to be able to respond openly to the critics?"

Such issues have been raised repeatedly about inquiries of this type.

Mr. Lynch, for example, was said to have acted as both umpire and advocate when Kidder, Peabody & Company hired him to look into whether the bond trader Joseph Jett had acted alone to create \$350 million in bogus profits even as Mr. Lynch was representing Kidder in a case against Mr. Jett. Kidder said at the time that the investigation was fair and objective — but never billed it as independent.

Critics also complained that no report of Mr. Lynch's findings was ever made public in his reviews at Bausch & Lomb and Mattel. Still, there was no evidence that Mr. Lynch failed to uncover the truth in any of those cases. Mr. Lynch did not return a telephone call to his office seeking comment.

But even companies that announce the results of investigations and commit publicly to making changes do not gain immunity from criticism.

Though Mitsubishi has enacted six of Ms. Martin's initial recommendations for its Illinois plant — and has announced a timetable for adopting 34 more that she offered last month — the lawyer representing women who are suing the company argues that the Martin review was little more than window-dressing.

"There is no question that they went to her for her name and prestige and the fact that she was female," Patricia Benassi, a lawyer in Peoria, Ill., said. Ms. Benassi contended that beyond a new, mandatory training course on sexual harassment, Ms. Martin's work has had "a limited impact on the day-to-day life of the people in that plant."

The company said, however, that it had hired Ms. Martin, in part, for her expertise on labor issues.

"I think what is fundamental is the commitment to operate in good faith to move forward to address the recommendations we have received," Gael O'Brien, a company spokeswoman for Mitsubishi, said.

Ms. Martin, now a consultant in the Chicago area and a professor at Northwestern University's Kellogg Graduate School of Management, said that Mitsubishi's public declaration of a time frame for adopting her proposals spoke to the company's sincerity. "A consultant's report, in general, companies can sort of take and throw away," Ms. Martin said. "Mine is different in that not only is it public, but the time frame for accomplishing all of the things suggested is also public. That is the only way I would have done this."

While companies may receive a public relations lift from hiring consultants, there is a downside, too, Ms. Martin said: "They may get some good will, but they sure are going to get public scrutiny."

The arrangement poses risks to consultants, too, Ms. Benassi said. "One of the difficulties someone in Lynn Martin's or Andrew Young's position faces is whether or not when they come to him or her, they really are sincere, or whether this is just wrapping paper on an ugly package," she said. "I don't know if the consultant always knows that."

N.Y.  
TIMES  
2/2

## Discrimination

### **Second Circuit Approves Reduction Of Punitive Damages to \$300,000 Cap**

**E**xamining a claim of "glass ceiling" gender bias against the Olsten Corp., the U.S. Court of Appeals for the Second Circuit has approved procedures followed by a trial judge in cutting a jury's award of \$5 million in punitive damages to Mary Ann Luciano. Luciano, a former Olsten executive, claimed she was denied a promotion and terminated because of her gender. In November 1995 following a month-long trial, the judge reduced the award to \$300,000.

Olsten provides temporary workers nationwide. Although the company's workforce is mostly female, a "glass ceiling" blocked the promotion of women to the top executive rank, according to the court. Evidence at trial showed a \$10,000 disparity in wages for men and women with the rank of director (*Luciano v. The Olsten Corp.*, CA 2, No. 96-7262, 3/21/97).

Olsten had sought an order in its favor as a matter of law. It also moved for a new trial, or for a reduction in the size of the award. On appeal, the Second Circuit held that the use of the statutory cap in this case is consistent with a ratio Congress has considered reasonable between economic and punitive damages.

Judge Frank X. Altimari observed that the \$300,000 award is less than twice the actual damages and falls under the double damages awarded for willful violations of the Age Discrimination in Employment Act and the Equal Pay Act.

Luciano filed suit under Title VII of the 1964 Civil Rights Act and the New York State Human Rights Law alleging that Olsten and three of its executives reneged on a promised promotion to the rank of vice president. The jury trial ended in an award of \$150,714 in compensatory damages, \$11,400 in damages for emotional distress, \$17,713 for other expenses, and \$5,000,002 in punitive damages.

The district judge held that the verdict was supported by the evidence. He refused to set aside the punitive damage award, but cut the sum to meet the \$300,000 statutory cap.

**Lure of Vice Presidency.** After sifting through the facts, the Second Circuit said that in 1989 Luciano was promised a promotion to vice president when she received an offer from another company. Luciano chose to remain as Olsten's director of field marketing. She received a written promise to review her performance in a year and promote her at that time assuming her performance was acceptable.

The court added that the evidence supports the conclusion that male colleagues, resentful of her rise up the corporate ladder, conspired to overload her with work to ensure that her performance would be rated unsatisfactory. Altimari said that the jury had sufficient evidence before it to conclude that men with poor, or even abysmal, performance records were routinely promoted to senior management positions. He found that her performance was excellent, and that promotions went to male colleagues who headed money-losing operations.

**Jury Told to Weigh Statistics.** Olsten argued that the verdict was tainted because of the admission into evidence of statistical data showing the workforce split between men and women, with accompanying salaries. The trial judge said that the evidence was credible and reliable because it came from Olsten's own records, that expert testimony was not needed to explain it, and that the evidence did not unduly prejudice the company's interests. The judge instructed the jury that its task was "to weigh all the statistical, numerical and graph evidence...and decide what weight and significance, if any, you want to give to it."

Altimari concluded that Olsten's motion for a new trial was properly denied, and that the evidence supported the inference of intentional discrimination. Turning to the jury instructions, he found that the jury was repeatedly admonished that Luciano bore the burden of proving discrimination. Any possible confusion in the instructions stemming from the use of the words "motivating factor" and "determinative influence" was cured, he said, by the judge's statement, "When I say motivating factor, I mean that her gender had a determinative influence on those decisions."

Olsten also claimed that only conduct that was "extraordinarily egregious" should trigger an award of \$300,000—the statutory cap for an employer with more than 500 workers. Altimari said that nothing in the statute supports the employer's argument. Punitive damages are warranted, he said, for an employer who "discriminates with malice or with reckless indifference" to the rights of the individual. The court concluded that the 1991 amendments to Title VII incorporate the standard of other civil rights laws.

Judges James L. Oakes and Fred Parker joined in the opinion.

By BERNARD MOWER

# EEOC sues Carson City firm, alleges woman sexually harassed

By Steve Timko  
RENO GAZETTE-JOURNAL

The federal government has sued a Carson City business on behalf of a woman who said she was fired after she complained about sexual harassment.

The United States Equal Employment Opportunity Commission filed the suit Monday in U.S. District Court in Reno on behalf of Lisa A. Lundquist against Laughlin Associates, Inc., which offers business consultation and corporation services.

Lawsuits alleging sexual harassment or retaliation for reports of sexual harassment are not unusual in Reno federal court. The EEOC seldom gets involved, however. A computer search of federal cases involving the EEOC shows only two such cases in Reno in the past four years.

Lundquist reported sexual ha-

rrassment to Lewis E. Laughlin, the company's senior vice president and chief executive officer, on Dec. 3, 1992, and again on Jan. 18, 1993, the EEOC said.

She was fired on Jan. 21, 1993.

"By this lawsuit we are sending a message that no one can violate (laws against retaliation for sexual harassment reports) with impunity, not even the CEO," EEOC regional attorney Pamela J. Thomason said in a written statement.

Bob Seligman, Laughlin executive vice president, called it a five-year-old case in which both the state and federal governments had found there was no sexual harassment of Lundquist.

According to Seligman, Lundquist wants two or three weeks of vacation pay.

"We just consider it extortion because we don't think she's entitled to it," Seligman said. "We're not going to pay."

■ *"By this lawsuit we are sending a message that no one can violate... with impunity."*

**Pamela J. Thomason**  
EEOC regional attorney

"We disagree with that," responded Peter F. Laura, an EEOC senior trial attorney. "I think this case is one involving retaliation."

Laura conceded the EEOC did not find enough evidence to support Lundquist's claim she was sexually harassed. But the agency made a determination on Dec. 30 that the retaliation claim had merit, Laura said.

# World could face suit despite EEOC ruling

The Daily  
Citizen-News

Dalton, GA

March 23, 1997

## Failure to reach agreement may force ex-employees to choose court fight

By **ROBERT JACKSON**

Citizen-News Business Editor

Efforts to settle a discrimination claim facing World Carpets Inc. involving five former female salespersons could end up in federal court.

Even though the Equal Employment Opportunity Commission ruled in November against World Carpets and then reaffirmed their decision earlier this year after World requested the case be reheard, the parties have not been able to come together on a final settlement.

The inability of the parties to come together will likely produce a costly court battle that should finally bring to close a case that dates back to 1992.

Barry Elson, the attorney representing the five women, said that unless the issue can be solved through the conciliation process with the EEOC, he will take the case to a federal court.

Bernice Williams-Kimbrough, district director of the EEOC office in Atlanta, could not discuss the case but said conciliation is a process followed by the EEOC after a finding of discrimination. The process is designed to keep all of the parties from going to court and to develop an amicable settlement to the case without getting entangled in heated legal issues.

She said the process usually lasts 90 days.

Conciliation in the case involving World Carpets began in February, Elson said, and he indicated he has set a March or early April deadline for the case to be resolved through the EEOC.

According to Elson, it should be clear early in the process if World wants to sit down and come to a settlement.

Both sides in the case — World Carpets and Elson's clients — have different reasons as to why a settlement has not yet been reached. World Carpet blames the EEOC

and Elson blames World Carpets.

"World has really stonewalled the EEOC," Elson said.

"They've been a reluctant participant in this entire process."

"The process is under-way," World spokesperson Martha McCorkle, vice president of financial services, said. "It's certainly not a very speedy process."

"We're responding to our attorneys and the EEOC."

"We're responding in a timely basis to all requests. (We have) not asked for any extension, we are responding before all of the deadlines. We are (simply) dealing with a government agency that is overloaded."

The case began back in 1992 when World conducted a reorganization of its distribution operations and fired 10 territory managers responsible for selling and promoting the company's Customweave carpet line. Nine of the 10 were women. World's reorganization plan replaced the 10 territory managers with six men who filled a newly created position of regional vice-president.

In 1993, five of the women — Patricia Folino, Carol Lee Salganik, Jodi Pinski, Marilyn Yamich and Emily McDonell — chose to contest the move and last November the EEOC ruled that World violated federal sex discrimination laws when it fired the women and replaced them with men.

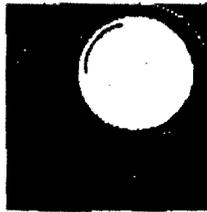
"Historically this company doesn't promote women," Folino said.

She added that World has refused to acknowledge the women even after they went to the EEOC in 1993.

"They haven't acknowledged our existence (or didn't) until the EEOC made its decision (in December)," Folino said.

Salganik agreed with Folino, particularly in her assessment of World's employment of women.

"Most definitely there were no women in management at World," she said.



# WORLD CARPETS

## Former worker pursues discrimination case

By ROBERT JACKSON  
Citizen-News Business Editor

Once again World Carpets Inc. is facing the sting of sex discrimination allegations.

Last year, World Carpet was hit with a federal ruling citing numerous civil rights violations tied to the firm's hiring and employment practices.

This year the Dalton-based carpet producer is undergoing another serious EEOC investigation and is staring at the possibility of a lawsuit as a result of it.

In December, 5 women await Ringgold resolution in their case. Demetria A. Weeks filed a complaint with the Equal Employment Opportunity Commission claiming she was unfairly fired because she was pregnant and that her employer lied in the statement of termination.

Her lawyer, Bill Mitchell of Atlanta, has indicated that delays in the EEOC review process now being conducted may eventually lead him to seek alternative relief in court.

Weeks claims she was fired from her job as a machine operator in the company's spinning mill on South Hamilton Street because she was pregnant, and that company statements indicating she could not do her job were wrong.

She admitted to two, possibly three, notices of poor performance within a month before she was fired; but, evidence shows that the Georgia Department of Labor determined Weeks had been a good employee in her previous two years with World and her firing was not related to her job performance.

"In the present case the claimant (Weeks) had given her best effort and was discharged for reasons not considered to be within her control," the DOL report stated. "Therefore, fault cannot be assigned to her for the incidents which led to her discharge."

The only difference between her last two months with World and her previous years as an employee, Weeks said, was that she was pregnant and she asked for lighter duty.

However, she said, she was given a more difficult job that required her to be on her feet about 10 hours during a normal 12-hour shift.

On her last night as a machine operator, she said, she had only one 15-minute break in the 12-hour shift.

World spokesperson Martha McCorkle, vice president of financial services, said it's not unusual



Citizen-News/Phil Farnor

Demetria Weeks holds her 2-week-old baby, Tyler Andrew. Weeks claims that World Carpets dismissed her because she was pregnant.

1/2

DAILY  
CITIZEN  
NEWS

DAILY CITIZEN NEWS

2/2

FROM PAGE 1

## WORLD: Company faced with discrimination accusations

for her company to face an EEOC discrimination complaint and, except for one case, has never been found liable by the federal agency.

"People file EEOC complaints all the time," McCorkle said.

She did not discuss the issues of the Weeks case other than to say World is complying with all of the requests issued by the federal agency in its investigation.

Like McCorkle, Mitchell did not comment on the specifics of the case, but denied World has been cooperative.

"(We have) not been successful reaching a settlement and they (World) don't appear to be interested in that," Mitchell said.

Mitchell said the EEOC has a 180-day window after a claim is filed to investigate a case, but because the agency has a history

of being slow to complete its review process the window may close before Weeks' case is completed. As a result, he said, he is considering legal action in court against World.

While Mitchell said he has not yet decided whether to take the case to a state court or federal court, he feels certain his case is strong.

"I will say an employer cannot make an adverse employment decision because of pregnancy," Mitchell said.

Weeks, who last week gave birth to a 7-pound, 3-ounce boy named Tyler Andrew, is now at home taking care of her son.

Citing a difficult pregnancy with complications during labor, Weeks said her doctors performed a Caesarean section.

In an affidavit filed with the

EEOC, Weeks said, "I was moved to a difficult job, creeling for four Suessens, which I had never previously done by myself before. They were running very fast and running out of yarn. ... I could not keep up and I told my supervisor I could not keep up and asked to be moved. ... They refused. I worked that job by myself until the end of my 12-hour shift. Just before shift change Tuesday morning I got some help and I had no problems keeping up after that."

Also in her affidavit, Weeks said that while one supervisor was critical of her job performance, another "never complained about my performance until the day I got fired. They refused to let me change jobs, and refused to let me leave or slow down when I got sick or was having other preg-

nancy related problems."

World claims that Weeks received three warnings or notices within a year and that was sufficient for termination.

According to a statement made by World Carpets to the DOL, "she (Weeks) was discharged due to poor performance. ... She made little effort to perform the job properly and showed no interest in the way her job looked or the problems she was causing the operators ... this cannot be tolerated."

The statement made to the DOL denied Weeks was forced to work when she was ill.

"If they have to be absent and go to the doctor it is one excused absence. No one is forced to work while feeling bad. If someone reports to work they are expected to do the job they are paid to do."

DAILY CITIZEN NEWS

# EEOC'S REPORT ON WORLD CARPETS' EMPLOYMENT POLICY

Findings of the Equal Opportunity Commission following its investigation of the cases involving five women who were fired 1992 by World Carpets Inc. as part of its reorganization.

Ten regional manager positions were eliminated, nine of which were held by women, and that the company replaced them with six vice presidencies, all of which were given to men.

Evidence obtained by the commission disclosed that World failed

to promote or consider Jodi Pinski for a regional vice president position, while four of the six men selected to fill the newly-created position did not meet the minimum qualifications for the job and had less relevant experience than Pinski.

World's explanations for promotion and hiring of the men and not Pinski were not credible, and evidence demonstrates that her firing was based on her sex.

Carol Lee Salganik ranked among the top 10 percent in the

company's line sales and that this demonstrates World's statement that she was discharged for unacceptable job performance is not creditable.

Neither Marilyn Yamich nor Emily Sharpe and Patricia Folino were considered by World for any of the vice president slots even though four of the men hired for them had less experience and did not meet established qualifications for the job. Yamich and Sharpe were also considered to have the same qualifications as one of

the men who was hired as a vice president.

Statements from World as to reasons why Yamich, Sharpe and Folino were discharged are not creditable, and that they were fired because of their sex.

Females employed in the company's credit and customer service department have been subject to discrimination with regard to their pay and job classification. Women in the same hourly positions as men in the department were paid less.

## Thousands of claims filed each year with EEOC

According to the Equal Employment Opportunity Commission, the Pregnancy Discrimination Act requires that if an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee.

For example they must provide her with modified tasks, alternative assignments, disability leave or leave without pay.

National claims filed for pregnancy discrimination (filed with the EEOC and state agencies):

- 1991: 3,000
- 1992: 3,385
- 1993: 3,577
- 1994: 4,170
- 1995: 4,191
- \*1996: 3,743

EEOC statistics on gender discrimination (the number of cases filed with the EEOC):

- 1991: 17,422
- 1992: 21,492
- 1993: 23,905
- 1994: 25,980
- 1995: 26,181
- \*1996: 23,513

\*Data for 1996 is preliminary.  
\*\*Figures from the implementation of the Americans with Disabilities Act are now included.

## DAILY CITIZEN NEWS

**Whatever Happened To 'World 5'****Name:** Patricia Folino**Residence:** Philadelphia, Pa.**Years at World:** 1987-1992**Currently:** Operates Folino and Associates, a consulting service that works with businesses on workplace issues related to women, the handicapped and racial minorities.**Note:** Has twice visited the White House since being fired and met with then-Secretary of Labor Robert Reich on issues related women in the workplace.**Name:** Carol Lee Salganik**Residence:** Owning Mills, Md.**Years at World:** 1990-92**Currently:** An independent sales representative of several carpet manufacturers.**Note:** Has spent 25 years in the carpet industry including 13 years with Mohawk Industries Inc.**Name:** Marilyn Yamich**Residence:** Riverdale, Ill. (Chicago suburb)**Years at World:** 1984-1993**Currently:** Unemployed**Note:** Had been in remission from cancer then had a recurrence and underwent surgery in 1993 for ovarian cancer. She has been in remission for about a year from the most recent cancer attack.**Name:** Emily McDonell**Residence:** Denton, Texas (Dallas suburb)**Worked for World:** 1989-1992**Currently:** Selling carpet for a retail outlet in Dallas.**Note:** Has been in the carpet business, retail and as a manufacturer's representative, since 1981.**Name:** Jodi Pinski**Residence:** Boston, Mass.**Worked for World:** 1988-92**Currently:** Owns her own business, Lasting Impressions.**Note:** Filed bankruptcy in 1995, has worked as an after-school program coordinator for school-age children.

**U.S. Equal Employment Opportunity Commission**

# NEWS

FOR IMMEDIATE RELEASE  
March 19, 1997

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

**SEX DISCRIMINATION SUIT FILED BY EEOC  
AGAINST A PHOENIX BASED KNIGHT TRANSPORTATION, INC.**

Phoenix, Arizona -- On March 14th the Phoenix Office of the Equal Employment Opportunity Commission ("EEOC") filed a class Title VII sex discrimination lawsuit in federal court in Phoenix, Arizona against Knight Transportation, Inc. (Knight). In the lawsuit, the Commission alleges Knight failed to hire Katherine Duncan and a class of qualified female applicants because of their sex. The Commission alleges Knight Transportation discriminated against Ms. Duncan and other female applicants and prospective applicants when it denied them training opportunities and employment because of their sex and engaged in a pattern or practice of discrimination against women.

The Commission alleges the pattern or practice of sex discrimination involves Knight Transportation's driver training program, which required, among other things, over-the-road trips with a trainer. Katherine Duncan and other qualified female applicants were excluded from training opportunities and employment because Knight Transportation's expressly refused to allow male trainers to train female trainees and because it employed no female trainers. Female applicants and potential applicants for trainee positions were advised Knight Transportation did not have female trainers available and were thus discouraged from applying for trainee positions. Although as many as seventy individuals may have been hired as trainees, with many applications coming from women, Knight Transportation hired but one female.

The Commission alleges that for the duration of the training program Knight Transportation engaged in aggressive recruiting for driver positions, including trainees. Knight Transportation failed, however, to make similar efforts to ensure its training program was available to females or develop reasonable alternatives to its training policy which had a disparate impact on females.

1/2

The EEOC is seeking backpay with prejudgment interest for a class of females, including Ms. Duncan, and compensatory and punitive damages. The Commission also seeks injunctive and other curative relief to eradicate the effects of the unlawful employment practices.

The EEOC enforces 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 Title I of the Americans with Disabilities Act, which prohibits discrimination against individuals with disabilities in the private sector; the Age Discrimination in Employment Act of 1967; the Equal Pay Act of 1963; the Civil Rights Act of 1991; and the provisions of the Rehabilitation Act of 1973 which prohibit discrimination affecting people with disabilities in the federal sector.

# # #

2/2

**NEWS**

FOR IMMEDIATE RELEASE  
March 10, 1997

CONTACT: C. LARRY WATSON  
REGIONAL ATTORNEY  
(216) 522-7455

**EEOC FILES RETALIATION DISCRIMINATION AND ADA SUIT  
AGAINST TACO BELL**

CLEVELAND, OHIO – The Cleveland District Office of the United States Equal Employment Opportunity Commission today announced that on March 7, 1997, suit was filed against Fostoria Restaurants, Inc., d.b.a. Taco Bell of Fostoria, Ohio, in the United States District Court for the Northern District of Ohio, Western Division, in Toledo, Ohio.

The Commission alleges that Defendant disciplined and subsequently terminated Deborah S. Hendricks in retaliation for having opposed practices made unlawful by Title VII of the 1964 Civil Rights Act, as amended. The Commission further alleges that Defendant utilizes an employment application which contains pre-employment inquiries that violate the Americans with Disabilities Act of 1990..

The suit is assigned to U. S. District Court Judge David A. Katz. In the suit, the Commission seeks relief in the form of a permanent injunction prohibiting any employment practice which discriminates on the basis of retaliation, the use of employment applications which contain disability-related inquiries that are likely to elicit information about a disability and any other employment practice which discriminates on the basis of disability. In addition to injunctive relief, the Commission seeks for Ms.Hendricks the payment of appropriate back wages with prejudgment interest, reinstatement, compensation for past and future pecuniary and nonpecuniary losses, as well as punitive damages .

In a joint statement, Dorothy J. Porter, Director of the Cleveland Office and C. Larry Watson, Regional Attorney of the Cleveland Office, stated that "This lawsuit sends a clear message that the EEOC will take action to protect employees who are disciplined and fired in retaliation for complaining about unlawful discrimination. The law clearly prohibits retaliation and where the circumstances warrant, we will take action to protect the interests of all employees."

The Commission enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex or national origin or retaliation; the Age Discrimination in Employment Act; the Equal Pay Act; prohibitions against discrimination affecting individuals with disabilities in the federal sector; sections of the Civil Rights Act of 1991, and Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments.

# In This Issue

Lead Report / Page AA-1

News / Page A-1

Conference Report / Page C-1

Economic News / Page D-1

## LEAD REPORT

**CONSUMER PRICES** Labor, retiree groups keeping up fight against CPI formula change ..... AA-1

## NEWS

**CHILD LABOR** DOL hearing to focus on child labor in production of rugs, soccer balls, shoes ..... A-3

**COLLECTIVE BARGAINING** UAW ends strike at air force facility; replacement workers to leave by Friday ..... A-4

**CONSUMER CONFIDENCE** Confidence remains at high level in March, Conference Board reports ..... A-4

**DISCRIMINATION** EEOC files pair of class actions against janitorial firms in Chicago ..... A-7

Judge calls for law changes or new court to meet rising flood of job bias litigation ..... A-2

Second Circuit approves reduction of punitive damages to \$300,000 cap ..... A-9

**FEDERAL RESERVE** Fed's open market panel votes to raise short-term interest rates ..... A-7

**FLSA** Report says two-earner families, women would benefit from comp time ..... A-3

**HEALTH CARE** Decline in employer-based health plans contributed to drop in private coverage ..... A-6

**INTERNATIONAL LABOR** U.S. clothing maker agrees to recognize union at its assembly plant in Guatemala ... A-2

**SAFETY AND HEALTH** Acting labor secretary calls for end to silicosis in the American workplace ..... A-5

Judge denies trucking group's request for injunction in '96 injury survey dispute ..... A-6

OSHA proposes lockout/tagout fines topping \$1 million at Georgia poultry firm ..... A-5

OSHA proposes penalties against Hanover food processing plant ..... A-5

**SEXUAL HARASSMENT** Court awards \$8.1 million in damages to former recruiter for Waffle House ..... A-1

## CONFERENCE REPORT

**DISCRIMINATION** Tax law change called most significant development of 1996 affecting bias accords ..... C-1

## ECONOMIC NEWS

**EMPLOYMENT** Correction to BLS tables with data on state and metropolitan area employment and unemployment in 50 DLR D-6, 3/14/97 ..... D-1

## TABLE OF CASES

American Trucking Associations Inc. v. Secretary of Labor (DC DC) ..... A-6

EEOC v. Admiral Maintenance Services L.P. (DC NIII) ..... A-7

EEOC v. Capital Services Inc. (DC NIII) ..... A-7

Luciano v. The Olsten Corp. (CA 2) ..... A-9

Scribner v. Waffle House Inc. (DC NTexas) ..... A-1

Tschappat v. Reich (DC DC) ..... A-2

# Tracking Your Investments

By Mike Causey  
Washington Post Staff Writer

**M**ost federal workers, including 80 percent of the people hired since 1983 under the "new" private-sector-style pension program, are investing in the stock, bond or Treasury funds of their \$47 billion thrift savings plan. The plan is the government's in-house, tax-deferred 401(k).

Like most private retirement plans, the retirement system that covers most feds requires them to invest regularly to guarantee a good to potentially very, very good retirement.

Moving with the times, the Federal Retirement Thrift Investment Board has created a Web site where feds can track rates of return and even do estimates of their future account balances.

When the savings plan was established, it was expected to provide about a third of the retirement income of people under the Federal Employees Retirement System. That takes in nearly everybody hired after 1983. But because of the good (so far) returns of the stock fund, many experts say they believe that the plan could provide more than half the money FERS employees have in retirement, assuming they invest wisely.

Last year, the C-fund (stock index) returned 22.85 percent. The year before, it returned 37.41 percent. The F-fund (bond index) returned 3.66 percent last year and 18.31 percent in 1995. The fail-safe G-fund (guaranteed Treasury securities) returned 6.76 percent last year and 7.03 percent in 1995.

Nearly half the money in the savings plan now is in the C-fund. That represents a shift in payroll contributions from employees and also the rapid growth of the stock fund compared with the two other funds.

Investing in the plan is important for workers under the old Civil Service Retirement System, but it is critical for those under the FERS program. Most feds are under the FERS plan, but most workers at or close to retirement age still are under the CSRS plan.

CSRS employees generally get a more generous government pension. They are allowed to invest as much as 5 percent of their salaries in the savings plan's stock, bond or Treasury funds. CSRS employees are not entitled to a government match.

People under the newer FERS system get a less generous government pension. But to offset that they are allowed to put as much as 10 percent of their pay in the savings plan (up to an annual maximum contribution of \$9,500). Those who contribute nothing still get a 1 percent contribution to their accounts from the government. Employees who contribute 5 percent or more get a total government match of 5 percent, which also is tax-deferred. In effect, it amounts to a tax-deferred pay raise.

## Web Site Information

The savings plan Web site is at <http://www.tsp.gov>. People can get answers to many commonly asked questions, current information and rates of return, and can download forms and publications. There also is a calculator to help investors project future account balances based on how much they invest from each paycheck and estimated rates of return.

## Meetings

The Office of Personnel Management is sponsoring a seminar May 1-2 on "critical incident stress debriefing." It is aimed at agencies' employee assistance program counselors and mental health professionals. Speakers are psychologist Michael Beasley and Mark Maggio, of the Federal Judicial Center. Call 202-606-1269.

## 50-Plus Job Fair

Feds who have lost or may lose their jobs are invited to an April 4 nonsectarian job fair sponsored by the Jewish Council for the Aging. The session at the Doubletree Hotel in Rockville (near the Twinbrook Metro station) is geared toward job-hunters 50 or older. The job fair will run from 9 a.m. to 3 p.m., and registration is free. Call 703-846-8520 and press 2 for the job expo.

Wednesday, March 26, 1997

WEDNESDAY, MARCH 26, 1997

THE WASHINGTON POST



## WASHINGTON REPORT

### NEWS FROM THE NATION'S CAPITAL

By Corey E. Fleming

1/2

## EEOC's Handling of Claims Is Improving, Lawyers Say

Discrimination claims are being handled better by the EEOC now that the agency is using a new system to prioritize cases, both plaintiffs' and defense lawyers tell *Lawyers Weekly USA*.

Meritless cases are thrown out by the agency much more quickly, and strong cases are pursued more aggressively, sources say. EEOC agents are also much more willing to answer questions and keep outside counsel informed about developments in their cases.

However, the agency still has its problems. In particular, "medium-priority" cases still tend to languish for months before they receive attention.

The agency introduced its new system almost two years ago. Cases are divided into three categories as soon as they arrive at the agency: "A" cases are given high priority and are pursued aggressively, "B" cases are investigated further to decide if they should be made a priority or rejected, and "C" cases — those that are clearly meritless — are rejected without investigation.

(For more information on the new system, see 95 LWUSA 399; Search words for LWUSA On-Line: Pitched, Skyrocketed.)

### 'Good Step Forward'

Both plaintiffs and defense lawyers are quick to praise the new system.

"In terms of overall performance, the agency is 2,000% better than it was three years ago," says Chicago plaintiffs' attorney Steven Platt.

"The categorization of cases has been very effective. It's an enormous success," agrees Chicago defense lawyer Gerald Skoning.

The new system is "a good step forward. The agency is becoming more focused on significant issues," says Washington, D.C. plaintiffs' lawyer Paul Sprenger.

"The EEOC is making good on its promise to prioritize the complaints," says Baltimore defense lawyer Jana Howard Carey.

The agency's investigators also seem to be more willing to cooperate with outside lawyers now that the new system is in place.

"There has been a tremendous change in attitude and approach," Platt says. "The investigators are more savvy, and they are more willing to talk to private lawyers."

Defense lawyer Carey says she has had several cases in which investigators "have simply called us directly before issuing a complaint where answers to a few questions could resolve it."

However, other lawyers give the system more mixed reviews.

"The cases that are truly non-meritorious are getting weeded out at the get-go, and they are pressing harder on the ones that they are definitely interested in, but on the ones that are questionable, there's still a huge delay in getting any reaction from them," says Washington, D.C. defense lawyer Barbara Berish Brown.

Houston plaintiffs' lawyer Margaret Harris says she hasn't noticed much of a change in the way the agency handles cases.

"The EEOC is so swamped that a change in their enforcement plan is going to get overwhelmed by the lack of funding. It's great to have a plan, but if Congress won't give them the money to do something with it, it can be the best plan in the world, and it will still have little impact," she says.

### Untimely Cases Thrown Out

Historically, "one of the frustrations defense counsel had was the EEOC's insistence on conducting a full-blown investigation of a charge that was untimely on its face. They are not doing that any more," Skoning says.

When meritless charges have been filed against her clients, the EEOC investigators have been willing to dismiss the claims quickly, Carey agrees.

In several cases, the EEOC investigators have also advised the potential plaintiffs not to file suit on their own in clearly meritless cases, says Carey.

At the other extreme, the agency is now "more conscientious in investigating the cases they do investigate," says Platt.

When charges the EEOC considers a priority have been filed against her clients, the agency has moved very quickly, demanding an "immediate response" to requests for information and "coming in right away and starting doing interviews," Carey agrees.

### Good At Sorting Cases

Lawyers also say that the agency is doing a pretty good job sorting the good from the bad cases, although they do make mistakes.

Predictably, defense lawyers complain that too many cases are given high priority where it's not warranted, while plaintiffs' attorneys worry that too many good cases are being thrown out without investigation.

"You're always going to have lawyers who say that their case should have been handled differently, but in gener-

**BAY AREA**

# UPS Is Accused of Bias Against the Disabled

■ The delivery company won't hire drivers with 'monocular' vision, the government says.

By Bob Egolko  
Associated Press

A federal agency accused United Parcel Service on Thursday of illegally denying jobs as drivers and mechanics to people who lack vision in one eye but can still drive safely.

In a U.S. District Court suit, the Equal Employment Opportunity Commission charged the delivery company with violating the Americans with Disabilities Act by failing to assess vision-impaired drivers' individual safety records and instead barring them as a group.

Drivers with "monocular" or one-eyed vision can get state drivers' licenses and are allowed by federal transportation regulations to drive trucks weighing up to 10,000 pounds. Some monocular drivers have been given waivers to drive larger trucks and have compiled above-average safety records, said EEOC lawyer

Jonathan Peck, quoting a federal study. Some UPS trucks weigh less than 10,000 pounds, but the company does not let monocular people drive them even if the employees have medical clearance and safe driving records, the EEOC said. "Under the ADA, stereotypical notions about what is or is not safe for a disabled employee to do have no place in the workplace," said Susan McDuffie, the EEOC's district director.

The ADA, which took effect in 1992, prohibits job discrimination against disabled people who are able to work, and requires employers to make reasonable accommodations for their disabilities. This is the first nationwide class-action suit filed by the EEOC under the ADA, Peck said.

The Atlanta-based company said the suit was baseless.

"UPS believes this is a safety issue, not a disability issue," the company said.

Citing the 60-year-old federal ban on monocular drivers of trucks over 10,000 pounds, UPS said it has "adopted that safety standard for all our vehicles." The company also said it was "a strong proponent of the ADA" and employs monocular people "where this does not present a

safety concern."

More than 40 cases have been reported nationwide of qualified employees barred as drivers or mechanics by UPS because of monocular vision, said Donk Jones, business agent of Teamsters Local 315, who attended the EEOC news conference.

One case involves Shawn Hogya, 26, of Santa Rosa, one of three named plaintiffs in the EEOC suit. Partly blind in one eye because of a baseball injury suffered at 14, he was hired by UPS in 1990 and gained enough seniority in 1994 to apply for a driver's job, with a raise of \$8 or \$9 an hour, he told reporters.

He passed the company's written exam

and road test but was disqualified after telling a doctor about his eyesight, he said. Hogya, who still works for UPS as a loader, described himself as a cautious driver who's never had an accident and said he probably would never have taken the UPS job if he'd known about the company's policy.

Jones said UPS has allowed one driver, Yvonne Harbison of Oakland, to return to her job of 14 years after losing vision in one eye due to a medical condition. The company initially refused to reinstate Harbison despite medical clearance, and has responded to other complaints with an attitude of "stall and delay and hope it goes away," the Teamster agent said.

al, I think they've done a pretty good job of sorting through the cases," Skoning says.

The agency has "better than a 50-50 batting average. On balance, it's been an improvement," Carey says.

One area in which Carey faults the agency is ADA cases where the plaintiff is seriously ill or near death. The agency tends to "jump on" these, even if there is no strong evidence of discrimination, she says.

"They let the emotionality of that kind of situation override what might in other situations be a more incisive review of the facts," she claims.

### Moving Faster?

Lawyers disagree about whether all cases are moving through the EEOC faster under the new system, or whether it's just affecting the "A" and "C" cases.

"My sense from what I'm seeing is that the time cases sit there is less," says Carey.

Skoning says he has seen "a number of situations where the cases have been resolved or disposed of more quickly than they have been in the past."

But the agency is still "grappling with its backlog," which is slowing it down, according to Skoning.

"It's like turning an ocean liner — it isn't going to turn on a dime," he says.

And Platt adds that he had not seen a time decrease at all.

However, it has taken some time for the local offices to get used to the new system, so the processing may begin to go faster in the future, he comments.

### 'Priority List' Less Successful

Last February, the agency also released a list of the types of cases it would consider top priorities. However, lawyers say that the list has resulted in little real change at the agency, because the categories are so broad that almost any case can be considered a priority.

The "priority" cases include (1) large, systemic cases that affect many work-

ers, (2) cases where the employer retaliated against the claimant or challenged a subpoena, and (3) cases involving an area of law that the EEOC wants to develop, such as what constitutes a "reasonable accommodation" under the ADA, whether individual supervisors can be sued, and how religious practices must be accommodated.

"The enforcement plan is so broad, and the categories are so flexible, that it's hard to get a real focus out of them. I don't know that I've seen a change in how they select the cases they are going to litigate," says Brown.

Platt adds, "The enforcement plan has no safe harbors. There is nothing they say they are not going to enforce."

As a plaintiffs' lawyer, however, Platt says the lack of focus in the plan works to his advantage.

"Nothing is safe. If you are an employer, they might choose to come after you and make an example of you," he explains.

The priorities list was discussed in more detail at 96 LWUSA 202; Search words for LWUSA On-Line: Wayside, Wing.

2/2



EEOC chairman Gilbert Casellas' new system for prioritizing cases is winning praise from both plaintiffs' and defense lawyers. Casellas is shown with EEOC general counsel C. Gregory Stewart (right).

LAWYERS WEEKLY USA

# To Some Employers, an Expanded Family

## Leave Act Won't Fly

*Clinton's Proposal to Provide More Reasons for Personal Time Has Companies Complaining About Abuses and Bureaucracy*

When Pat Vagonis was pregnant with her first child in 1994, she and her husband, Jim, had a concern: whether they could stay home during the baby's first few months—a time they felt was critical to their daughter's development.

"We would have felt very uncomfortable not being home," said Pat Vagonis, 33. "We would have had to

### WORKPLACE

Steven Ginsberg

bring someone else in."

Enter the Family

and Medical Leave Act, enacted the year before. The law allowed both mother and father to spend three months each at their Potomac home with their daughter, Christine.

"As a result of us being there, our daughter is very well-adjusted and confident," Pat Vagonis said. "It was also a new experience, and we wanted to enjoy it. So many people said they went back [to work] so quickly that they lost the benefit of watching their children grow."

The law allowed Pat, then director of project development at McLean-based American Technical Resources, to spend the first 12 weeks of Christine's life at home. Jim, 30, a database administrator for Prudential Home Mortgage in Frederick at the time, took the following 12 weeks off.

"We were a little concerned because neither company had ever processed the paperwork," Pat Vagonis said. "But it worked smoothly and we had no trouble when we came back."

Helping working families balance their lives and careers is the primary goal of the Family and Medical Leave Act, which was one of President Clinton's first-term priorities and which was passed despite heavy congressional and employer opposition.

The law took effect Aug. 4, 1993, and 3½ years later it is again under congressional and corporate fire as Clinton proposes to expand its scope.

The Family and Medical Leave Act requires employers to give workers as many as 12 weeks of unpaid leave for the birth, adoption or serious illness of a child or parent, or for the employee's own "serious health condition." Employers must continue health care coverage during the leave and give the worker the same job—or a comparable one—upon return.

You must have worked for a company for 12 months and logged 1,250 hours during that time to gain the

*"How do we let someone off three hours for a PTA meeting when they're flying in a metal tube?"*

— Libby Sartain, a vice president at Southwest Airlines Co.

law's protections. It applies only to companies with more than 50 employees who live 75 miles or less from work. The law covers about two-thirds of the nation's work force.

Clinton has proposed amending the law to allow as many as 24 hours of unpaid leave per year for personal reasons, such as parent-teacher conferences or children's dental appointments.

For thousands of workers, the FMLA has made it easier to balance family needs with a career's de-

mands, but some employers—mostly large corporations—have bristled at Clinton's latest proposal. They say the law has created a bevy of administrative nightmares that will only get worse if the law is expanded.

Clinton's proposals "go far beyond the scope of FMLA," said Deanna Gelak, who heads a coalition opposing the changes for the Alexandria-based Society for Human Resource Management, which represents 80,000 human resource professionals. "We believe it's impossible for employers to verify and the government to enforce this type of leave without becoming Big Brother."

Companies say it would be difficult to verify that employees were taking a couple of hours at a time

1/2

**WHITE HOUSE CONFERENCE ON ETHNICITY & PLURALISM IN THE 21<sup>ST</sup> CENTURY**

On behalf of the National Italian American Foundation and the Arab American Institute, I am writing to seek your support for the following letter to President Clinton. It calls for the convening of a White House Conference on Ethnicity and Pluralism in the 21<sup>st</sup> Century. We invite you to join us as co-signers by simply returning this fax to me (ATTN: Bob Blancato) at (202)682-3984 and indicate who from your organization should appear on the letter. We will simply be listing names and their respective organizations. Deadline to "sign" is Tuesday, April 15.

**LETTER TO PRESIDENT CLINTON**

We the undersigned organizations (and individuals) wish to join in support of the proposal that you convene a White House Conference on Ethnicity and Pluralism in the 21st Century. We believe such a Conference would be critical for defining a vision for the 21st century when as a result of demographics, the very face of America will be changing.

Throughout your Administrations, you have been extremely effective in holding productive White House Conferences. Issues and constituencies from aging to small business to youth have all benefited from the policy directions produced at their Conferences.

In our judgment, a White House Conference on Ethnicity and Pluralism in the 21st Century would be the most appropriate possible vehicle to focus national attention on both the challenges and opportunities associated with ethnicity, immigration and the increased diversity of the American people. It would serve as a special forum for you to further articulate your hopes for an American society which features unity between people in what the late Dr. Arthur Flemming would refer to as "the national community."

We propose that once the request for this White House Conference is approved, local, state and regional conferences begin to help set the agenda and direction for the main conference. At these forums, the key issues can be identified and solutions defined. At these forums, the views of a strong cross section of our nation can be solicited and received. At these forums we will be able to identify those who might serve as delegates to the White House Conference.

We would all do our part to provide resources to make this a genuine public/private partnership. We hope that in the first year of the new century and the final year of your historic Presidency, you will approve the convening of the White House Conference on Ethnicity and Pluralism in the 21st century.

Sincerely,

1275 K Street N.W., Suite 602, Washington, DC 20005  
Phone 202.789.0470 • Fax 202.682.3984

321 Broadway, 6th floor, New York, NY 10007  
Phone 212.385.3800 • Fax 212.385.3804

# **EEOC News Clips**

*for*

*March 27, 1997*



*Compiled by  
The Office of Communications and Legislative Affairs*

# Lead Report

## Disabilities Discrimination

### **EEOC Sets Out Employer Guidance On Psychiatric Disabilities Under ADA**

**C**iting the "myths, fears, and stereotypes" that face individuals with psychiatric disabilities in the workplace, the Equal Employment Opportunity Commission has issued detailed policy guidance on the obligations employers must meet to accommodate these workers under Title 1 of the Americans with Disabilities Act.

Charges alleging discrimination on the basis of an emotional or psychiatric impairment have constituted about 12.7 percent of the ADA charges filed with the commission over the past four years, according to agency statistics. Last year, the commission received nearly 18,000 charges alleging disability discrimination—about 23 percent of its total intake of nearly 78,000 charges.

In enforcement guidance released March 26—the first detailed explanation of the commission's position on psychiatric disabilities—the federal civil rights enforcement agency explains its view of what constitutes a protected psychiatric disability under the act, when an employer may ask applicants or employees about psychiatric disabilities, and what types of accommodations the commission will regard as meeting obligations under the ADA. The document also gives a series of practical examples to explain EEOC's position on the law and cites a number of reported court opinions.

EEOC regulations on the ADA define "mental impairment" to include "any mental or psychological disorder, such as . . . emotional or mental illness." The definition "also refers to mental retardation, organic brain syndrome, and specific learning disabilities. . . as well as other neurological disorders such as Alzheimer's disease," the commission explained.

"A qualified individual with a psychiatric disability is covered by the ADA, even if medication is taken to control the effects of the disability," EEOC said.

**Defining a 'Major Life Activity'.** An impairment must substantially limit one or more "major life activities" to be considered a covered disability and, therefore, require reasonable accommodation by an employer under the ADA. In addressing mental impairments, the commission explained, those activities may include "learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working"—all of which, under some circumstances, might require accommodation by the covered employer.

**"Consistently high levels of hostility, social withdrawal, or failure to communicate when necessary" could justify a finding of disability discrimination under the ADA, the commission says.**

In the case of "interaction with others" or "ability to concentrate," EEOC explained, the individual's restriction will be compared to "the average person in the general population." For example, although "some unfriendliness with co-workers or a supervisor" would not be considered a disability, more severe problems of social interaction might be covered:

"An individual would be substantially limited [in his ability to interact with others], however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary. These limitations must be long-term, as opposed to temporary, to justify a finding of ADA disability."

**Requesting Reasonable Accommodation.** When a disabled employee requests "reasonable accommodation" to a disability, EEOC said, the request may be made "in plain English and need not mention the ADA or use the phrase reasonable accommodation." However, the commission added, "if the employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations."

The employee, EEOC said, does not have to be the one requesting the accommodation, which also could be made by "a family member, friend, health professional, or other representative." The commission said it disagreed with a 1995 decision by the U.S. Court of Appeals for the Eighth Circuit, which held that an employer was not alerted to a disability, *Miller v. National Casualty Co.*, 4 AD Cases 1089 despite repeated calls from the employee's sister regarding the employee's mental problems.

Reasonable accommodations "must be determined on a case-by-case basis, because workplaces and jobs vary, as do people with disabilities," the commission said. In accommodating individuals with psychiatric disabilities, however, the commission suggested time off from work or a modified work schedule and "simple physical changes" to the workplace, such as room dividers, partitions, or other soundproofing, or permitting an individual with difficulty in concentrating to wear headphones.

112

2/2

Adjusting supervisory methods or providing a job coach also might be a reasonable accommodation, EEOC suggested. Reassignment to a different job "must be considered. . .when accommodation in the present job would cause undue hardship or would not be possible. Reassignment may be considered if there are circumstances under which both the employer and em-

ployee voluntarily agree that it is preferable to accommodation in the present position."

By NANCY MONTWIELER

*Text of EEOC policy guidance is in Section E. Text will be available in the near future on EEOC's web site at [www.eeoc.gov](http://www.eeoc.gov)*

# NEWS

FOR IMMEDIATE RELEASE  
Wednesday, March 26, 1997

CONTACT: Claire Gonzales  
Reginald Welch  
(202) 663-4900  
TDD: (202) 663-4494

## EEOC RELEASES POLICY GUIDANCE CONCERNING THE APPLICATION OF THE ADA TO PERSONS WITH PSYCHIATRIC DISABILITIES

WASHINGTON -- The U.S. Equal Employment Opportunity Commission (EEOC) announced today the release of a policy guidance that answers various questions concerning the application of the employment provisions of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities. The enforcement guidance is entitled *The Americans with Disabilities Act and Psychiatric Disabilities*.

In releasing the document, EEOC Chairman Gilbert F. Casellas said, "The guidance answers the most commonly asked questions about how the ADA affects persons with psychiatric disabilities. It provides practical instruction to employers and persons with psychiatric disabilities on their respective rights and responsibilities."

The guidance addresses the issue of what constitutes a psychiatric disability that is protected by the ADA. It makes clear that a qualified individual with a psychiatric disability is covered by the ADA even if medication is taken to control the effects of the disability.

Other issues addressed in the guidance include:

- when an employer may ask applicants or employees about psychiatric disabilities or require medical examinations (including psychiatric examinations);
- what types of reasonable accommodations may be effective for persons with psychiatric disabilities; and
- when an employer may hold a person with a psychiatric disability to workplace conduct standards.

-- more --

**ADA and Psychiatric Disabilities -- page 2**

The text of the policy guidance will be available on EEOC's web-site at [www.eeoc.gov](http://www.eeoc.gov) shortly after the release of the document. Also within a few days of the release date, hard copies of the publication may be obtained by calling the Commission's Publications Distribution Center at 1-800-669-3362 (TDD 1-800-800-3302), or writing to EEOC's Office of Communications and Legislative Affairs, 1801 L Street, N.W., Washington, D.C. 20507.

In addition to enforcing Title I of the ADA, which prohibits discrimination against people with disabilities in the private sector and state and local governments, EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act; the Equal Pay Act; prohibitions against discrimination affecting individuals with disabilities in the federal government; and sections of the Civil Rights Act of 1991.

###

# Text

1/13

## EEOC Guidance on Psychiatric Disabilities And the Americans With Disabilities Act

EEOC	NOTICE	Number
		915.002
		Date
		3/25/97

1. **SUBJECT:** EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities

2. **PURPOSE:** This enforcement guidance sets forth the Commission's position on the application of Title I of the Americans with Disabilities Act of 1990 to individuals with psychiatric disabilities.

3. **EFFECTIVE DATE:** Upon receipt.

4. **EXPIRATION DATE:** As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. **ORIGINATOR:** ADA Division, Office of Legal Counsel.

6. **INSTRUCTIONS:** File after Section 902 of Volume II of the Compliance Manual.

Date 3-25-97

/s/ Gilbert F. Casellas  
Chairman

### INTRODUCTION

The workforce includes many individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or misunderstood. Congress intended Title I of the Americans with Disabilities Act (ADA)<sup>1</sup> to combat such employment discrimination as well as the myths, fears, and stereotypes upon which it is based.<sup>2</sup>

The Equal Employment Opportunity Commission ("EEOC" or "Commission") receives a large number of charges under the ADA alleging employment discrimination based on psychiatric disability.<sup>3</sup> These charges raise a wide array of legal issues including, for example, whether an individual has a psychiatric disability as defined by the ADA and whether an employer may ask about an individual's psychiatric disability. People with psychiatric disabilities and employers also have posed numerous questions to the EEOC about this topic.

<sup>1</sup> 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

<sup>2</sup> H.R. Rep. No. 101-485, pt. 3, at 31-32 (1990) [hereinafter House Judiciary Report].

<sup>3</sup> Between July 26, 1992, and September 30, 1996, approximately 12.7% of ADA charges filed with EEOC were based on emotional or psychiatric impairment. These included charges based on anxiety disorders, depression, bipolar disorder (manic depression), schizophrenia, and other psychiatric impairments.

This guidance is designed to:

- facilitate the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability;
- respond to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and
- answer questions posed by employers about how principles of ADA analysis apply in the context of psychiatric disabilities.<sup>4</sup>

### WHAT IS A PSYCHIATRIC DISABILITY UNDER THE ADA?

Under the ADA, the term "disability" means: "(a) A physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."<sup>5</sup>

This guidance focuses on the first prong of the ADA's definition of "disability" because of the great number of questions about how it is applied in the context of psychiatric conditions.

### Impairment

#### 1. What is a "mental impairment" under the ADA?

The ADA rule defines "mental impairment" to include "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."<sup>6</sup> Examples of "emotional or mental illness[es]" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. The current edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (now the fourth edition, DSM-IV) is relevant for identifying these disorders. The DSM-IV has been recognized as an important reference by courts<sup>7</sup> and is widely used by American mental

<sup>4</sup> The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994).

<sup>5</sup> 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1996). See generally EEOC Compliance Manual § 902, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7251 (1995).

<sup>6</sup> 29 C.F.R. § 1630.2(h)(2) (1996). This ADA regulatory definition also refers to mental retardation, organic brain syndrome, and specific learning disabilities. These additional mental conditions, as well as other neurological disorders such as Alzheimer's disease, are not the primary focus of this guidance.

<sup>7</sup> See, e.g., *Boldini v. Postmaster Gen.*, 928 F. Supp. 125, 130, 5 AD Cas. (BNA) 11, 14 (D.N.H. 1995) (stating, under section 501 of the Rehabilitation Act, that "in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association . . .").

health professionals for diagnostic and insurance reimbursement purposes.

Not all conditions listed in the DSM-IV, however, are disabilities, or even impairments, for purposes of the ADA. For example, the DSM-IV lists several conditions that Congress expressly excluded from the ADA's definition of "disability."<sup>8</sup> While DSM-IV covers conditions involving drug abuse, the ADA provides that the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use.<sup>9</sup> The DSM-IV also includes conditions that are not mental disorders but for which people may seek treatment (for example, problems with a spouse or child).<sup>10</sup> Because these conditions are not disorders, they are not impairments under the ADA.<sup>11</sup> Even if a condition is an impairment, it is not automatically a "disability." To rise to the level of a "disability," an impairment must "substantially limit" one or more major life activities of the individual.<sup>12</sup>

## 2. Are traits or behaviors in themselves mental impairments?

No. Traits or behaviors are not, in themselves, mental impairments. For example, stress, in itself, is not automatically a mental impairment. Stress, however, may be shown to be related to a mental or physical impairment. Similarly, traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.<sup>13</sup>

<sup>8</sup> These include various sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. 42 U.S.C. § 12211(b) (1994); 29 C.F.R. § 1630.3(d) (1996).

<sup>9</sup> 42 U.S.C. § 12210(a) (1994). However, individuals who are not currently engaging in the illegal use of drugs and who are participating in, or have successfully completed, a supervised drug rehabilitation program (or who have otherwise been successfully rehabilitated) may be covered by the ADA. Individuals who are erroneously regarded as engaging in the current illegal use of drugs, but who are not engaging in such use, also may be covered. *Id.* at § 12210(b).

Individuals with psychiatric disabilities may, either as part of their condition or separate from their condition, engage in the illegal use of drugs. In such cases, EEOC investigators may need to make a factual determination about whether an employer treated an individual adversely because of his/her psychiatric disability or because of his/her illegal use of drugs.

<sup>10</sup> See DSM-IV chapter "Other Conditions That May Be a Focus of Clinical Attention."

<sup>11</sup> Individuals who do not have a mental impairment but are treated by their employers as having a substantially limiting impairment have a disability as defined by the ADA because they are regarded as having a substantially limiting impairment. See EEOC Compliance Manual § 902.8, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7282 (1995).

<sup>12</sup> This discussion refers to the terms "impairment" and "substantially limit" in the present tense. These references are not meant to imply that the determinations of whether a condition is an impairment, or of whether there is substantial limitation, are relevant only to whether an individual meets the first part of the definition of "disability," i.e., actually has a physical or mental impairment that substantially limits a major life activity. These determinations also are relevant to whether an individual has a record of a substantially limiting impairment or is regarded as having a substantially limiting impairment. See *id.* §§ 902.7, 902.8, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7276-78, 7281 (1995).

<sup>13</sup> *Id.* § 902.2(c)(4), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7258 (1995).

## Major Life Activities

An impairment must substantially limit one or more major life activities to rise to the level of a "disability" under the ADA.<sup>14</sup>

### 3. What major life activities are limited by mental impairments?

The major life activities limited by mental impairments differ from person to person. There is no exhaustive list of major life activities. For some people, mental impairments restrict major life activities such as learning, thinking, concentrating, interacting with others,<sup>15</sup> caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity that may be limited by mental impairments.<sup>16</sup>

### 4. To establish a psychiatric disability, must an individual always show that s/he is substantially limited in working?

No. The first question is whether an individual is substantially limited in a major life activity other than working (e.g., sleeping, concentrating, caring for oneself). Working should be analyzed only if no other major life activity is substantially limited by an impairment.<sup>17</sup>

## Substantial Limitation

Under the ADA, an impairment rises to the level of a disability if it substantially limits a major life activity.<sup>18</sup> "Substantial limitation" is evaluated in terms of the severity of the limitation and the length of time it restricts a major life activity.<sup>19</sup>

The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition. Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work, and in other settings, as well as evidence showing that the individual's functional limitations are linked to his/her impairment. Expert testimony about substantial limitation is not necessarily required. Credible testimony from the individual with a disability and his/her family members, friends, or coworkers may suffice.

### 5. When is an impairment sufficiently severe to substantially limit a major life activity?

An impairment is sufficiently severe to substantially limit a major life activity if it prevents an individual from performing a major life activity or significantly restricts

<sup>14</sup> 42 U.S.C. § 12102(2)(A) (1994); 29 C.F.R. § 1630.2(g)(1) (1996). See also EEOC Compliance Manual § 902.3, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7261 (1995).

<sup>15</sup> Interacting with others, as a major life activity, is not substantially limited just because an individual is irritable or has some trouble getting along with a supervisor or coworker.

<sup>16</sup> Sleeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully.

<sup>17</sup> See 29 C.F.R. pt. 1630 app. § 1630.2(j) (1996) ("[i]f an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered . . . ."); see also EEOC Compliance Manual § 902.4(c)(2), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7266 (1995).

<sup>18</sup> 42 U.S.C. § 12102(2) (1994).

<sup>19</sup> See generally EEOC Compliance Manual § 902.4, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7262 (1995).

the condition, manner, or duration under which an individual can perform a major life activity, as compared to the average person in the general population.<sup>20</sup> An impairment does not significantly restrict major life activities if it results in only mild limitations.

**6. Should the corrective effects of medications be considered when deciding if an impairment is so severe that it substantially limits a major life activity?**

No. The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating measures, including medications.<sup>21</sup> Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.<sup>22</sup> Relevant evidence for EEOC investigators includes, for example, a description of how an individual's condition changed when s/he went off medication<sup>23</sup> or needed to have dosages adjusted, or a description of his/her condition before starting medication.<sup>24</sup>

**7. How long does a mental impairment have to last to be substantially limiting?**

An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an in-

<sup>20</sup> See 29 C.F.R. § 1630.2(j) (1996).

<sup>21</sup> S. Rep. No. 101-116, at 23 (1989); H.R. Rep. No. 101-485, pt. 2, at 52 (1990); House Judiciary Report, *supra* n.2, at 28-29. See also 29 C.F.R. pt. 1630 app. § 1630.2(i) (1996).

<sup>22</sup> ADA cases in which courts have disregarded the positive effects of medications or other treatment in the determination of disability include *Canon v. Clark*, 883 F. Supp. 718, 4 AD Cas. (BNA) 734 (S.D. Fla. 1995) (finding that individual with insulin-dependent diabetes stated an ADA claim), and *Sarsycki v. United Parcel Ser.*, 862 F. Supp. 336, 340, 3 AD Cas. (BNA) 1039 (W.D. Okla. 1994) (stating that substantial limitation should be evaluated without regard to medication and finding that an individual with insulin-dependent diabetes had a disability under the ADA). Pertinent Rehabilitation Act cases in which courts have made similar determinations include *Liff v. Secretary of Transp.*, 1994 WL 579912, at \*3-4 (D.D.C. 1994) (deciding under the Rehabilitation Act, after acknowledging pertinent ADA guidance, that depression controlled by medication is a disability), and *Gilbert v. Frank*, 949 F.2d 637, 641, 2 AD Cas. (BNA) 60 (2d Cir. 1991) (determining under the Rehabilitation Act that an individual who could not function without kidney dialysis had a substantially limiting impairment).

Cases in which courts have found that individuals are not substantially limited after considering the positive effects of medication are, in the Commission's view, incorrectly decided. See, e.g., *Mackie v. Runyon*, 804 F. Supp. 1508, 1510-11, 2 AD Cas. (BNA) 260 (M.D. Fla. 1992) (holding under section 501 of the Rehabilitation Act that bipolar disorder stabilized by medication is not substantially limiting); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91, 2 AD Cas. (BNA) 1326 (5th Cir. 1993) (holding under section 504 of the Rehabilitation Act that an individual with insulin-dependent diabetes did not have a disability), *cert. denied*, 114 S. Ct. 1386, 3 AD Cas. (BNA) 512 (1994).

<sup>23</sup> Some individuals do not experience renewed symptoms when they stop taking medication. These individuals are still covered by the ADA, however, if they have a record of a substantially limiting impairment (i.e., if their psychiatric impairment was sufficiently severe and long-lasting to be substantially limiting).

<sup>24</sup> If medications cause negative side effects, these side effects should be considered in assessing whether the individual is substantially limited. See, e.g., *Guice-Mills v. Derwinski*, 967 F.2d 794, 2 AD Cas. (BNA) 187 (2d Cir. 1992).

dividual's ability to perform a major life activity.<sup>25</sup> Whether the impairment is substantially limiting is assessed without regard to mitigating measures such as medication.

**Example A:** An employee has had major depression for almost a year. He has been intensely sad and socially withdrawn (except for going to work), has developed serious insomnia, and has had severe problems concentrating. This employee has an impairment (major depression) that significantly restricts his ability to interact with others, sleep, and concentrate. The effects of this impairment are severe and have lasted long enough to be substantially limiting.

In addition, some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.<sup>26</sup>

**Example B:** An employee has taken medication for bipolar disorder for a few months. For some time before starting medication, he experienced increasingly severe and frequent cycles of depression and mania; at times, he became extremely withdrawn socially or had difficulty caring for himself. His symptoms have abated with medication, but his doctor says that the duration and course of his bipolar disorder is indefinite, although it is potentially long-term. This employee's impairment (bipolar disorder) significantly restricts his major life activities of interacting with others and caring for himself, when considered without medication. The effects of his impairment are severe, and their duration is indefinite and potentially long-term.

However, conditions that are temporary and have no permanent or long-term effects on an individual's major life activities are not substantially limiting.

**Example C:** An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was most distressed for about a month during and immediately after the breakup. He sought counseling and his mood improved within weeks. His counselor gave him a diagnosis of "adjustment disorder" and stated that he was not expected to experience any long-term problems associated with this event. While he has an impairment (adjustment disorder), his impairment was short-term, did not significantly restrict major life activities during that time, and was not expected to have permanent or long-term effects. This employee does not have a disability for purposes of the ADA.

**8. Can chronic, episodic disorders be substantially limiting?**

Yes. Chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit

<sup>25</sup> EEOC Compliance Manual § 902.4(d), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7273 (1995).

<sup>26</sup> *Id.*, 8 FEP Manual (BNA) 405:7271.

and intensify, sometimes repeatedly, over the course of several months or several years.<sup>27</sup>

### 9. When does an impairment substantially limit an individual's ability to interact with others?

An impairment substantially limits an individual's ability to interact with others if, due to the impairment, s/he is significantly restricted as compared to the average person in the general population. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.

These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.

*Example:* An individual diagnosed with schizophrenia now works successfully as a computer programmer for a large company. Before finding an effective medication, however, he stayed in his room at home for several months, usually refusing to talk to family and close friends. After finding an effective medication, he was able to return to school, graduate, and start his career. This individual has a mental impairment, schizophrenia, which substantially limits his ability to interact with others when evaluated without medication. Accordingly, he is an individual with a disability as defined by the ADA.

### 10. When does an impairment substantially limit an individual's ability to concentrate?

An impairment substantially limits an individual's ability to concentrate if, due to the impairment, s/he is significantly restricted as compared to the average person in the general population.<sup>28</sup> For example, an individual would be substantially limited if s/he was easily and frequently distracted, meaning that his/her attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if s/he experienced his/her "mind going blank" on a frequent basis.

Such limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.<sup>29</sup>

*Example A:* An employee who has an anxiety disorder says that his mind wanders frequently and that he is often distracted by irrelevant thoughts. As a result, he makes repeated errors at work on detailed or complex tasks, even after being reprimanded. His doctor says that the errors are caused by his anxiety disorder and may last indefinitely. This individual has a

<sup>27</sup> See, e.g., *Clark v. Virginia Bd. of Bar Exam'rs*, 861 F. Supp. 512, 3 AD Cas. (BNA) 1066 (E.D. Va. 1994) (vacating its earlier ruling (at 3 AD Cas. (BNA) 780) that plaintiff's recurrent major depression did not constitute a "disability" under the ADA).

<sup>28</sup> 29 C.F.R. § 1630.2(j)(i) (1996); EEOC Compliance Manual § 902.3(b), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7261 (1995).

<sup>29</sup> Substantial limitation in concentrating also may be associated with learning disabilities, neurological disorders, and physical trauma to the brain (e.g., stroke, brain tumor, or head injury in a car accident). Although this guidance does not focus on these particular impairments, the analysis of basic ADA issues is consistent regardless of the nature of the condition.

disability because, as a result of an anxiety disorder, his ability to concentrate is significantly restricted as compared to the average person in the general population.

*Example B:* An employee states that he has trouble concentrating when he is tired or during long meetings. He attributes this to his chronic depression. Although his ability to concentrate may be slightly limited due to depression (a mental impairment), it is not significantly restricted as compared to the average person in the general population. Many people in the general population have difficulty concentrating when they are tired or during long meetings.

### 11. When does an impairment substantially limit an individual's ability to sleep?

An impairment substantially limits an individual's ability to sleep if, due to the impairment, his/her sleep is significantly restricted as compared to the average person in the general population. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

For example, an individual who sleeps only a negligible amount without medication for many months, due to post-traumatic stress disorder, would be significantly restricted as compared to the average person in the general population and therefore would be substantially limited in sleeping.<sup>30</sup> Similarly, an individual who for several months typically slept about two to three hours per night without medication, due to depression, also would be substantially limited in sleeping.

By contrast, an individual would not be substantially limited in sleeping if s/he had some trouble getting to sleep or sometimes slept fitfully because of a mental impairment. Although this individual may be slightly restricted in sleeping, s/he is not significantly restricted as compared to the average person in the general population.

### 12. When does an impairment substantially limit an individual's ability to care for him/herself?

An impairment substantially limits an individual's ability to care for him/herself if, due to the impairment, an individual is significantly restricted as compared to the average person in the general population in performing basic activities such as getting up in the morning, bathing, dressing, and preparing or obtaining food. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

Some psychiatric impairments, for example major depression, may result in an individual sleeping too much. In such cases, an individual may be substantially limited if, as a result of the impairment, s/he sleeps so much that s/he does not effectively care for him/herself.

<sup>30</sup> A 1994 survey of 1,000 American adults reports that 71% averaged 5-8 hours of sleep a night on weeknights and that 55% averaged 5-8 hours a night on weekends (with 37% getting more than 8 hours a night on weekends). See *The Cutting Edge: Vital Statistics — America's Sleep Habits*, Washington Post, May 24, 1994, Health Section at 5.

Alternatively, the individual may be substantially limited in working.

### DISCLOSURE OF DISABILITY

Individuals with psychiatric disabilities may have questions about whether and when they must disclose their disability to their employer under the ADA. They may have concerns about the potential negative consequences of disclosing a psychiatric disability in the workplace, and about the confidentiality of information that they do disclose.

#### 13. May an employer ask questions on a job application about history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or psychiatric disability?

No. An employer may not ask questions that are likely to elicit information about a disability before making an offer of employment.<sup>31</sup> Questions on a job application about psychiatric disability or mental or emotional illness or about treatment are likely to elicit information about a psychiatric disability and therefore are prohibited before an offer of employment is made.

#### 14. When may an employer lawfully ask an individual about a psychiatric disability under the ADA?

An employer may ask for disability-related information, including information about psychiatric disability, only in the following limited circumstances:

- **Application Stage.** Employers are prohibited from asking disability-related questions before making an offer of employment. An exception, however, is if an applicant asks for reasonable accommodation for the hiring process. If the need for this accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his/her disability. The employer may require the applicant to provide documentation from an appropriate professional concerning his/her disability and functional limitations.<sup>32</sup> A variety of health professionals may provide such documentation regarding psychiatric disabilities including primary health care professionals,<sup>33</sup> psychiatrists, psychologists, psychiatric nurses, and licensed mental health professionals such as licensed clinical social workers and licensed professional counselors.<sup>34</sup>

An employer should make clear to the applicant why it is requesting such information, i.e., to verify the existence of a disability and the need for an accommodation. Furthermore, the employer may request only information necessary to accomplish these limited purposes.

**Example A:** An applicant for a secretarial job asks to take a typing test in a quiet location rather than in a

<sup>31</sup> See 42 U.S.C. § 12112(d)(2) (1994); 29 C.F.R. § 1630.13(a) (1996). See also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 4, 8 FEP Manual (BNA) 405:7193-94 (1995).

<sup>32</sup> Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7193 (1995).

<sup>33</sup> When a primary health care professional supplies documentation about a psychiatric disability, his/her credibility depends on how well s/he knows the individual and on his/her knowledge about the psychiatric disability.

<sup>34</sup> Important information about an applicant's functional limitations also may be obtained from non-professionals, such as the applicant, his/her family members, and friends.

busy reception area "because of a medical condition." The employer may make disability-related inquiries at this point because the applicant's need for reasonable accommodation under the ADA is not obvious based on the statement that an accommodation is needed "because of a medical condition." Specifically, the employer may ask the applicant to provide documentation showing that she has an impairment that substantially limits a major life activity and that she needs to take the typing test in a quiet location because of disability-related functional limitations.<sup>35</sup>

Although an employer may not ask an applicant if s/he will need reasonable accommodation for the job, there is an exception if the employer could reasonably believe, before making a job offer, that the applicant will need accommodation to perform the functions of the job. For an individual with a non-visible disability, this may occur if the individual voluntarily discloses his/her disability or if s/he voluntarily tells the employer that s/he needs reasonable accommodation to perform the job. The employer may then ask certain limited questions, specifically:

- whether the applicant needs reasonable accommodation; and

- what type of reasonable accommodation would be needed to perform the functions of the job.<sup>36</sup>

- **After making an offer of employment, if the employer requires a post-offer, preemployment medical examination or inquiry.** After an employer extends an offer of employment, the employer may require a medical examination (including a psychiatric examination) or ask questions related to disability (including questions about psychiatric disability) if the employer subjects all entering employees in the same job category to the same inquiries or examinations regardless of disability. The inquiries and examinations do not need to be related to the job.<sup>37</sup>

- **During employment, when a disability-related inquiry or medical examination of an employee is "job-related and consistent with business necessity."**<sup>38</sup> This requirement may be met when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions<sup>39</sup> will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical con-

<sup>35</sup> In response to the employer's request for documentation, the applicant may elect to revoke the request for accommodation and to take the test in the reception area. In these circumstances, where the request for reasonable accommodation has been withdrawn, the employer cannot continue to insist on obtaining the documentation.

<sup>36</sup> EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6-7, 8 FEP Manual (BNA) 405:7193-94 (1995).

<sup>37</sup> If an employer uses the results of these inquiries or examinations to screen out an individual because of disability, the employer must prove that the exclusionary criteria are job-related and consistent with business necessity, and cannot be met with reasonable accommodation, in order to defend against a charge of employment discrimination. 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. § 1630.10, 1630.14(b)(3), 1630.15(b) (1996).

<sup>38</sup> 42 U.S.C. § 12112(d)(4) (1994); 29 C.F.R. § 1630.14(c) (1996).

<sup>39</sup> A "qualified" individual with a disability is one who can perform the essential functions of a position with or without reasonable accommodation. 42 U.S.C. § 12111(8) (1994). An employer does not have to lower production standards, whether qualitative or quantitative, to enable an individual with a disability to perform an essential function. See 29 C.F.R. pt. 1630 app. § 1630.2(n) (1996).

dition. Thus, for example, inquiries or medical examinations are permitted if they follow-up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his/her position. In addition, inquiries or examinations are permitted if they are required by another Federal law or regulation.<sup>40</sup> In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.<sup>41</sup>

**Example B:** A delivery person does not learn the route he is required to take when he makes deliveries in a particular neighborhood. He often does not deliver items at all or delivers them to the wrong address. He is not adequately performing his essential function of making deliveries. There is no indication, however, that his failure to learn his route is related in any way to a medical condition. Because the employer does not have a reasonable belief, based on objective evidence, that this individual's ability to perform his essential job function is impaired by a medical condition, a medical examination (including a psychiatric examination) or disability-related inquiries would not be job-related and consistent with business necessity.<sup>42</sup>

**Example C:** A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin around-the-clock labor negotiations during the next several weeks. The employer is concerned, however, that this will trigger another manic episode and that, as a result, the employee will drive recklessly and pose a significant risk of substantial harm to himself and others. There is no indication that the employee's condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings. The employer may make disability-related inquiries, or require a medical examination, because it has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.

**Example D:** An employee with depression seeks to return to work after a leave of absence during which she was hospitalized and her medication was ad-

<sup>40</sup> 29 C.F.R. § 1630.15(e) (1996) ("It may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation . . .").

<sup>41</sup> There may be additional situations which could meet the "job-related and consistent with business necessity" standard. For example, periodic medical examinations for public safety positions that are narrowly tailored to address specific job-related concerns and are shown to be consistent with business necessity would be permissible.

<sup>42</sup> Of course, an employer would be justified in taking disciplinary action in these circumstances.

justed. Her employer may request a fitness-for-duty examination because it has a reasonable belief, based on the employee's hospitalization and medication adjustment, that her ability to perform essential job functions may continue to be impaired by a medical condition. This examination, however, must be limited to the effect of her depression on her ability, with or without reasonable accommodation, to perform essential job functions. Inquiries about her entire psychiatric history or about the details of her therapy sessions would, for example, exceed this limited scope.

#### 15. Do ADA confidentiality requirements apply to information about a psychiatric disability disclosed to an employer?

Yes. Employers must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric disability, confidential under the ADA. This includes medical information that an individual voluntarily tells his/her employer. Employers must collect and maintain such information on separate forms and in separate medical files, apart from the usual personnel files.<sup>43</sup> There are limited exceptions to the ADA confidentiality requirements:

- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- first-aid and safety personnel may be told if the disability might require emergency treatment; and
- government officials investigating compliance with the ADA must be given relevant information on request.<sup>44</sup>

#### 16. How can an employer respond when employees ask questions about a coworker who has a disability?

If employees ask questions about a coworker who has a disability, the employer must not disclose any medical information in response. Apart from the limited exceptions listed in Question 15, the ADA confidentiality provisions prohibit such disclosure.

An employer also may not tell employees whether it is providing a reasonable accommodation for a particular individual. A statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability because only individuals with disabilities are entitled to reasonable accommodation under the ADA. In response to coworker questions, however, the employer may explain that it is acting for legitimate business reasons or in compliance with federal law.

<sup>43</sup> For a discussion of other confidentiality issues, see EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 21-23, 8 FEP Manual (BNA) 405:7201-02 (1995).

<sup>44</sup> 42 U.S.C. § 12112(d)(3)(B), (4)(C) (1994); 29 C.F.R. § 1630.14(b)(1) (1996). The Commission has interpreted the ADA to allow employers to disclose medical information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws. 29 C.F.R. pt. 1630 app. § 1630.14(b) (1996). The Commission also has interpreted the ADA to permit employers to use medical information for insurance purposes. *Id.* See also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 21 nn.24, 25, 8 FEP Manual (BNA) 405:7201 nn.24, 25 (1995).

As background information for all employees, an employer may find it helpful to explain the requirements of the ADA, including the obligation to provide reasonable accommodation, in its employee handbook or in its employee orientation or training.

### REQUESTING REASONABLE ACCOMMODATION

An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability unless it can show that the accommodation would impose an undue hardship.<sup>45</sup> An employee's decision about requesting reasonable accommodation may be influenced by his/her concerns about the potential negative consequences of disclosing a psychiatric disability at work. Employees and employers alike have posed numerous questions about what constitutes a request for reasonable accommodation.

#### 17. When an individual decides to request reasonable accommodation, what must s/he say to make the request and start the reasonable accommodation process?

When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."<sup>46</sup>

**Example A:** An employee asks for time off because he is "depressed and stressed." The employee has communicated a request for a change at work (time off) for a reason related to a medical condition (being "depressed and stressed" may be "plain English" for a medical condition). This statement is sufficient to put the employer on notice that the employee is requesting reasonable accommodation. However, if the employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations.<sup>47</sup>

**Example B:** An employee submits a note from a health professional stating that he is having a stress reaction and needs one week off. Subsequently, his wife telephones the Human Resources department to say that the employee is disoriented and mentally falling apart and that the family is having him hospitalized. The wife asks about procedures for extending the employee's leave and states that she will provide the necessary information as soon as possible but that she may need a little extra time. The wife's statement is sufficient to constitute a request for reasonable accommodation. The wife has asked for changes at work (an exception to the procedures for requesting leave and more time off) for a reason related to a

<sup>45</sup> See 42 U.S.C. §§ 12111(9), 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.2(o), 9 (1996); 29 C.F.R. pt. 1630 app. § 1630.9 (1996).

<sup>46</sup> *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (an employee's request for reasonable accommodation need not use "magic words" and can be in plain English). See *Bultemeyer v. Ft. Wayne Community Schs.*, 6 AD Cas. (BNA) 67 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist).

<sup>47</sup> See Question 21 *infra* about employers requesting documentation after receiving a request for reasonable accommodation.

medical condition (her husband had a stress reaction and is so mentally disoriented that he is being hospitalized). As in the previous example, if the need for accommodation is not obvious, the employer may request documentation of disability and clarification of the need for accommodation.<sup>48</sup>

**Example C:** An employee asks to take a few days off to rest after the completion of a major project. The employee does not link her need for a few days off to a medical condition. Thus, even though she has requested a change at work (time off), her statement is not sufficient to put the employer on notice that she is requesting reasonable accommodation.

#### 18. May someone other than the employee request a reasonable accommodation on behalf of an individual with a disability?

Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.<sup>49</sup> Of course, an employee may refuse to accept an accommodation that is not needed.

#### 19. Do requests for reasonable accommodation need to be in writing?

No. Requests for reasonable accommodation do not need to be in writing. Employees may request accommodations in conversation or may use any other mode of communication.<sup>50</sup>

#### 20. When should an individual with a disability request a reasonable accommodation to do the job?

An individual with a disability is not required to request a reasonable accommodation at the beginning of employment. S/he may request a reasonable accommodation at any time during employment.<sup>51</sup>

<sup>48</sup> In the Commission's view, *Miller v. Nat'l Cas. Co.*, 61 F.3d 627, 4 AD Cas. (BNA) 1089 (8th Cir. 1995) was incorrectly decided. The court in *Miller* held that the employer was not alerted to Miller's disability and need for accommodation despite the fact that Miller's sister phoned the employer repeatedly and informed it that Miller was falling apart mentally and that the family was trying to get her into a hospital. See also *Taylor v. Principal Financial Group*, 5 AD Cas. (BNA) 1653 (5th Cir. 1996).

<sup>49</sup> Cf. *Beck v. Univ. of Wis.*, 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996) (assuming, without discussion, that a doctor's note requesting reasonable accommodation on behalf of his patient triggered the reasonable accommodation process); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (stating that a doctor need not be expressly authorized to request accommodation on behalf of an employee in order to make a valid request). In addition, because the reasonable accommodation process presumes open communication between the employer and the employee with the disability, the employer should be receptive to any relevant information or requests it receives from a third party acting on the employee's behalf. 29 C.F.R. pt. 1630 app. § 1630.9 (1996).

<sup>50</sup> Although individuals with disabilities are not required to keep records, they may find it useful to document requests for reasonable accommodation in the event there is a dispute about whether or when they requested accommodation. Of course, employers must keep all employment records, including records of requests for reasonable accommodation, for one year from the making of the record or the personnel action involved, whichever occurs later. 29 C.F.R. § 1602.14 (1996).

<sup>51</sup> As a practical matter, it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

**21. May an employer ask an employee for documentation when the employee requests reasonable accommodation for the job?**

Yes. When the need for accommodation is not obvious, an employer may ask an employee for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the employee has a covered disability for which s/he needs a reasonable accommodation.<sup>52</sup> A variety of health professionals may provide such documentation with regard to psychiatric disabilities.<sup>53</sup>

*Example A:* An employee asks for time off because he is "depressed and stressed." Although this statement is sufficient to put the employer on notice that he is requesting accommodation,<sup>54</sup> the employee's need for accommodation is not obvious based on this statement alone. Accordingly, the employer may require reasonable documentation that the employee has a disability within the meaning of the ADA and, if he has such a disability, that the functional limitations of the disability necessitate time off.

*Example B:* Same as Example A, except that the employer requires the employee to submit all of the records from his health professional regarding his mental health history, including materials that are not relevant to disability and reasonable accommodation under the ADA. This is not a request for reasonable documentation. All of these records are not required to determine if the employee has a disability as defined by the ADA and needs the requested reasonable accommodation because of his disability-related functional limitations. As one alternative, in order to determine the scope of its ADA obligations, the employer may ask the employee to sign a limited release allowing the employer to submit a list of specific questions to the employee's health care professional about his condition and need for reasonable accommodation.

**22. May an employer require an employee to go to a health care professional of the employer's (rather than the employee's) choice for purposes of documenting need for accommodation and disability?**

The ADA does not prevent an employer from requiring an employee to go to an appropriate health professional of the employer's choice if the employee initially provides insufficient information to substantiate that s/he has an ADA disability and needs a reasonable accommodation. Of course, any examination must be job-related and consistent with business necessity.<sup>55</sup> If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

<sup>52</sup> EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7193 (1995).

<sup>53</sup> See *supra* nn.32-34 and accompanying text. See also *Bultemeyer v. Ft. Wayne Community Schs.*, 6 AD Cas. (BNA) 67 (7th Cir. 1996) (stating that, if employer found the precise meaning of employee's request for reasonable accommodation unclear, employer should have spoken to the employee or his psychiatrist, thus properly engaging in the interactive process).

<sup>54</sup> See Question 17, Example A, *supra*.

<sup>55</sup> Employers also may consider alternatives like having their health professional consult with the employee's health professional, with the employee's consent.

**SELECTED TYPES OF REASONABLE ACCOMMODATION**

Reasonable accommodations for individuals with disabilities must be determined on a case-by-case basis because workplaces and jobs vary, as do people with disabilities. Accommodations for individuals with psychiatric disabilities may involve changes to workplace policies, procedures, or practices. Physical changes to the workplace or extra equipment also may be effective reasonable accommodations for some people.

In some instances, the precise nature of an effective accommodation for an individual may not be immediately apparent. Mental health professionals, including psychiatric rehabilitation counselors, may be able to make suggestions about particular accommodations and, of equal importance, help employers and employees communicate effectively about reasonable accommodation.<sup>56</sup> The questions below discuss selected types of reasonable accommodation that may be effective for certain individuals with psychiatric disabilities.<sup>57</sup>

**23. Does reasonable accommodation include giving an individual with a disability time off from work or a modified work schedule?**

Yes. Permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery related to a disability is a reasonable accommodation, unless (or until) the employee's absence imposes an undue hardship on the operation of the employer's business.<sup>58</sup> This includes leaves of absence, occasional leave (e.g., a few hours at a time), and part-time scheduling.

A related reasonable accommodation is to allow an individual with a disability to change his/her regularly scheduled working hours, for example, to work 10 AM to 6 PM rather than 9 AM to 5 PM, barring undue hardship. Some medications taken for psychiatric disabilities cause extreme grogginess and lack of concentration in the morning. Depending on the job, a later schedule can enable the employee to perform essential job functions.

<sup>56</sup> The Job Accommodation Network (JAN) also provides advice free-of-charge to employers and employees contemplating reasonable accommodation. JAN is a service of the President's Committee on Employment of People with Disabilities which, in turn, is funded by the U.S. Department of Labor. JAN can be reached at 1-800-ADA-WORK.

<sup>57</sup> Some of the accommodations discussed in this section also may prove effective for individuals with traumatic brain injuries, stroke, and other mental disabilities. As a general matter, a covered employer must provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, barring undue hardship. 42 U.S.C. § 12112(b)(5)(A) (1994).

<sup>58</sup> 29 C.F.R. pt. 1630 app. § 1630.2(o) (1996). Courts have recognized leave as a reasonable accommodation. See, e.g., *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 3 AD Cas. (BNA) 1636 (7th Cir. 1995) (defendant had duty to accommodate plaintiff's pressure ulcers resulting from her paralysis which required her to stay home for several weeks); *Vializ v. New York City Bd. of Educ.*, 1995 WL 110112, 4 AD Cas. (BNA) 345 (S.D.N.Y. 1995) (plaintiff stated claim under ADA where she alleged that she would be able to return to work after back injury if defendant granted her a temporary leave of absence); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) ("[A] leave of absence to obtain medical treatment is a reasonable accommodation if it is likely that, following treatment, [the employee] would have been able to safely perform his duties . . .").

9/13

**24. What types of physical changes to the workplace or equipment can serve as accommodations for people with psychiatric disabilities?**

Simple physical changes to the workplace may be effective accommodations for some individuals with psychiatric disabilities. For example, room dividers, partitions, or other soundproofing or visual barriers between workspaces may accommodate individuals who have disability-related limitations in concentration. Moving an individual away from noisy machinery or reducing other workplace noise that can be adjusted (e.g., lowering the volume or pitch of telephones) are similar reasonable accommodations. Permitting an individual to wear headphones to block out noisy distractions also may be effective.

Some individuals who have disability-related limitations in concentration may benefit from access to equipment like a tape recorder for reviewing events such as training sessions or meetings.

**25. Is it a reasonable accommodation to modify a workplace policy?**

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, barring undue hardship.<sup>59</sup> For example, it would be a reasonable accommodation to allow an individual with a disability, who has difficulty concentrating due to the disability, to take detailed notes during client presentations even though company policy discourages employees from taking extensive notes during such sessions.

*Example:* A retail employer does not allow individuals working as cashiers to drink beverages at checkout stations. The retailer also limits cashiers to two 15-minute breaks during an eight-hour shift, in addition to a meal break. An individual with a psychiatric disability needs to drink beverages approximately once an hour in order to combat dry mouth, a side-effect of his psychiatric medication. This individual requests reasonable accommodation. In this example, the employer should consider either modifying its policy against drinking beverages at checkout stations or modifying its policy limiting cashiers to two 15-minute breaks each day plus a meal break, barring undue hardship.

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. As an example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship.<sup>60</sup> In addition, an employer, in spite of a "no-leave" policy, may, in appropriate circumstances, be required to provide leave to an employee with a disability

<sup>59</sup> 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1996).

<sup>60</sup> See *Dutton v. Johnson County Bd.*, 1995 WL 337588, 3 AD Cas. (BNA) 1614 (D. Kan. 1995) (it was a reasonable accommodation to permit an individual with a disability to use unscheduled vacation time to cover absence for migraine headaches, where that did not pose an undue hardship and employer knew about the migraine headaches and the need for accommodation).

as a reasonable accommodation, unless the provision of leave would impose an undue hardship.<sup>61</sup>

**26. Is adjusting supervisory methods a form of reasonable accommodation?**

Yes. Supervisors play a central role in achieving effective reasonable accommodations for their employees. In some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by electronic mail). Supervisors also may provide or arrange additional training or modified training materials.

Adjusting the level of supervision or structure sometimes may enable an otherwise qualified individual with a disability to perform essential job functions. For example, an otherwise qualified individual with a disability who experiences limitations in concentration may request more detailed day-to-day guidance, feedback, or structure in order to perform his job.<sup>62</sup>

*Example:* An employee requests more daily guidance and feedback as a reasonable accommodation for limitations associated with a psychiatric disability. In response to his request, the employer consults with the employee, his health care professional, and his supervisor about how his limitations are manifested in the office (the employee is unable to stay focused on the steps necessary to complete large projects) and how to make effective and practical changes to provide the structure he needs. As a result of these consultations, the supervisor and employee work out a long-term plan to initiate weekly meetings to review the status of large projects and identify which steps need to be taken next.

**27. Is it a reasonable accommodation to provide a job coach?**

Yes. An employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability as a reasonable accommodation, barring undue hardship.<sup>63</sup> An employer also may be required to allow a job coach paid by a public or private social service agency to accompany the employee at the job site as a reasonable accommodation.

<sup>61</sup> See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (1996).

<sup>62</sup> Reasonable accommodation, however, does not require lowering standards or removing essential functions of the job. *Bolstein v. Reich*, 1995 WL 46387, 3 AD Cas. (BNA) 1761 (D.D.C. 1995) (attorney with chronic depression and severe personality disturbance was not a qualified individual with a disability because his requested accommodations of more supervision, less complex assignments, and the exclusion of appellate work would free him of the very duties that justified his GS-14 grade), *motion for summary affirmance granted*, 1995 WL 686236 (D.C. Cir. 1995). The court in *Bolstein* noted that the plaintiff objected to a reassignment to a lower grade in which he could have performed the essential functions of the position. 1995 WL 46387, \* 4, 3 AD Cas. (BNA) 1761, 1764 (D.D.C. 1995).

<sup>63</sup> See 29 C.F.R. pt. 1630 app. § 1630.9 (1996) (discussing supported employment); U.S. Equal Employment Opportunity Commission, "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act," at 3.4, 8 FEP Manual (BNA) 405:7001 (1992) [hereinafter *Technical Assistance Manual*]. A job coach is a professional who assists individuals with severe disabilities with job placement and job training.

**28. Is it a reasonable accommodation to make sure that an individual takes medication as prescribed?**

No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a barrier that is unique to the workplace. When people do not take medication as prescribed, it affects them on and off the job.

**29. When is reassignment to a different position required as a reasonable accommodation?**

In general, reassignment must be considered as a reasonable accommodation when accommodation in the present job would cause undue hardship<sup>64</sup> or would not be possible.<sup>65</sup> Reassignment may be considered if there are circumstances under which both the employer and employee voluntarily agree that it is preferable to accommodation in the present position.<sup>66</sup>

Reassignment should be made to an equivalent position that is vacant or will become vacant within a reasonable amount of time. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Reassignment is not required if a vacant position at a lower level is also unavailable.

### CONDUCT

Maintaining satisfactory conduct and performance typically is not a problem for individuals with psychiatric disabilities. Nonetheless, circumstances arise when employers need to discipline individuals with such disabilities for misconduct.

**30. May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability?**

Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.<sup>67</sup> For example, nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a

<sup>64</sup> For example, it may be an undue hardship to provide extra supervision as a reasonable accommodation in the present job if the employee's current supervisor is already very busy supervising several other individuals and providing direct service to the public.

<sup>65</sup> 42 U.S.C. § 12111(9)(B) (1994). For example, it may not be possible to accommodate an employee in his present position if he works as a salesperson on the busy first floor of a major department store and needs a reduction in visual distractions and ambient noise as a reasonable accommodation.

See EEOC Enforcement Guidance: Workers' Compensation and the ADA at 17, 8 FEP Manual (BNA) 405:7399-7400 (1996) (where an employee can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation, because of a disability, an employer must reassign him/her to an equivalent vacant position for which s/he is qualified, absent undue hardship).

<sup>66</sup> Technical Assistance Manual, *supra* note 63, at 3.10(5), 8 FEP Manual (BNA) 405:7011-12 (reassignment to a vacant position as a reasonable accommodation); see also 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1996).

<sup>67</sup> 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. § 1630.10, .15(c) (1996).

disability.<sup>68</sup> Other conduct standards, however, may not be job-related for the position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA.

*Example A:* An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard — a prohibition against employee theft — that is job-related for the position in question and consistent with business necessity.

*Example B:* An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard — a rule prohibiting intentional damage to equipment — that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

*Example C:* An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.

The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.

<sup>68</sup> See EEOC Compliance Manual § 902.2, n.11, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7259, n.11 (1995) (an employer "does not have to excuse . . . misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees"); see 56 Fed. Reg. 35,733 (1991) (referring to revisions to proposed ADA rule that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

11/13

**31. Must an employer make reasonable accommodation for an individual with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity?**

An employer must make reasonable accommodation to enable an otherwise qualified individual with a disability to meet such a conduct standard in the future, barring undue hardship.<sup>69</sup> Because reasonable accommodation is always prospective, however, an employer is not required to excuse past misconduct.<sup>70</sup>

**Example A:** A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers. After receiving a suspension as the second step in uniform, progressive discipline, she discloses her disability, states that it causes her behavior, and requests a leave of absence for treatment. The employer may discipline her because she violated a conduct standard — a rule prohibiting disruptive behavior towards patrons and coworkers — that is job-related for the position in question and consistent with business necessity. The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship, to enable her to meet this conduct standard in the future.

**Example B:** An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 AM to 5:30 PM, but he arrives at 9:00, 9:30, 10:00 or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 AM to 6:30 PM, a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 AM.

**Example C:** An employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm. The employer immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor. When he learns that his employment has been terminated, the employee asks the employer to put the termination on hold and to give him a month off for treatment instead. This is the employee's first request for accom-

modation and also the first time the employer learns about the employee's disability. The employer is not required to rescind the discharge under these circumstances, because the employee violated a conduct standard — a rule prohibiting threats of physical harm against supervisors — that is job-related for the position in question and consistent with business necessity. The employer also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability. His employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity.<sup>71</sup>

**32. How should an employer deal with an employee with a disability who is engaging in misconduct because s/he is not taking his/her medication?**

The employer should focus on the employee's conduct and explain to the employee the consequences of continued misconduct in terms of uniform disciplinary procedures. It is the employee's responsibility to decide about medication and to consider the consequences of not taking medication.<sup>72</sup>

**DIRECT THREAT**

Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a "direct threat."<sup>73</sup> Employers must apply the "direct threat" standard uniformly and may not use safety concerns to justify exclusion of persons with disabilities when persons without disabilities would not be excluded in similar circumstances.<sup>74</sup>

The EEOC's ADA regulations explain that "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."<sup>75</sup> A "significant" risk is a high, and not just a slightly increased, risk.<sup>76</sup> The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence.<sup>77</sup> With respect to the employment of individuals with psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat.<sup>78</sup> An individual does not pose a "direct threat" simply by virtue of having a history of psychiat-

<sup>71</sup> Regardless of misconduct, an individual with a disability must be allowed to file a grievance or appeal challenging his/her termination when that is a right normally available to other employees.

<sup>72</sup> If the employee requests reasonable accommodation in order to address the misconduct, the employer must grant the request, subject to undue hardship.

<sup>73</sup> See 42 U.S.C. § 12113(b) (1994).

<sup>74</sup> 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

<sup>75</sup> 29 C.F.R. § 1630.2(r) (1996). To determine whether an individual would pose a direct threat, the factors to be considered include: (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm will occur; and (4) imminence of the potential harm. *Id.*

<sup>76</sup> 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

<sup>77</sup> 29 C.F.R. § 1630.2(r) (1996).

<sup>78</sup> 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

<sup>69</sup> See 29 C.F.R. § 1630.15(d) (1996).

<sup>70</sup> Therefore, it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur. See Question 20 *supra*.

ric disability or being treated for a psychiatric disability.<sup>79</sup>

**33. Does an individual pose a direct threat in operating machinery solely because s/he takes medication that may as a side effect diminish concentration and/or coordination for some people?**

No. An individual does not pose a direct threat solely because s/he takes a medication that may diminish coordination or concentration for some people as a side effect. Whether such an individual poses a direct threat must be determined on a case-by-case basis, based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence. Therefore, an employer must determine the nature and severity of this individual's side effects, how those side effects influence his/her ability to safely operate the machinery, and whether s/he has had safety problems in the past when operating the same or similar machinery while taking the medication. If a significant risk of substantial harm exists, then an employer must determine if there is a reasonable accommodation that will reduce or eliminate the risk.

*Example:* An individual receives an offer for a job in which she will operate an electric saw, conditioned on a post-offer medical examination. In response to questions at this medical examination, the individual discloses her psychiatric disability and states that she takes a medication to control it. This medication is known to sometimes affect coordination and concentration. The company doctor determines that the individual experiences negligible side effects from the medication because she takes a relatively low dosage. She also had an excellent safety record at a previous job, where she operated similar machinery while taking the same medication. This individual does not pose a direct threat.

**34. When can an employer refuse to hire someone based on his/her history of violence or threats of violence?**

An employer may refuse to hire someone based on his/her history of violence or threats of violence if it can show that the individual poses a direct threat. A determination of "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering the most current medical knowledge and/or the best available objective evidence. To find that an individual with a psychiatric disability poses a direct threat, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. This includes an assessment of the likelihood and imminence of future violence.

*Example:* An individual applies for a position with Employer X. When Employer X checks his employment background, she learns that he was terminated two weeks ago by Employer Y, after he told a coworker that he would get a gun and "get his supervisor if he tries anything again." Employer X also learns that these statements followed three months of escalating incidents in which this individual had had several altercations in the workplace, including one in which he had to be restrained from fighting with a coworker. He then revealed his disability to Employer Y. After being given time off for medical treatment, he

<sup>79</sup> House Judiciary Report, *supra* n.2, at 45.

continued to have trouble controlling his temper and was seen punching the wall outside his supervisor's office. Finally, he made the threat against the supervisor and was terminated. Employer X learns that, since then, he has not received any further medical treatment. Employer X does not hire him, stating that this history indicates that he poses a direct threat.

This individual poses a direct threat as a result of his disability because his recent overt acts and statements (including an attempted fight with a coworker, punching the wall, and making a threatening statement about the supervisor) support the conclusion that he poses a "significant risk of substantial harm." Furthermore, his prior treatment had no effect on his behavior, he had received no subsequent treatment, and only two weeks had elapsed since his termination, all supporting a finding of direct threat.

**35. Does an individual who has attempted suicide pose a direct threat when s/he seeks to return to work?**

No, in most circumstances. As with other questions of direct threat, an employer must base its determination on an individualized assessment of the person's ability to safely perform job functions when s/he returns to work. Attempting suicide does not mean that an individual poses an imminent risk of harm to him/herself when s/he returns to work. In analyzing direct threat (including the likelihood and imminence of any potential harm), the employer must seek reasonable medical judgments relying on the most current medical knowledge and/or the best available factual evidence concerning the employee.

*Example:* An employee with a known psychiatric disability was hospitalized for two suicide attempts, which occurred within several weeks of each other. When the employee asked to return to work, the employer allowed him to return pending an evaluation of medical reports to determine his ability to safely perform his job. The individual's therapist and psychiatrist both submitted documentation stating that he could safely perform all of his job functions. Moreover, the employee performed his job safely after his return, without reasonable accommodation. The employer, however, terminated the individual's employment after evaluating the doctor's and therapist's reports, without citing any contradictory medical or factual evidence concerning the employee's recovery. Without more evidence, this employer cannot support its determination that this individual poses a direct threat.<sup>80</sup>

#### PROFESSIONAL LICENSING

Individuals may have difficulty obtaining state-issued professional licenses if they have, or have a record of, a psychiatric disability. When a psychiatric disability results in denial or delay of a professional license, people may lose employment opportunities.

<sup>80</sup> Cf. *Ofat v. Ohio Civ. Rights Comm'n*, 1995 WL 310051, 4 AD Cas. (BNA) 753 (Ohio Ct. App. 1995) (finding against employer, under state law, on issue of whether employee who had panic disorder with agoraphobia could safely return to her job after disability-related leave, where employer presented no expert evidence about employee's disability or its effect on her ability to safely perform her job but only provided copies of pages from a medical text generally discussing the employee's illness).

13 / 13

**36. Would an individual have grounds for filing an ADA charge if an employer refused to hire him/her (or revoked a job offer) because s/he did not have a professional license due to a psychiatric disability?**

If an individual filed a charge on these grounds, EEOC would investigate to determine whether the professional license was required by law for the position at issue, and whether the employer in fact did not hire the

individual because s/he lacked the license. If the employer did not hire the individual because s/he lacked a legally-required professional license, and the individual claims that the licensing process discriminates against individuals with psychiatric disabilities, EEOC would coordinate with the Department of Justice, Civil Rights Division, Disability Rights Section, which enforces Title II of the ADA covering state licensing requirements.

# Judge Approves Texaco Settlement

## Payout Is Record for Bias Case

By Gail Appleson  
Reuter

NEW YORK, March 26—A federal judge has approved Texaco Inc.'s record \$176.1 million settlement of a widely watched racial discrimination suit, the company said today.

The case received widespread attention after transcripts of tape recordings submitted as evidence showed executives allegedly discussing the destruction of documents and making racist remarks.

The settlement is believed to be the largest ever in a racial discrimination suit. The class action covers all blacks employed in salaried positions at Texaco or its subsidiaries at any time from March 23, 1991, through Nov. 15, 1996.

About 1,348 notices were sent to potential claimants. None chose to opt out of the plan, and no objections were made during a fairness hearing held last week in White Plains federal court.

U.S. District Judge Charles Brieant approved the settlement last Friday. It was made available today.

He said he would rule later on fee applications by the two plaintiffs' firms, seeking 25 percent of the cash part of

the settlement. The judge said he had received letters from several claimants objecting to the requested fees, which would come to about \$29 million.

Brieant praised the settlement in his written decision as "fair and reasonable and highly beneficial to the class."

"That Texaco is sufficiently solvent to withstand a judgment beyond the dreams of avarice does not diminish in any way the extraordinary result for the class achieved by the settlement process," Brieant said in his ruling.

He said that since there are so many class members, employed at different jobs and at various locations throughout the country, it would have been difficult for a jury to extrapolate evidence of apparent discrimination against one worker in one location and one job title to apply to a national work force.

Michael Hausfeld of Washington-based Cohen, Milstein, Hausfeld & Toll, one of the plaintiffs' firms, said that under the accord, claimants will receive awards ranging from \$60,000 to \$80,000.

The plan was well-received by civil rights groups and by Jesse Jackson, who responded by calling for an end to a consumer boycott of Texaco that he helped initiate in November.

The NAACP Legal Defense and Educational Fund filed a brief supporting the settlement and told the court that the pact is "innovative and will be highly effective as a model for ending systemic discrimination in employment."

Texaco also had reached an agreement with the Equal Employment Opportunity Commission for the agency to intervene in the settlement. Under the accord, the EEOC will have rights to certain information, to monitor the settlement and to participate in court proceedings.

Although Texaco denies fault, it agreed on Nov. 15 to pay \$176.1 million to settle the 1994 class action lawsuit filed by black employees who alleged they were discriminated against in pay and promotions.

Texaco fired a top executive of an insurance subsidiary and took actions against other current and former employees who could be heard on the tapes planning the destruction of documents. The moves came after the company received a final report from an outside lawyer who investigated the situation.

The tapes were made public after Richard Lundwall, former senior coordinator of personnel services of Texaco's finance department, turned them over to the plaintiffs' lawyers. He and other executives can be heard on the tapes planning to destroy documents requested by the plaintiffs.

Although Lundwall turned over the tapes, he subsequently was indicted for obstruction of justice. He is the only defendant facing criminal charges growing out of the case.

### FOR MORE INFORMATION

To browse an archive of documents related to the Texaco race discrimination case, click on the above symbol on the front page of The Post's Web site at [www.washingtonpost.com](http://www.washingtonpost.com)

## Race Discrimination

### Judge Approves Texaco Settlement, Reserves Judgment on Attorneys' Fees

**N**EW YORK—A federal district judge has approved the landmark class-action settlement of a race discrimination suit against Texaco Corp., finding in a brief memorandum decision that the \$172 million agreement satisfies all the legal criteria for judicial approval.

The March 21 decision and judgment by Judge Charles L. Brieant of U.S. District Court for the Southern District of New York—while settling the litigation nearly three years after the initial complaint was filed—reserved the court's exclusive jurisdiction over the administration of the agreement and the performance of the parties in fulfilling its terms. It further left open the matter of attorneys' fees in the case (*Roberts v. Texaco*, DC SNY, No. 94-2015, 3/21/97).

The decision did not address the widely publicized and unprecedented history of the litigation, which included the disclosure of tape recordings allegedly showing Texaco executives concealing documents from discovery and making deprecating racial and religious remarks. Criminal charges remain pending against the former executive who made the recordings for his role in the taped meetings (56 DLR A-7, 3/24/97).

**Fairness Hearing Hailed.** Brieant acted after attorneys at a March 18 fairness hearing hailed the Texaco agreement as "one of the most scrutinized and acclaimed settlements" ever reached under Title VII of the Civil Rights Act (53 DLR A-9, 3/19/97). The \$172 million settlement calls for damage awards averaging more than \$63,000 to 1,348 black salaried Texaco employees, an 11.34 percent salary increase valued at \$22 million over five years, and the establishment of a diversity task force at the company, funded with an additional \$35 million.

The total value of the settlement dropped from the initially publicized figure of \$176 million after the value of the salary increases was recalculated, sources involved in structuring the agreement said.

"Based upon the entire presentation to this court, including factors concerning which the court does not perceive it necessary to comment in its decision, this court finds and concludes that the settlements arrived at by arms-length negotiation between equally informed parties is fair and reasonable, and highly beneficial to the class," Brieant said in a six-page decision. "It should be and hereby is approved."

Rather than recount the case's history, Brieant said that "the familiarity of the reader is assumed with respect to all matters shown in the record of this case" and cited a March 12 affidavit by plaintiffs' attorneys Daniel L. Berger and Michael D. Hausfeld as providing the necessary background.

The judge further noted that the Labor Department has found no objection to the settlement and that the Equal Employment Opportunity Commission had reached its own related settlement with Texaco (3 DLR AA-1, 1/4/97). He also cited an amicus curiae brief from the NAACP Legal Defense and Education Fund calling the settlement "innovative" and saying it "will be

highly effective as a model for ending systemic discrimination in employment."

After describing the agreement's general terms, Brieant said, "The court resists the temptation to summarize the specific agreements for the future contained in the settlement agreement, beyond noting that they are highly favorable to the accomplishment of the goals and hopes for improved equality in employment and legal opportunity for advancement shared by the class action plaintiffs and the highest ranking officers of Texaco."

He continued, "We note that the agreement reflects a denial on the part of Texaco of any intention to discriminate in the past, and that with respect to such discrimination as may have been present the chief executive officer and the board of directors had no actual or direct knowledge, nor did they directly cause the existence of whatever problems may have been present."

In his analysis of the legal criteria for approval, Brieant said, "This court agrees with the contention of plaintiffs' counsel that if the case were to go to trial and plaintiffs prevailed on all of their claims it is highly unlikely that plaintiffs would be able to recover any greater financial benefits than are set forth in the settlement agreement; many years might go by before they recovered anything, and as far as the consensual monitoring task force is concerned it is highly unlikely that the court would impose such a post-trial supervisory scheme upon the defendant, even if it lost the case totally."

Brieant noted that the settlement class is broader than that identified in an earlier probable-cause discrimination finding by EEOC, which applied only to black salaried employees in certain higher pay grades.

**Difficulty of Proof.** He continued, "A difficulty of proof exists in this case because many members of the class are employed in different and varied positions in facilities throughout the nation, so that it would be difficult for a trial jury to extrapolate evidence of apparent discrimination against one employee in one location and in one job title to apply to a national workforce.

"That Texaco is sufficiently solvent to withstand a judgment beyond the dreams of avarice does not diminish in any way the extraordinary result for the class achieved by the settlement process."

Turning to the fee application, Brieant said "several individual members of the settlement class have written to the court objecting to the 'amount and manner of disbursement of fees.'" Calling the objections "essentially form letters" that incorporate by reference a *Wall Street Journal* article, he said that the article "appears to be rife with irony but of little help to any court in fixing a fair fee."

Brieant continued, "Nevertheless, the court recognizes its obligation to compensate the lawyers who produced the result fairly, and at the same time to protect the interests of the absent class members from any excess charges. Accordingly, this matter requires further study and will be resolved by the court by separate findings and conclusions to be developed."

The plaintiffs' attorneys seek 25 percent of the \$115 million cash portion of the settlement, plus \$788,040 in expenses. Also severed from the approval was the issue of incentive awards sought for the named plaintiffs in the case.

By JOHN HERZFELD

## Sex Harassment

### **Court Rules EEOC May Contact Potential Class Members in Suit Against Mitsubishi**

**A** federal judge March 24 ruled that the Equal Employment Opportunity Commission can send a letter to potential class members in its sex harassment suit against Mitsubishi Motor Manufacturing of America Inc.

The court also ruled that Mitsubishi cannot meet privately with potential claimants in the suit (*EEOC v. Mitsubishi Motor Manufacturing of America Inc.*, DC Cill, No. 96-1192, 3/24/97).

"Any future attempt by Mitsubishi to hold discussions with the alleged victims in this case concerning past incidents of harassment must be done by a noticed deposition in accordance with the Federal Rules of Civil Procedure," wrote Judge Joe B. McDade of the U.S. District Court for the Central District of Illinois.

However, the company is not required to wait until formal discovery, which is scheduled to begin in October 1997, to obtain further information needed to remedy ongoing discrimination, the court said.

McDade ordered the parties to "prioritize and depose as soon as practicable any alleged victim who has information about ongoing harassment" at MMMA's auto assembly plant in Normal, Ill.

**EEOC Letter Can Be Sent.** The court issued its rulings in response to MMMA's objections to a proposed EEOC letter to company employees to advise them about aspects of the suit. The ruling is "the latest chapter in an ongoing war between the parties regarding proposed communications to the alleged victims of sexual harassment," McDade observed.

EEOC drafted the letter after learning that MMMA had conducted 12 interviews with women who had spoken to EEOC in 1994 during the commission's initial investigation of sex harassment charges at the plant. MMMA contended that the interviews are part of its own investigation of discrimination claims, but EEOC claimed that the interviews advanced the company's interests in the litigation.

The court imposed a scheduling order that requires EEOC to provide MMMA with a list of names of the alleged victims of discrimination within five days after the date it sends its letter.

Addressing MMMA's concern that its employees' privacy should be protected, the court said, "The individuals on [EEOC's] list have a legitimate right to know that their names are being turned over to Mitsubishi, but will not be disclosed to the public at large." Since EEOC concedes that the company may have a reasonable basis for disclosing the names of alleged victims to other employees, the letter must be changed to reflect the potential of disclosure to other employees, the court said.

The court also ordered EEOC to make other changes to its proposed letter. For example, the court said there is no need to warn employees about the danger of speaking informally with Mitsubishi personnel or counsel in light of "safeguards" already taken.

**Employee-Initiated Discussions.** As for employee-initiated discussions with MMMA, the court said that it "presumes" that the company will turn away alleged victims of past sex harassment who attempt to discuss their claims with the company. If contacted by an employee, MMMA must notify the employee of the right to be represented by EEOC and that all discussions will be done by notice depositions.

For employee-initiated complaints of "new" harassment, EEOC agreed that informal interviews would be appropriate, provided that the claimant is informed that representation by EEOC is available. The court rejected the company's assertion that allowing employees with new complaints to go directly to EEOC would discourage employees from making new complaints of ongoing harassment.

McDade said that the court presumes that EEOC will not abuse the privilege by dissuading employees from using the company's internal process. This approach will assist Mitsubishi in its attempt to remedy ongoing harassment, because such claimants are likely to bring new claims to EEOC rather than to Mitsubishi directly, the court said.

By NADYA ASWAD

# If the Boss Is Out of Line, What's the Legal Boundary?

## Testing a Wider Concept of Sexual Harassment

By JENNIFER STEINHAUER

There is no law against being an obnoxious tyrannical boss, even though thousands of employees probably have fantasized about one. But a growing number of women are now seeking to expand the reach of the Federal statute that prohibits employment discrimination in an effort to strike back at bosses who they contend have made their lives miserable.

Take the case of Peter Arnell, who runs an advertising agency in Manhattan that has several high-profile fashion clients. His supporters say he is just a world-class taskmaster who relentlessly drives his employees, male and female alike, to do their best.

But employees and clients also say they have heard and seen Mr. Arnell use foul and abusive language to reduce office workers, particularly women, to tears for the way they took a message, phrased a question or cleaned the top of his desk.

His behavior, many colleagues acknowledge, can often be miserable — even unbearable.

But is it illegal?

That is what four former employees assert in a lawsuit filed in December in Federal District Court in Manhattan. The women, who all worked as secretaries in the executive office of Arnell Group, are seeking damages for what they say were months of abusive tirades by Mr. Arnell. The abuse, they say, ended only with their dismissal or resignation. Their lawyer, Jeffrey Mann, declined to comment.

Mr. Arnell did not return repeated phone calls to his office. An assistant said he was out of the country. His lawyer, Carolyn T. Ellis, would not



Peter Arnell, an advertising executive, directing a commercial from a video monitor. The photograph appeared with an article last year about one of his campaigns in American Photo magazine.



### The Limits Of the Law

Mr. Arnell, whose agency's clients include Hanes and Samsung, left, is being sued by former employees who claim he used abusive behavior as a form of sexual harassment. The case is one of several aimed at expanding the scope of Federal employment discrimination law.

1 of 3

# Testing a Wider Concept of Sexual Harassment

comment on the case, which is still in the discovery phase, other than to say, "We have a very good defense, and we think we are going to win." The company declined to provide a photograph of Mr. Arnell.

A number of cases like this are trying to broaden the use of the employment discrimination law known as Title VII of the Civil Rights Act of 1964 beyond classic sexual harassment like groping and unwanted requests for sexual favors.

These cases even go beyond lawsuits in which women have won damages after showing that suggestive pin-ups and cartoons prominently displayed in the workplace had created a hostile working environment.

But it is an open question whether the law can be stretched to accommodate these new claims.

"There are a growing number of cases involving what the courts may deem boorish, but not actionable, behavior," said Jay W. Waks, co-chairman of the labor and employment department at Kaye, Scholer, Fierman, Hays & Handler in New York, who usually represents employers in such cases.

## A Hostile Shop, Or Merely Uncouth?

Over all, lawsuits that charge sexual harassment or discrimination soared in the mid-1990's after Anita Hill's confrontation with Clarence Thomas at his Supreme Court confirmation hearings in 1991. The Equal Employment Opportunity Commission said that in 1996 there were 15,342 sexual harassment cases recorded by the agency; in 1990 there were 6,127.

Mr. Waks said that sexual harassment is always hard to prove and that no two cases are exactly alike. But in cases in which no classic harassment occurred, courts have tended to draw the line in favor of plaintiffs only when they can prove that there was a pattern in which an employee's sex was mentioned amid a litany of abuse or obscenity.

Among several recent cases in which plaintiffs were able to establish harassment, the standard-setter involved Teresa Harris, who sued her employer, Forklift Systems Inc. of Nashville, even though her boss, Charles Hardy, never touched her or sought sexual favors.

Instead, he berated her in front of other employees, saying such things as "You're a woman, what do you know?" He asked her and other female employees to take coins from his pants pocket and threw objects on the ground that he insisted the women pick up.

The Supreme Court reversed a lower court decision in 1993, saying that such behavior constituted a "hostile work environment."

Lawyers on both sides of the issue agreed that such cases are on the rise. Yet two recent cases, in which the plaintiffs were victorious at trial but overturned on appeal, underscore how hard it can be to distinguish between what is illegal sexual harassment and what is just plain rude.

For example, Debra Black, a mortgage broker in Ohio, was

Zaring, a principal in the firm, frequently made sexually suggestive comments and told her she was "paid great for a woman." In the court's statement of facts, Mr. Zaring was described as once grabbing a pastry, "saying, 'Nothing I like more in the morning than sticky buns,' while looking plaintiff up and down, smiling, and wriggling his eyebrows."

In overturning the jury's finding for the plaintiff, Cornelia Kennedy, a judge in the United States Court of Appeals for the Sixth Circuit, wrote that the behavior was disturbing, but "Title VII was not designed to purge the workplace of vulgarity."

Consider also the case of Valerie A. Baskerville against the Culligan International Company of Northbrook, Ill. Ms. Baskerville was awarded \$25,000 in damages after enduring comments and sexually provocative movements from a regional manager, Michael Hall.

But Richard A. Posner, the chief judge of the United States Court of Appeals for the Seventh Circuit, threw out the judgment. "Mr. Hall is not a man of refinement," Judge Posner wrote, "but neither is he a sexual harasser."

Despite the difficulty of proving such cases in court, many plaintiffs sue in hopes of bringing the behavior to light or persuading a defendant to settle to avoid adverse publicity.

That strategy sometimes succeeds. "The irony of these cases is that what is a good legal defense can be a total catastrophe in terms of how you are seen by the public," said Stephen M. Paskoff, the president of Employment Learning Innovations, a management training firm in Atlanta. He has also noticed a growing number of such cases, adding that defendants "can win the battle but lose the war."

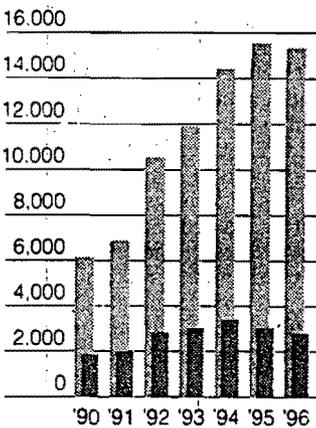
## Did Pink Collars Make Easy Targets?

The lawsuit against Mr. Arnell illustrates many of these complexities. The women involved were not willing to discuss the case publicly. But none of the plaintiffs are contending in their suit that Mr. Arnell made unwanted advances or touched them. Nor are they asserting that they hit a glass ceiling installed by a male-dominated corporate hierar-

### A Tough Battle

Sexual harassment complaints have surged since 1990, but few are decided in favor of plaintiffs.

- Recorded sexual harassment cases
- Resolved in plaintiffs' favor



Source: Equal Employment Opportunity Commission

The New York Times

awarded \$50,000 in compensatory damages and \$200,000 in punitive damages after suing her employer, Zaring Homes Inc. of Cincinnati.

She said she had had to endure biweekly meetings at which Tim

2 of 3

3043

chy. And only a smattering of the accusations involve sexually charged behavior. (There are complaints that Mr. Arnell pretended to masturbate in front of his employees and that he brandished sexually explicit catalogues.)

Rather, at the heart of the suit are accusations that what the plaintiffs consider to be Mr. Arnell's abusive behavior and fits of rage — often salted with sexual references — were directed at his secretaries simply because they were women.

The plaintiffs — Lynne Centofanti, Elizabeth Torres, Geraldine Barbezat and Roseann Damato — are suing on grounds of sexual harassment and discrimination. Each is seeking \$200,000 in damages. They also charge defamation and intentional infliction of emotional distress.

Mr. Arnell, the plaintiffs said, engaged in frequent profanity-peppered outbursts that often included derogatory references to women. "On numerous occasions, I heard Mr. Arnell say, 'Those women out there are [expletive deleted] useless,'" Ms. Centofanti said in a statement filed with the lawsuit.

But Mr. Arnell has strong defenders at the agency. Mr. Arnell's work, often on campaigns aimed at women, has brought him into frequent contact with female clients. His shop, for instance, developed the tag line "In

## What's mean and vulgar may not necessarily be illegal.

women we trust" for a campaign for the designer Donna Karan. He came up with the Hanes hosiery advertisements that feature the legs of Tina Turner. Other clients that market to women include Anne Klein, Banana Republic and Chanel. Women represent more than half of his senior creative staff.

"I've gotten more opportunities here than I have ever imagined," said Susan Conway, a creative director who has worked at the agency six years. "I have nothing but good things to say about working here."

Sara Arnell, a principal at the agency and the wife of Mr. Arnell, also defended her husband. "I feel like he listens a lot," she said. "He never criticizes anybody personally. He does criticize work, but he would never say a person was worthless."

But for the rank-and-file clerical staff, life under Mr. Arnell is lived on egg shells, according to former employees, clients and executives at firms that provide temporary help

for the agency. And many of the complaints are not so much that Mr. Arnell's abuse is sexually laden as that it is aimed almost exclusively at women low in the pecking order.

"Mr. Arnell constantly degraded and abused me and other female members of my staff in front of other male employees," Ms. Barbezat said in her statement. In hers, Ms. Centofanti states, "While yelling at me from a distance of approximately one inch from my face, Mr. Arnell asked me how I could be so [expletive deleted] stupid to ask a caller to leave his beeper number."

## The Creative Bully Management School

Creative industries generally, and advertising in particular, have reputations for attracting executives whose unusual talent and drive are matched only by their tempers and theatrics. Mr. Arnell, clients and subordinates say, fits that stormy-genius stereotype, pushing all of his employees to perfect their craft. "He is a really intense person," Ms. Conway said. "We are all asked to achieve excellence here, down to how you design the note pads."

Mr. Arnell saw such demands as part of his modus operandi. A feature article last summer in American Photo magazine about one of his campaigns captured an exchange in which Mr. Arnell berated his staff for its work. The reporter wrote that Mr. Arnell said his outburst was part of "a good opportunity to spread a little healthy fear among the crew."

Several people said that Mr. Arnell's male employees sometimes took as much abuse as the women. One former employee, who spoke only on the condition that his name not be used, described an incident in which one of Mr. Arnell's male personal assistants was forced to sit under a desk as punishment during a meeting.

Mr. Arnell's lawyer, Ms. Ellis, said that her team would show that Mr. Arnell, whatever his conduct, did not violate the law. In her motion to dismiss the lawsuit, which is pending, she cited the right to free speech in responding to the plaintiffs' defamation and emotional distress claims: "As case law demonstrates, words like 'stupid,' 'useless,' 'worthless' and 'incompetent' constitute nonactionable, protected opinions. These words fall into the category of rhetorical hyperbole and vigorous epithets that courts have held state opinions rather than facts."

The motion continues, "Taken as a whole, the character of this conduct, even if true, is not 'atrocious,' 'beyond all possible bounds of decency' and 'utterly intolerable.'"

Absent some out-of-court settlement, it will be up to a judge or a jury

to decide whether the behavior described in the complaints crossed the line into illegality. "People have started to look at Title VII for a broad range of conduct," Jocelyn Frye, a lawyer for the Women's Legal Defense Fund in Washington, said. "This is a perfect example of how an employee can bring actions against an employer, who may have just seemed like a bad guy but once he started injecting gender found out his behavior was prohibited."

Excerpts from one former employee's court filing against Peter Arnell, and his lawyer's reply.

Mrs. Elizabeth Torres

The Particulars Are

1. I was employed as Chief Executive Officer from January 1, 1995 to December 31, 1995

### ONE ACCUSATION

"Mr. Arnell constantly referred to my sex and on numerous occasions called me a 'stupid [expletive deleted] woman.'... Mr. Arnell would always make the type of remarks as described above... for the benefit of a male audience. His abusive behavior often brought me to tears."

ELIZABETH TORRES  
former secretary to Mr. Arnell

a. Mr. Arnell on numerous occasions

b. Mr. Arnell

### IN DEFENSE

"Taken as a whole, the character of this conduct, even if true, is not 'atrocious,' 'beyond all possible bounds of decency' and 'utterly intolerable.'"

CAROLYN T. ELLIS  
lawyer for Mr. Arnell, citing standards from case law

front of male employees intimating that I was

4. Mr. Arnell would act in the above, and act in the

# English-only memo given to employees

By MIMI WHITEFIELD  
Herald Business Writer

The Spanish American League Against Discrimination has taken issue with a memo apparently issued by a Miami air leasing company that says English is the only acceptable language in the workplace.

Osvaldo Soto, chairman of SALAD, said he received a copy of a memo last week signed by George Batchelor, president of International Air Leases, that said:

"Our company policy has been and continues to be that no language other than English is to be spoken during the workday. We are an American company, in America, and I

expect our employees to speak English whether at their desks, in the hallways or communicating with each other by telephone."

Soto said he sent a letter to Batchelor last Friday stating that he had received "this incredible memo that appears to be yours" and asked for immediate confirmation or denial of



Batchelor

its authenticity.

Soto said Tuesday night that he hadn't received a response.

"We are looking into this," said Michael Henrickson, an attorney for International Air Leases. "Our position is not to comment at this time."

Soto, a lawyer, said he views English-only policies in the workplace as a violation of First Amendment and privacy rights.

"It's my contention that even though English is the language of this nation, Spanish is a benefit to this community and speaking not just English but two or three languages is intrinsically tied to the economic future of this area."

The memo received by SALAD said an English-only policy spelled out previously by Batchelor had been ignored in recent months and stated, "I will continue to pay my employees in American money, not pesos, but unless there is an immediate and continuing improvement, I intend to cut all vacation time in half."

"I found this to be insulting," Soto said. "If this is true, it's sad really."

**DUPONT CO.**

### **Class-Action Status Sought In Conoco Texas Bias Case**

Lawyers for five black and Hispanic plaintiffs who claim they were discriminated against by Conoco Inc., a unit DuPont Co., said they will seek class-action status in a lawsuit filed this week. The suit, filed Monday in a federal court in Dallas, alleges racism at Conoco-branded gasoline stations and convenience stores in North Texas. The original complaint details two incidents of racist remarks and violence that allegedly occurred in 1995. Hal Gillespie, lead attorney for the plaintiffs, said his clients contacted the company after the incidents occurred but "were unable to resolve the issues at that time." A Conoco spokesman said the company has yet to be served, but "is taking the allegation very seriously." He said Conoco has started an investigation and is going through customer complaints received since January 1995. The spokesman noted that the company owns and operates 20 of the 374 Conoco-branded outlets in North Texas.

### Sex Discrimination

#### **Punitive Under 1991 Rights Law Not Subject to Heightened Standard**

**C**ongress did not intend punitive damages authorized under the Civil Rights Act of 1991 to be limited to extraordinarily egregious employment discrimination cases, a divided U.S. Court of Appeals for the District of Columbia Circuit has ruled.

Judge David S. Tatel found a lower court erred by refusing to allow consideration of punitive damages to go to the jury that determined the American Dental Association discriminated against top-ranking employee Carole Kolstad on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (*Kolstad v. American Dental Association*, CA DC, No. 96-7030, 3/21/97).

Also on March 21 the U.S. Court of Appeals for the Second Circuit issued *Luciano v. The Olsten Corp.*, which found "nothing" in the text of the 1991 civil rights law "indicates a heightened standard was meant to apply to Title VII cases" (58 DLR A-9, 3/26/97).

"By our decision today, we do not suggest that evidence sufficient to establish liability under Title VII for intentional discrimination will always sustain an award of punitive damages under section 1981(a)" of the 1991 civil rights law, Tatel wrote.

For example, in a hostile work environment situation, evidence of employer liability may not be enough to show that the employer "maliciously or recklessly permitted the offending conduct," the court said. And the 1991 civil rights law, itself, already excludes punitive damages in disparate impact cases, the court noted.

"Decisive to us, however, is Section 1981 (a)'s plain language, which tracks the standard that courts had previously established for the proof required to sustain awards of punitive damages under other federal civil rights statutes," the majority wrote.

**Punitive for 'Garden-Variety' Claims? Dissenting Judge Stephen F. Williams objected to the majority's finding that "in a Title VII suit the minimum standard of evidence for punitive damages is, with narrow exceptions, no higher than the standard for liability."**

1 / 2

Williams warned that "the upshot of the majority's view is that punitive damages are available in every case of garden-variety Title VII discrimination, excepting only a few rather unusual ones."

Section 1981(a) of the 1991 civil rights act authorizes punitive damages for intentional discrimination under Title VII, and under Section 1981(b)(1), punitives are recoverable if a plaintiff demonstrates that a defendant "engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

The law caps punitive and compensatory awards at between \$50,000 and \$300,000, depending upon an employer's size.

**Cut-and-Paste Job Description.** A jury decided the Chicago-based ADA intentionally discriminated against Kolstad based on her gender when it denied her a promotion and instead promoted a male colleague for whom the association had written a "cut-and-paste" job description based on the man's qualifications, Tatel wrote.

The job in question was the second-highest ranking position with the ADA's Washington, D.C., office. Tatel said the evidence indicated that the male applicant had been preselected before the job opening was posted.

In Kolstad's subsequent Title VII claim, "the district court denied ADA's motion for judgment as a matter of law, but dismissed Kolstad's claims for compensatory and punitive damages, finding the evidence insufficient to support them," the court wrote. The jury found ADA discriminated against Kolstad and awarded \$52,718 in back pay.

The district court denied Kolstad's motion to be placed in the job she was denied, and held that she was not entitled to further equitable relief or attorneys' fees "because she failed to prove 'to the court's satisfaction' that she was a victim of sex discrimination," Tatel wrote.

Kolstad appealed, arguing that the district court erred in refusing to allow the jury to consider a punitive damages award and in denying her request for reinstatement and attorneys' fees. ADA cross appealed.

**Discriminatory Intent.** Tatel noted that preselection of a job candidate is relevant to the question of discriminatory intent and tends to discredit an employer's argument that discrimination was not at play in an employment decision.

The majority decided that because sufficient evidence was introduced to permit the jury to conclude that Kolstad proved intentional sex discrimination, "the district court should have instructed the jury that upon the requisite finding—malice or reckless indifference to Kolstad's rights—it could consider a punitive award."

"As both the Supreme Court and this court have explained, evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages," Tatel wrote, referring to the high court's 1983 decision in *Smith v. Wade* (461 U.S. 30).

Tatel quoted with approval from a D.C. Circuit decision he wrote in 1995, which held that evidence sufficient to establish an intentional violation of 42 U.S.C. Section 1981 may also be sufficient for a jury to award punitive damages (*Barbour v. Merrill*, (67 FEP Cases 369; 68 FEP Cases 126).

"[W]e hold that the standard of proof required to sustain awards of punitive damages under [the 1991 statute] is the same as that previously established for punitive awards under" under 42 U.S.C. Sections 1981 and 1983, two Reconstruction-era civil rights statutes, Tatel ruled.

The court also noted that the legislative history of the 1991 civil rights act cited a 1987 decision of the U.S. Court of Appeals for the First Circuit, which rejected the notion that something more than intentional discrimination is needed for a punitive damage award in a race discrimination claim brought under Section 1981 *Rowlett v. Anheuser-Busch*, (44 FEP Cases 1617).

The D.C. Circuit majority also remanded for reconsideration Kolstad's claims for additional relief and attorney's fees.

The majority decision was joined by Judge Patricia M. Wald.

**Expiration of Consent Decree.** According to Joseph A. Yablonski, of the Washington, D.C., law office of Yablonski, Both & Edelman, which represented Kolstad, the punitive damages question addressed by the D.C. Circuit is "not fully developed" by the federal appeals courts.

He questioned Judge Williams' assertion in his dissent that every other sister circuit to consider punitives under Section 1981(a) has demanded a "more culpable state of mind for punitive damages than the ordinary intent necessary for a violation of Title VII." The five cases cited by Williams either involve court dicta or are somewhat ambiguous on the precise question addressed by the D.C. Circuit, Yablonski said.

In any case, "I don't know what a garden variety discrimination case is, but if there's any such animal, this ain't one of them," he said. Kolstad's case "involved the highest level of authority" at the ADA.

"The top officials engaged in the process of cutting and pasting a job description and then not telling the truth about it," he said. According to Yablonski, the ADA was operating under a consent decree to address sex discrimination and failure to promote women during the seven years prior to when Kolstad sought the job, and "this was the very first high level post that opened up" after the decree expired.

The law firm representing the ADA declined comment.

2/2

### Disabilities Discrimination

#### **Federal Courts Deny Trio of ADA Claims For Failure to Raise Prima Facie Case**

**T**hree federal district courts recently granted summary judgment to employers defending claims under the Americans with Disabilities Act, finding that the plaintiff in each case had failed to raise a prima facie case of disability discrimination.

A former football referee who was fired for alleged poor performance failed to raise a factual issue that he was "regarded as disabled" because of obesity when all parties agreed that his weight does not prevent him from working at other jobs, the U.S. District Court for the Northern District of Illinois ruled (*Clemons v. The Big Ten Conference*, DC NIll, No. 96 C 0124, 2/19/97).

A chemical company employee who violated a return-to-work agreement by driving while intoxicated has no ADA claim based on the alleged disability of alcoholism, a federal district court in Texas ruled, finding that the plaintiff's breach of the agreement justifies discharge (*McKey v. Occidental Chemical Corp.*, DC Texas, No. G-96-170, 2/28/97).

An ADA plaintiff is "equitably estopped" from claiming that he is a qualified individual with a disability when he is receiving Social Security benefits on the presumption that he is unable to work because of disability, the U.S. District Court for the Middle District of Florida decided (*Thomas v. Fort Myers Housing Authority*, DC MFla, No. 95-332-CIV-FTM-17D, 2/21/97).

**Obese Referee Not Disabled.** Lorenzo Clemons is an African American who was fired from his part-time job as a referee for Big Ten Conference football games in 1994. From 1988 through 1993, Clemons had officiated approximately 11 games a year as an umpire on a seven-member crew of officials. Clemons weighed 235 pounds when initially hired, but in the early 1990s, his weight fluctuated from 270 to 285 pounds. League officials warned Clemons that he must keep his weight down in order to retain his job. While Clemons worked as a Big Ten referee, he held other jobs, first as a salesman for Kimberley-Clark Co. and then as a staff person in the Cook County (Ill.) Sheriff's Office.

The Big Ten rates its officials' performance over the course of a season in order to upgrade their accountability and to better quantify their performance, according to the U.S. District Court for the Northern District of Illinois. Among the criteria used by the conference are: appearance and physical condition; position, coverage, and movement; consistency, common sense and judgment; poise, decisiveness, and game control; and relationship with coaches, players, and others.

1 / 2

In 1988, Clemons was ranked 21 among 41 officials. However, his rating dropped in the early 1990s. In 1990, Clemons was ranked 36 among 44 officials and was told that he should lose 20 pounds; in 1991, Clemons was ranked last among 49 officials, and the written comments on his evaluation cited "appearance, gaining weight." Although his ranking improved slightly in 1992, Clemons was ranked 43 out of 45 officials in 1993 and placed last among the six umpires for Big Ten games.

At the end of 1993, league officials told Clemons that he must report to the annual referees' clinic in August 1994 weighing 270 pounds or less. He was placed on probation and warned that if his performance did not improve, he would be released from the roster of football officials. When Clemons showed up in August 1994 weighing at least 285 pounds, the Big Ten conference canceled his contract for the 1994 season.

In rejecting Clemons' claim under the ADA, Judge William T. Hart held that the plaintiff's argument that he was "perceived as disabled" because of obesity must fail because he cannot show that Big Ten conference officials perceived that Clemons was substantially limited in the major activity of working. Indeed, Clemons conceded that he worked without interruption at full-time jobs other than football referee and that his weight did not hinder him in working at other jobs. Pointing out that football official is a "single job" rather than a "class of jobs" as discussed in regulations interpreting the ADA, the court concluded, "[Clemons] cannot demonstrate that he was regarded as disabled on the basis of a specific job of his own choosing."

The court also rejected Clemons' race discrimination claim under Title VII of the 1964 Civil Rights Act, holding that he cannot show that his job performance was adequate when the Big Ten canceled his contract.

Martin P. Greene of Greene and Letts in Chicago represented Clemons.

Mark E. Furlane of Gardner, Carton & Douglas in Chicago represented the Big Ten Conference.

**Misconduct Firing Upheld.** In the Texas case, plaintiff Jimmy Dan McKey alleged that Occidental Chemical Corp. unlawfully discriminated against him on the basis of alcoholism when it fired him in June 1995 following an off-duty auto accident in which McKey's blood alcohol level was 0.314, more than three times the state minimum for intoxication.

Approximately two years earlier, McKey had been referred to the company's employee assistance program for suspected substance abuse problems and in January 1994, he had signed a return-to-work agreement in which he promised to abstain from alcohol and to attend therapy sessions. Failure to comply with the agreement was cause for immediate discharge.

In granting summary judgment to Occidental Chemical, Judge Samuel B. Kent emphasized that the ADA does not make alcoholism a "disability per se" and that McKey failed to show that his condition substantially limits a major life activity. "By his own testimony, [McKey's] ability to hear, to speak, to breathe, to learn, to lift things, . . . and perhaps most importantly, to hold down a job, have not been impaired by alcoholism," the court wrote. "Because [McKey] is fully able to perform these basic functions, i.e., these major life activities, his alcoholism does not qualify as a disability under the ADA."

Even if McKey could establish a prima facie case, the court added, Occidental had a legitimate, non-discriminatory reason to fire him based on the return-to-work agreement. "The ADA specifically provides that an employer may hold an alcoholic employee to the same performance and behavior standards to which the employer holds other employees 'even if the unsatisfactory performance is related to the alcoholism of such employee,'" the court observed. "[T]he statute clearly contemplates distinguishing the issue of misconduct from an employee's status as an alcoholic. To find otherwise would force employers to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic's use of intoxicating beverages; behavior that would be intolerable if engaged in by a sober employee or, for that matter, an intoxicated but non-alcoholic employee."

Sean P. Tracey of Appfel & Tracey in Alvin, Texas, represented McKey.

Holly Harvel Williamson of Littler, Mendelson, Fastiff, Tichy & Mathiason in Houston represented Occidental Chemical Corp.

**Inconsistent Positions.** In the case from Florida, Judge Elizabeth A. Kovachevich agreed with Fort Myers Housing Authority that former employee Chilton Thomas has no ADA claim because he applied for and is receiving Social Security disability benefits based on the presumption that he was completely disabled and unable to work.

In his ADA suit, Thomas had claimed that FMHA failed to accommodate his work-related back injury and then fired him in violation of the ADA. Some six months after his discharge, Thomas applied for and began receiving Social Security disability benefits.

"A majority of courts have held that if an individual files for and receives Social Security disability benefits based upon the presumption that he was completely disabled and unable to work, that this action estops the individual from raising a claim under the ADA," Kovachevich wrote. "... The Court finds that under the circumstances of this case, [Thomas] is equitably estopped from asserting he is a qualified individual with a disability under the ADA."

John D. Mills of Ft. Myers, Fla., represented Thomas.

John F. Potanovic Jr. of Henderson, Franklin, Starnes & Holt in Ft. Myers represented the housing authority.

2 / 2

### Sex Discrimination

## **Jury Awards \$303,000 to AARP Employee Who Claimed Retaliation for Sex Bias Suit**

**A** jury of the District of Columbia Superior Court March 20 awarded \$303,000 in back pay and damages to a female employee of the American Association of Retired Persons who alleged that the employer retaliated against her for filing a sex discrimination suit.

The jury awarded Beth Smith \$2,000 in back pay, \$1,000 in compensatory damages, and \$300,000 in punitive damages after finding that AARP had retaliated against her after she filed suit in 1995, said attorney David Cashdan of Cashdan & Golden in Washington, D.C., who represented Smith (*Smith v. American Association of Retired Persons*, DC SuperCt, No. 95-CA-1268, 3/20/97).

AARP plans to contest the jury verdict, said Lisa Davis, the association's director of media relations. Davis emphasized that the jury found no sex discrimination by AARP in its failure to promote Smith. "We firmly believe that there was no discrimination and the jury backed that up," she said. "We certainly pride our-

---

selves on a fair employment standards record and our record speaks for itself."

The jury also did not find in Smith's favor on her claims of aiding and abetting against Stephen Cablk, a named defendant, said Cashdan. Smith still works for AARP, according to Davis.

In an amended complaint, Smith alleged that after she filed her sex bias suit, AARP retaliated by rating her 1995 performance as "requiring improvement" and by denying her a salary increase. Smith also alleged that the lawsuit was referenced in her evaluation and that she was cited for needing to improve her attendance, even though she received approval to take time off to attend proceedings in the case.

Judge Henry H. Kennedy Jr. of the District of Columbia Superior Court had denied AARP's motion for summary judgment in January 1996.

Smith began working for AARP's management information systems operation department in 1989, and for four years held a supervisory position in charge of technical support staff. She was demoted to a nonsupervisory analyst job by Cablk, an AARP director. Smith applied for a supervisory position, but AARP selected a male candidate instead. The association argued that the department was reorganized and that functions shifted because there were different needs, Davis said.

## Arbitration

### **SEC Commissioner Says Industry Panels Not Qualified to Handle Job Bias Claims**

**S**ecurities and Exchange Commissioner Isaac Hunt asserted March 24 that "securities industry-dominated panels are . . . uniquely unqualified to arbitrate employment discrimination claims, particularly when those claims involve gender or race discrimination."

Criticizing the mandatory arbitration of such claims, Hunt, in an interview with BNA, called for the creation of another system to handle them.

Questions surrounding the mandatory arbitration of employment discrimination claims in the securities industry are being considered in several quarters. Currently, a broker is required, pursuant to his or her registration with the National Association of Securities Dealers Inc. on Form U-4, to resolve employment-related claims, including discrimination claims, through NASD arbitration.

However, the NASD is in the process of considering recommendations by its arbitration policy task force to improve the arbitration of employment discrimination claims, among other matters. In February, Reps. Edward Markey (D-Mass), Anna Eshoo (D-Calif), and Jesse Jackson Jr. (D-Ill), in a letter to the SEC Chairman Arthur Levitt, questioned the use of Form U-4 to require arbitration of employment discrimination disputes, saying it may exceed the authority conferred to the NASD and the other self-regulatory organizations by the 1934 Securities Exchange Act.

Markey March 6 introduced legislation, the Civil Rights Procedures Protection Act (HR 983), that would prohibit employers from using their own employment contracts to mandate the arbitration of disputes arising under the discrimination laws.

Levitt, responding to the February letter, commended Markey for "bringing this important policy issue squarely before the Congress." He said that the lawmakers' question about the scope of SRO authority "has no clear answer," but added that he believes the SEC should give the NASD the opportunity to address the task force recommendations before taking action.

Separately, Equal Employment Opportunity Commission Legal Counsel Ellen Vargyas said the EEOC believes the Form U-4 agreements violate the civil rights laws.

**Preserve 'Their Day in Court.'** "People should not have to give up their day in court in order to obtain employment in the securities industry," Hunt told BNA. That, in effect, is what happens when registered representatives agree to the conditions of the Form U-4, he contended.

In addition, Hunt asserted that securities industry-dominated panels are uniquely unqualified to arbitrate employment discrimination claims. "If you look at the makeup of the industry, you're not going to have the most diverse group of employees and employers in the world," he commented, adding, "They have very little experience in these areas of the law." "For those

reasons, . . . we need to devise another system for the handling of employment discrimination claims, particularly where race or gender is involved," Hunt concluded.

## Women's Bureau

### **Women's Participation in U.S. Workforce At All-Time High, Labor Department Reports**

**T**he 1990s saw black women enter higher-paying managerial and professional jobs in record numbers, but Hispanic women were still likely to hold low-paying service jobs, the department's Women's Bureau said in three separate fact sheets.

The bureau found that more black and Hispanic women are in the U.S. labor force than ever before, but that most women continue to earn less than their male counterparts.

Ida Castro, the director-designate of the Women's Bureau, said the information in the three fact sheets confirms that working women of all races are finding opportunities in the labor force, but added that the data also illustrates the importance of getting education and training. "The real challenge will be making sure they get the skills they need to prosper in the 21st century," she said.

Most of the statistics contained in the fact sheets are from the Labor Department's Bureau of Labor Statistics and the U.S. Census.

**By the Numbers.** Some 7.6 million black women were part of the U.S. labor force in 1995, more than ever before, the bureau said in its fact sheet *Black Women in the Labor Force*. The bureau expects that trend to continue as BLS projects that 9 million black women will be labor-force participants in 2005.

Some 1.5 million black women in 1995 held higher-paying managerial jobs, a 75 percent increase from the 863,000 in 1985, the bureau said. In 1995, black female professionals were employed mostly as registered nurses, elementary school teachers, social workers, accountants, and prekindergarten/kindergarten teachers. Some 2.7 million black women in 1995 held positions in technical, sales and administrative support occupations.

Despite this progress, the bureau said black women in general "face various stern realities." In 1995, black women who worked full time earned 85 percent of comparably employed white women, 86 percent of similarly employed black men, and only 63 percent of what white men earned. Black women are nearly three times as likely to live in poverty, and twice as likely to be unemployed as white women, the bureau said.

Women of Hispanic origin continue to have a lower participation rate than white and black women in terms of labor force participation, according to *Women of Hispanic Origin in the Labor Force*. However, the bureau expects to see a dramatic increase in the number of Hispanic women in the workforce. The number of Hispanic women in the labor force is expected to increase to 7 million in 2005, from 4 million in 1992.

Nearly 40 percent of Hispanic women workers in 1993 worked in retail sales, as secretaries or cashiers, the bureau said. Hispanic women were much more likely to be employed as operators, fabricators, laborers, and service workers, and were less likely to be employed in management or speciality jobs with the higher salaries than non-Hispanic women.

Hispanic women who worked year-round, full-time in 1991 had median annual earnings of \$16,200, nearly 80 percent of what similarly employed non-Hispanic women earned, according to the bureau.

**More Managers, But Not CEOs.** The employment of women in management has greatly increased since the 1980s, especially for black and Hispanic women, but the management jobs are not likely to be the top corporate spots, the bureau said in *Women in Management*. The term "management" is a broad category, the bureau noted, ranging from fast food managers to chief executive officers of large corporations.

In 1995, some 7.3 million women were employed in managerial jobs, an increase of 31 percent since 1988. Women are more likely to hold executive or managerial posts in fields dominated by women, such as the service industry. Women managers are less likely to be em-

ployed in manufacturing, construction, transportation, and public utilities.

The bureau also reiterated the 1995 findings of the Glass Ceiling Commission that found women hold less than 5 percent of top corporate positions (51 DLR A-1, 3/16/95).

Weekly earnings of women in management positions continues to be below that of male managers, the bureau said. In 1995, white and black women managers were making less than 70 percent of what male managers made. Hispanic women fared the worst, the bureau said. The earnings of Hispanic women managers averaged 58 percent of white male's earnings.

---

For more information or to obtain a copy of "Facts on Working Women" call 800 827-5335 or visit the agency web site at: [www.dol.gov/dol/wb/](http://www.dol.gov/dol/wb/)

# In This Issue

Lead Report / Page AA-1

News / Page A-1

Economic News / Page D-1

Text / Page E-1

## LEAD REPORT

**DISABILITIES DISCRIMINATION** EEOC sets out employer guidance on psychiatric disabilities under ADA ..... AA-1

Text of EEOC guidance on psychiatric disabilities and the ADA ..... E-1

## NEWS

**AIRLINES** American, pilots agree to extend cooling-off period past April 28 deadline ..... A-1

**ARBITRATION** SEC commissioner says industry panels not qualified to handle job bias claims ..... A-5

**DISABILITIES DISCRIMINATION** Federal courts deny trio of ADA claims for failure to raise prima facie case ..... A-2

**EMPLOYMENT POLICIES** Study finds increasing employment of expatriates ..... A-15

**ERISA** Second Circuit revives retiree challenge to Kodak denial that changes were planned ..... A-3

**FEDERAL EMPLOYEES** Federal impasse panel to decide union dispute over IRS layoff plans ..... A-6

**FLSA** NAM, UNITE speakers diverge sharply on legislation to improve U.S. workforce ..... A-5

**HEALTH CARE** President names advisory panel; patient rights called top priority ..... A-14

**MINIMUM WAGE** Colorado governor vetoes bill barring local minimum wage increases ..... A-12

**NAFTA** Some 200 lawmakers urge Clinton to continue Mexican trucking restrictions ..... A-2

**ORGANIZING** Sweeney urges unions to devote funds to AFL-CIO's renewed organizing efforts ..... A-7

**PENSIONS** Labor Department proposes amendment to plan asset rule ..... A-4

**PRODUCTIVITY** Productivity in coal mining soared thanks to technology, labor harmony ..... A-7

**RACE DISCRIMINATION** Judge approves Texaco settlement, reserves judgment on attorneys' fees ..... A-13

**SAFETY AND HEALTH** Fungicide- use limits on strawberries not protecting field workers, groups claim ..... A-11

**SEX DISCRIMINATION** Jury awards \$303,000 to AARP employee who claimed retaliation for sex bias suit ..... A-1

Punitives under 1991 civil rights law not subject to heightened standard ..... A-8

Text of decision of the District Columbia Circuit in *Kolstad v. American Dental Association* ..... E-14

**SEX HARASSMENT** Court rules EEOC may contact potential class members in suit against Mitsubishi .... A-10

**SPORTS** Baseball owners, players reps to meet on antitrust legislation ..... A-6

**WOMEN'S BUREAU** Women's participation in U.S. workforce at all-time high, Labor Department reports ..... A-9

## ECONOMIC NEWS

**MANUFACTURING** Durable goods orders up 1.5 percent in February, Commerce Department says ..... D-1

**COLLECTIVE BARGAINING** BNA's negotiated wage data shows median 40.6-cent increase to date in '97 ... D-3

## TEXT

EEOC guidance on psychiatric disabilities and the ADA ..... E-1

Decision of the District Columbia Circuit in *Kolstad v. American Dental Association* ..... E-14

## TABLE OF CASES

*Ballone v. Eastman Kodak Co. (CA 2)* ..... A-3

*Clemons v. The Big Ten Conference (DC NIII)* ..... A-2

# Leaping Into Retirement

By Mike Causey  
Washington Post Staff Writer

**E**arly retirement is like bungee jumping. It's not for everybody, but some folks can't wait to try.

Early retirement isn't popular in government (the typical fed leaves at age 61) unless Uncle Sam tosses in a buyout. Stand-alone early-outs aren't popular.

Some federal workers say they will take early retirement when and if (ha!) Congress eliminates the penalty for retiring early. Most feds take a 2 percent pension hit for each year they retire before age 55. The chances of Congress waiving the penalty are slim and none. By the time it happens, everybody who is interested—no matter how young they are today—will be too old to take advantage of it, or care.

But like eager bungee jumpers, some feds say they would retire tomorrow (penalty or no penalty) if Uncle Sam would open the early-out window. During such times, employees can depart on immediate pensions if they are at least age 50 with 20 years of service, or at any age (for some that is as young as 43) if they have 25 years in government.

Most agencies have the authority to offer early retirement. They no longer have to get permission from Congress or the Office of Personnel Management. In most cases, the early-out authority is due to expire in September. The last agency granted early-out authority was Fannie Mae, which got the approval in mid-February.

Because early-outs are so unpopular, many agencies haven't even informed employees that the possibility exists. But anybody can ask, and some downsizing agencies would jump at the chance, especially if it meant they didn't have to pay buyouts. It is one thing for an agency to tell you it isn't interested in offering early-outs. But if it tells you it can't do it—because of Congress, OPM or whatever—it is probably fibbing big-time.

## People

Steve Guiheen, one of the very best in the business, is retiring from the General Services Administration's public affairs

operation. He's been getting out the word for 20 years and his official conduct has been above reproach. Off-duty, however, he lives in a fantasy world where he is the quarterback for the Notre Dame football team.

Housing and Urban Development's Duane McGough is retiring after 39 years with Uncle Sam, most of them with HUD and predecessor agencies. He's been responsible for the American Housing Survey since it started. Colleague Ron Sepanik says everybody who worked with McGough is better for the experience.

## Results Update

Key personnel involved in developing their agencies' strategic plans, which are due Sept. 30, will be glued to the TV set Wednesday for a special satellite broadcast on the subject. The broadcast will feature Vice President Gore, Sen. John Glenn (D-Ohio) and Rep. Richard K. Armey (R-Tex.). They will explain what Congress and the White House expect in the way of strategic planning, mandated by the Results Act of 1993. The 90-minute broadcast will begin at 1 p.m. EST. For details on how to tune in, call the Office of Personnel Management Bulletin Board System via modem at 202-606-4800, or check out OPM's Web page at <http://www.opm.gov>.

## Diversity Day

The Food and Drug Administration's Center for Drug Evaluation and Research will have its "diversity day" observance April 8 at the Parklawn Building conference center in Rockville. Speakers will include Evelyn White, Health and Human Services; Michael Friedman, FDA; Janet Woodcock, director of the center; Asuntha Chiang, office of Sen. Barbara A. Mikulski (D-Md.); and Luwanda Jenkins, office of Maryland Gov. Parris N. Glendening (D). For details, call 301-594-6645.

Thursday, March 27, 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)

THURSDAY, MARCH 27, 1997

THE WASHINGTON POST

# AFFIRMATIVE ACTION: CHOOSING SIDES

After approval of a ban by the University of California Regents,  
Asian-Americans face yet another divide.

BY NORIMITSU ONISHI

IRVINE, Calif.

**P**HAT X. CHIEM UNDERSTOOD well why many of his fellow Vietnamese-American students on the University of California's campus here opposed affirmative action.

In 1979, he fled Saigon with his mother. Like tens of thousands of South Vietnamese refugees, they settled in Orange County, living in Costa Mesa, just a quick drive up the freeway from Irvine. When it came time to college, Mr. Chiem's high school grades were good enough to get him into U.C.L.A. But given the limits of his mother's wages as a factory worker, and the expense of living in Los Angeles, Mr. Chiem decided instead to stay home and commute to Irvine.

Many in his old circle of high school friends — strictly other Vietnamese-Americans — also enrolled at Irvine, majoring in biology and dreaming of medical school. And they hoped that by the spring of 1988, when the University of California has said it will stop using race as a factor in admissions for African-American, Hispanic and American Indian applicants, the acceptance odds would rise for Asian-Americans like them.

But at Irvine, Mr. Chiem made a second group of friends through his work on the campus newspaper. Most of them were whites. He quit the pre-med track to major in English. He spent the next few years covering the campus's different racial and ethnic groups, and spent summers in Fresno and Seattle as a reporting intern. By last year when he was elected editor in chief of the paper, *The New University*, Mr. Chiem's view of community had changed. And so had his views on affirmative action.

"Will Vietnamese-Americans benefit by the elimination of affirmative action?" said Mr. Chiem, now 21 and a senior, as he sat in a tree-lined plaza next to the main library. "Yes, I think so. But my concern is, are we then going to have a campus that's all Asian-American and white? When you have a campus where the population of African-Americans is 2 percent, it's hard to say we should eliminate affirmative action to increase the number of Asian-Americans."

Many Asian-Americans have found themselves torn over the ban on affirmative action at the nation's leading state-run university system. Last July, under pressure from Gov. Pete Wilson, the Board of Regents decided that the new admission policies would focus on academic achievement but would still allow the nine campuses to consider the impact of an applicant's disadvantaged economic background.

Norimitsu Onishi is a metropolitan reporter for *The New York Times*.

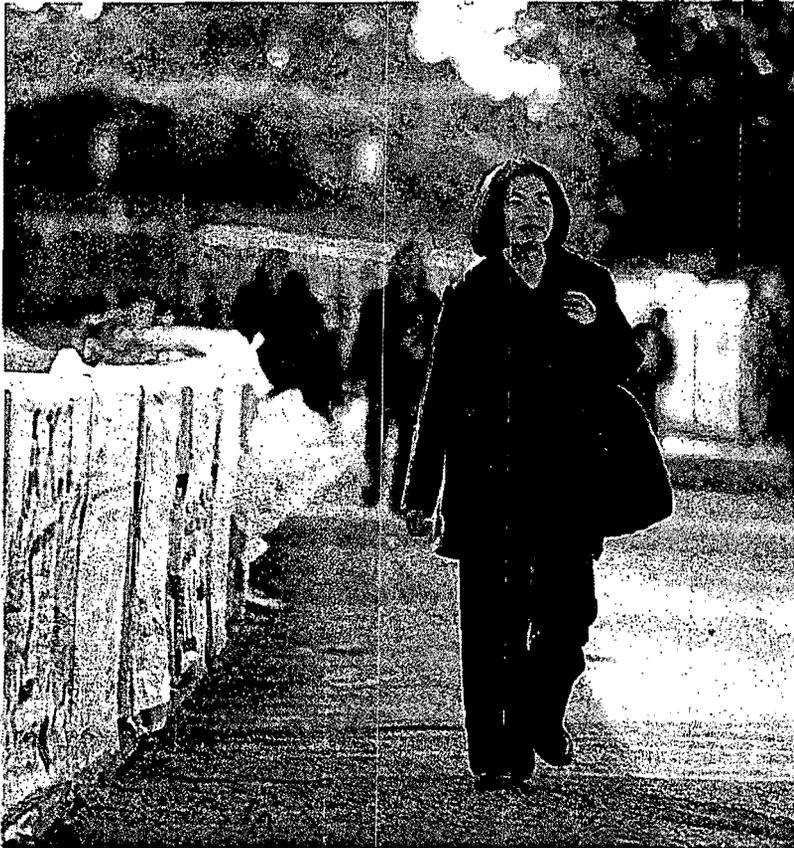
The new criteria are expected to boost the number of Asian-Americans, who generally have the highest grades and test scores of any racial group, and to hurt African-American and Hispanic applicants.

Binh Nguyen, 21, has been Mr. Chiem's best friend since they were 12. Mr. Nguyen admired his friend's individualism and the ease with which he moved in mainstream campus life. Mr. Nguyen's family, who arrived in the United States from Saigon in 1975, considered the medical profession the ideal, safest road to success in America. So an older sister graduated from George Washington University medical school, and an older brother is studying medicine at U.C.L.A.

At Irvine, Mr. Nguyen was planning to be a fifth-year senior next year, to boost his 3.4 grade-point average before applying to medical school. He was worried that for an Asian-American like him, getting into a University of California medical school would be hard. He also worried for Khang Dat and Nhat Tran, friends of his and Mr. Chiem's, who were applying to medical school this year and whose G.P.A.'s were higher than his own.

"Without affirmative action, it would hurt me to get into med school," Mr. Nguyen said. "Affirmative action is kind of needed, but for me as an applicant, I would personally not support it. I would look at affirmative action more on an individual basis, how it affects me."





Photographs by Jim Wilson/The New York Times



**TOP LEFT**, Michelle Tsui, who is Chinese-American, is the first Asian-American student-body president at Irvine. **BOTTOM LEFT**, Sunny Lee, who is Korean, was surprised by the disunity she found on campus. **ABOVE**, Phuong Pham, a Vietnamese-American student, tells friends to "stop being selfish." **LEFT**, Phat X. Chiem, also Vietnamese, edits the campus newspaper and now supports affirmative action.

rather than how it affects other minority groups. I wouldn't think how it affects all Asians. I wouldn't think that big. I would extend it to my friends. I would say Khang and Nhat are qualified. And if they didn't get in and they're qualified, I would be bummed."

For Asian-Americans the issue often comes down to this: Do they look out for their own interests? Or do they broaden their sense of community to include the interests of African-Americans and Hispanics? It is a particularly difficult question for what continues to be a largely immigrant population, already split along ethnic, generational, linguistic and income lines.

At one end are Chinese-Americans and Japanese-Americans who have been in the United States for a century and whose income and educational levels are above the national average. At the other economic end are Vietnamese, Laotians and Cambodians who came as refugees in the 1970's and 1980's; many of them are illiterate in their own language. In the vast middle: the Chinese, Koreans, Indians, Filipinos, many of them professional, who have come to the United States since 1965. The difference in opinions over affirmative action can also be heard at the dinner table: between the parent who mixes only with fellow immigrants and the child who attends a college with a diverse student body. And while Asians are not the only minority immigrant group in this country with such divisions, their

disproportionately high numbers in higher education and their resulting exclusion from race-based affirmative action initiatives do serve to put them in a special position. Many believe that Asian-Americans' potential political strength is weakened by their internal divisions.

"Even at Berkeley, Asian-Americans are apathetic or disagree with one another," said Justin Fong, 21, a junior who has organized building takeovers to fight for affirmative action. "It's very difficult to get anything done."

The issue of affirmative action in California is further complicated by the California Civil Rights Initiative, a proposed state amendment that would ban race-based affirmative action in government hiring and contracting. The state will vote on it in November.

"We recognize the problem with the U.C. system. Now we're being excluded because of affirmative action," said Charles Kim, executive director of the Los Angeles-based Korean-American coalition, which, like

## For Asian-Americans the issue often comes down to this: Do they look out for their own interests?

other Asian-American civil rights organizations, is fighting the amendment. "But at this point, affirmative action is one way to achieve social and economic equality. At this point, for example, if you take a look at the managerial level, we're severely underrepresented."

In the 1980's, education seemed to be the one issue that did unify Asian-Americans.

Congress lifted stringent quotas on immigration from Asia and Latin American in 1965 and gave preference to immigrants closely related to citizens. Their numbers increased so much that they now represent the largest groups of foreign-born residents in this country. By the 1980's, many children of those post-1965 Asian immigrants had reached college age and were becoming a growing share of the student populations at many of the nation's elite universities.

At the time, many Asian-American academics and advocates charged that institutions like Stanford, Berkeley, Harvard and Brown were informally capping the number of Asian-Americans they admitted. The universities, advocates said, were re-erecting the unofficial quotas that two generations earlier had kept the growing number of qualified Jews from their campuses. The universities largely denied these accusations, arguing instead that Asian applicants tended to be concentrated in the sciences and tended not to be the offspring of alumni.

Between 1988 and 1995, 16 out of 40 of the complaints filed with the Department of Education involving Asian-Americans and admissions at colleges or universities resulted in decisions favoring the complainant, according to a report by the United States General Accounting Office released in December. That proportion was far higher than for any other racial group.

Today, many Asian-Americans say that it is the affirmative action policies at public institutions like the University of California that perpetuate the practice of denying them educational opportunities they have rightly won.

"When I was young, I had a hard time getting things



Christopher Ayres for The New York Times



Jim Wilson/The New York Times



Jim Wilson/The New York Times

UPPER LEFT, S. Stephen Nakashima, a member of the California Board of Regents, says the current system punishes Asian-American students. LEFT, Lee Cheng, a law student at Berkeley, is seeking to abolish quotas at an elite San Francisco high school. ABOVE, Marcy Wang, former Berkeley professor, said she was denied tenure because she is a Chinese-American woman.

Although Asian-Americans are only 10 percent of California's population, they make up about a third of the undergraduates in the state system. They are the largest racial group at Irvine, Riverside and the system's two most competitive universities, U.C.L.A. and Berkeley. And in city college systems and in community colleges across the state, they make up a disproportionately high share of the student population. Even the percentage of Asian faculty, which is only about 4 percent throughout the country, according to the United States Department of Education, is about 20 percent in the University of California.

Worried about the effects of the end of affirmative action, many educators are groping for ways to maintain the racial diversity of their campuses. Berkeley's Chancellor, Chang-Lin Tien, a Chinese-American, is the only Asian-American head of a U.C. campus. (See related essay on Page 30.) Chancellor Tien, who opposes the ban on affirmative action, said his university has pledged \$1 million annually over five years to help disadvantaged youths from the San Francisco area's major urban school districts qualify for entrance.

.....

**A**T IRVINE, the university's unusual racial mix has spawned nicknames that, depending on who tells the joke, can be self-mocking or resentful. What does U.C.I. stand for? "The University of Chinese Immigrants" or "The University of Civics and Integrals," after the Hondas and Acuras that are the favorite cars of many Asian-Americans on campus.

A walkway near the student center is plastered with a poster in Korean and English, announcing a sports match between a Korean-American students' associa-

tion for those who speak Korean and a Korean-American association for those who do not. Inside the food court, students can order Chinese food and sushi. The food court also is a favorite hangout for many members of the five Asian sororities and fraternities, while the tables just outside are popular among those who belong to white Greek societies. Unaffiliated Asian-Americans are partial to the cafe.

Yet there also is a cross-cultural center on campus housing three umbrella groups whose purpose is to unify African-American, Hispanic and Asian-American students. And there is mixing of students even in the carvings on a tree. On a eucalyptus behind the plaza, a heart is carved with "Jenn + Thanh," the latter being a Vietnamese male name; next to it are the Vietnamese and English names of two women, "Xuân + Maria."

Not too long ago, Michelle Tsui was flipping through old family albums and recognized several photos of herself — at age 1 — in front of Irvine's main library. She realized that her parents, among the first wave of Chinese immigrants to move to Orange County just as U.C. Irvine was founded in 1963, had clear intentions.

"My parents visited the campus because even back then they wanted me to study here," said Ms. Tsui, 22, who last year became the first Asian-American to be elected president of U.C. Irvine's student government.

Manuel N. Gomez, now a vice chancellor who has been at Irvine since 1972, said many Asian immigrant families, like Ms. Tsui's, gravitated to Orange County because of the university.

The racial makeup of the campus reflects in part the change in Orange County over the last two decades from a largely white population to one with one of the most diverse concentrations of Asian immigrants. Starting in the early 1970's, Chinese immigrants settled throughout the area, followed by Vietnamese refugees and Korean immigrants, who eventually built a Little Saigon and a Koreatown in the cities of Garden Grove and Westminster. Irvine is also just 50 miles south of Los Angeles's population of both recent and more established Asian-American groups.

Phuong Pham, 22, a senior who heads a Vietnamese-American students organization, said she is a minority

because I was Japanese, and now it's the other way around," said S. Stephen Nakashima, 73, a University of California Regent who voted to ban race-based affirmative action. "You're Japanese, you're doing well, and they won't accept you."

"Back then," Mr. Nakashima said, referring to American society before affirmative action policies were created in the 1960's, "the discrimination was against Asians, blacks and Chicanos. Now it's against the whites and Asians."

The Supreme Court decided last May that race-based scholarships were unconstitutional. In January, Colorado began giving out only class-based scholarships. University systems in several states also are reviewing how they grant scholarships. And Arizona's state university system is considering eliminating race as a factor in its admissions.

But it is in California, home to 40 percent of the nation's 774,000 Asian-American college and university students in 1994 (New York was a distant second with 8 percent), that Asian-Americans must navigate affirmative action's politically treacherous waters.

among Vietnamese-Americans in supporting affirmative action. Even though she came to this country only in 1982, after spending her early childhood in Saigon, where she and her mother sold matches on the street to support themselves, Ms. Pham said she does not share what she described as her fellow Vietnamese-Americans' narrow view of community.

"They tell me, 'We came here with almost no English and we've worked hard to be proficient. We're on survival mode. So how can we think of other groups?'" Ms. Pham said. "I tell them, 'Now that you're proficient in English, stop being selfish and work with other groups. You should go beyond survival mode.'"

Sunny Lee, 22, immigrated from South Korea at the age of 6 and grew up in a largely white community in San Bernardino. Drawn to Irvine's large Asian-American population, she was surprised to discover others with the same length and style of hair, and a few with the same first and last name as hers. But perhaps most surprising, she said, was learning about the deep divisions among Irvine's Asian-American students.

Because of Irvine's large immigrant population, the Asian-American students' varying levels of assimilation was one such divide, ranging from those who were "fresh off the boat" to those who were so "white-washed," she said, that they joined Irvine's white fraternities and sororities, instead of the Asian ones.

To bridge those divides, Ms. Lee is the social chairwoman of the Asian/Pacific Student Association, an umbrella group for 19 of the campus's Asian-American organizations. The association considers itself nonpolitical, although its officers support affirmative action.

"This alliance was created in 1984 so that the heads of the organizations would know what the others were doing," she said, "but it's difficult."

Perhaps because the Asian-Americans on campus are politically disorganized or undecided about affirmative action, Irvine has not experienced the protests over



Drawn for The New York Times

For her, she said, life would be the same if she were on a campus with 53 percent whites. What mattered was the small number of other African-American students. Despite her 3.7 grade point average at a Catholic high school and her score of 1,200 out of 1,600 on her Scholastic Assessment Test, she thought white and Asian-American students viewed her as having slipped into Irvine because of affirmative action.

....

AND THEN THERE are the Regents.

It was Ward Connerly, an African-American businessman and Regent who proposed the July vote banning affirmative action in admissions.

Mr. Nakashima, joined by the other Asian-American Regent, David Lee, a Chinese-American, voted with Mr. Connerly. Mr. Lee has spoken little about his decision. Not so Mr. Nakashima.

Because of his Japanese ancestry, Mr. Nakashima was interned in a United States Government camp during World War II. He graduated from Berkeley in 1948 and began seeking jobs as a certified public accountant. Companies, he recalled, refused to hire him. And so Mr. Nakashima went to Berkeley's Boat Hall School of Law. Eventually he built a successful law practice in San Jose, and in 1989 he was appointed to the University of California's Board of Regents by former Gov. George Deukmejian.

Mr. Nakashima said the new admission policies will concentrate Asian-Americans at Berkeley and U.C.L.A. and shift African-American and Hispanic students to the other campuses.

"The young black and Chicano students should enter the right schools," said Mr. Nakashima, whose children and grandchildren also attended the state's public universities. "If a young black student gets into Berkeley or U.C.L.A. and has a 3.4 average, and has to compete against 4.0's, what is he going to do? He can't compete."

The University of California guarantees a place at one of its campuses to the top 12.5 percent of high school seniors in the state. But although 13 percent of whites, 5 percent of African-American seniors and 4

percent of Hispanic students qualified in 1990, 32 percent of Asians-Americans did. The data, which the state collects twice a decade, are expected to show a further rise in qualifying Asian-Americans for 1995.

Starting for the spring enrollment of 1988, grades and scores on the S.A.T. test alone will determine 50 to 75 percent of students accepted, compared with the current levels of 40 to 60 percent. For the remaining slots, admission officers will instead weigh an applicant's socioeconomic background.

An internal report in May 1995, based on a computer simulation, predicted that such a change would result in a 15 to 25 percent overall rise of Asian-Americans at the University of California, and as much as 25 to 35 percent increase at Berkeley and U.C.L.A., where 75 percent of students would be admitted on merit. The number of whites would remain about the same, but Hispanic students would dip 5 to 15 percent and African-Americans would drop somewhere between 40 and 50 percent.

The report acknowledges that the outcome may not be so stark. But it is clear, said Terry Colvin, a spokesman for the University of California, that the new policy will boost Asian-American enrollment.

Lance T. Izumi, a fellow at the San Francisco-based Pacific Research Institute who testified at the hearings before the Board of Regents' decision in July, said the current race-based policies especially harm newer Asian-American groups. The newer groups, like Vietnamese or Cambodians, are lumped in with more affluent Asian-Americans who, if rejected at a public university, can afford to turn elsewhere, said Mr. Izumi, 37, whose grandparents came from Japan.

In a study of the acceptance rates of 519 U.C. Irvine students who applied to the University of California's five medical schools in 1993, the Pacific Research Institute found that black and some Hispanic applicants were admitted at more than twice the rates of Viet-

Continued on Page 32

**'They have the potential to be so politically powerful on this campus,' a black student said.**

its elimination like those at U.C.L.A. or Berkeley. In the fall, a small group of Hispanic students at Irvine, supported by advocates from off campus, held a hunger strike. But the strikers ended up attracting little support among Asian-American students, many of whom said they felt alienated by the strikers' extremism.

On a recent evening, about 60 people gathered at the cross-cultural center to listen to Ms. Lee and other Asian-American student leaders talk at a meeting for the Asian/Pacific Student Association. The messages were hardly political, but the underlying attempt at unity was clear. Students stood and explained what their organizations were doing, inviting others to functions. Four groups lobbied for membership in the umbrella organization.

The next day, Stephanie Essig, 21, a black biology major from Oakland who was sitting in the African-American student union at the cross-cultural center, said she was surprised at the Asian-Americans' political disunity. "They have the potential to be so politically powerful on this campus," she said.

# A VIEW FROM BERKELEY

'We should consider race, ethnicity and gender' in admissions, the chancellor says.

BY CHANCELLOR CHANG-LIN TIEN

**W**HEN THE DEBATE over affirmative action in higher education started to simmer, the stance I took as the chancellor of the University of California at Berkeley seemed to surprise many people.

To be sure, my view — that we should consider race, ethnicity and gender along with many other factors in admissions — has put me at odds with some constituencies, including the majority of the Regents of the University of California. Last July, these officials voted to end affirmative action admission policies.

And with California voters to decide later this year whether to end all state affirmative action programs, silence might seem a more prudent course for the head of a major public university. We already have enough battles to fight, my staff sometimes reminds me: declining public funding, for example.

A few students and friends have hinted that it might make more sense for me, as an Asian-American, to oppose affirmative action.

Asian-Americans, who are not considered underrepresented minorities under affirmative action, have divergent views. Some are disturbed by the "model minority" stereotype; they say it pits them against other minorities and hides the discrimination they still face. Others — including the two Asian-American Regents who voted to end affirmative action — believe the only fair approach is to base admissions on academic qualifications. That also opens the door to more Asians.

So why do I strongly support affirmative action? My belief has been shaped by my role in higher education. And by my experience as a Chinese immigrant. I know first-hand that America can be a land of opportunity. When I came here, I was a penniless 21-year-old with a limited grasp of the language and culture. Yet I was permitted to accomplish a great deal. My research in heat transfer contributed to better nuclear reactor safety and space shuttle design. My former students are professors and researchers at some of America's best schools and business concerns.

But as I struggled to finish my education here, I also encountered the ugly realities of racial discrimination. This, too, is part of America's legacy and it is inextricably connected to the need for affirmative action.

When I first arrived in this country in 1956 as a graduate student, for example, I lived in Louisville, Ky. One day I got on a bus and saw that all the black people were in the back, the white people in the front. I didn't know where I belonged, so for a long time I stood near the driver. Finally, he told me to sit down in the front, and I did. I didn't take another bus ride for a whole year. I would walk an hour to avoid that.

I served as a teaching fellow at Louisville for a professor who refused to pronounce my name. He addressed me as "Chinaman." One day he directed me to adjust some valves in a large laboratory apparatus. Climbing a ladder, I lost my balance and instinctively grabbed a nearby steam pipe. It was scorchingly hot

*Chang-Lin Tien has been chancellor of the University of California, Berkeley since July 1990.*



Jim Wilson for the New York Times

and produced a jolt of pain that nearly caused me to faint. Yet I did not scream. Instead, I stuffed my throbbing hand into my coat pocket and waited until the class ended. Then I ran to the hospital emergency room, where I was treated for a burn that had singed all the skin off my palm.

Outwardly, my response fit the stereotype of the model-minority Asian: I said nothing and went about my business. But my silence had nothing to do with stoicism. I simply did not want to endure the humiliation of having the professor scold me in front of the class.

Of course, four decades later, there have been major civil rights advances in America. But serious racial divisions remain. That's why colleges and universities created affirmative admissions programs. The idea was to open the doors to promising minority students who lacked educational and social opportunities.

As Berkeley's chancellor, I have seen the promise of affirmative action come true. No racial or ethnic group constitutes a majority among our 21,000 undergraduates. And Berkeley students enter with higher grades and test scores than their predecessors. They graduate at the highest rate in our history.

I think that affirmative action should be a temporary measure, but the time has not yet come to eliminate it. Educational opportunities for inner-city minority students, for example, still contrast dramatically with those of affluent students in the suburbs, where many white families live.

And as a public institution, the university needs to look at broader societal needs, including greater leadership training of California's African-American and Hispanic population.

I try to explain this when, as occasionally happens, Asian-American or white friends complain to me that their child, a straight-A student, didn't get into Berkeley because we give spaces to others. I also say that we use admission criteria other than test scores, grades and ethnicity, including a genius for computers, musical talent, geographical diversity.

Besides, a straight-A average wouldn't guarantee admission to Berkeley even if there were no affirmative action. For a freshman class with 3,500 places, we get about 25,000 applicants. This year, 10,784 of them had a 4.0 high school record.

What's more, helping minority students may not be the most compelling reason for preserving affirmative action.

Every time I walk across campus, I am impressed by the vibrant spirit of this diverse community. In teeming Sproul Plaza, the dozens of student groups who set up tables represent every kind of social, political, ethnic and religious interest. In the dorms, students from barrios, suburbs, farm towns and the inner city come together.

When there are diverse students, staff and faculty (among whom there are still too few minorities) everybody stands to gain.

Of course, interactions between students of different backgrounds can bring misunderstanding. Some white students tell me they feel squeezed out by black and Latino students they believe are less deserving, as well as by overachieving Asian-American students. Some African-American and Latino students confide they sometimes feel their professors

and white classmates consider them academically inferior, a view that's slow to change even when they excel.

Still, the overall message I get time and again from students and recent graduates is that they have valued the chance to challenge stereotypes.

So I was stunned by the Regents' decision to end affirmative action admissions policies, which goes into effect by 1998. I even debated whether to resign.

In Chinese, however, the character for "crisis" is actually two characters: one stands for danger and the other for opportunity. And I took the Chinese approach. Noting that the Regents had reaffirmed their commitment to diversity when they discarded affirmative action, I decided to stay to try to make a difference.

Recently, I joined the superintendents of the major urban school districts of the San Francisco Bay area to announce a campaign: The Berkeley Pledge.

Under this program, Berkeley is deepening its support for disadvantaged youth trying to qualify for admission. One way will be to provide educational expertise for teachers; another will be to create incentives for pupils at selected school "pipelines" that begin in kindergarten. We also are stepping up our recruitment of exceptional minority students.

America has come a long way since the days of Jim Crow segregation. It would be a tragedy if our nation's colleges and universities slipped backward now, denying access to talented but disadvantaged youth and eroding the diversity that helps to prepare leaders. ■

# Los Angeles Times

DATE: 2-14-97

PAGE: A-11

## Prop. 209: A Graceful Exit for the Courts

■ **California:** The referendum process accomplishes what pork barrel politics won't.

By **MICHAEL S. GREVE**

Civil rights groups are rejoicing over a federal district court's injunction against the enforcement of the "California civil rights initiative." Chances are, though, that the higher courts will set aside the injunction and find that the CCRI—now Article 1, Section 31 of the California Constitution—is plainly constitutional.

To do this, the courts need not impose uncompromising constitutional colorblindness, a dramatic step they may be reluctant to take. They need only recognize that popular referendums such as CCRI are the most viable way of extricating the country from a rancorous debate.

The ACLU and its fellow plaintiffs in the CCRI litigation attack CCRI precisely because it is a referendum. While conceding that government bodies are "of course" free to repeal race preferences they enacted, the ACLU argues that the voters may not move the issue to a "new and remote" level of government. Enshrining colorblindness in the state Constitution is "discriminatory" because it makes it harder for racial minorities (but not other groups) to obtain benefits—that is, race-based preferences.

How can a constitutional provision that flat-out prohibits discrimination for or against anybody to violate the equal protection clause and "discriminate" against minorities? The ACLU hangs its argument on a 1982 Supreme Court case, *Washington vs. Seattle School District*, in which a 5-4 majority struck down a state constitutional amendment that would have prohibited local school boards from using business to promote racial integration. The court's reasoning in that case is best explained by the political context: The white majority had moved the busing issue

from local school boards, where blacks wielded at least some influence, to the state level, where they were overwhelmed. The Washington court, however, expressly authorized statewide bans on local preferences. And in any event, the CCRI opponents' attempt to paint CCRI as a conspiracy against minorities is absurd.

California of 1997 isn't Mississippi of 1962; it's the most multiracial, laid-back state in the country. A state where white males form a numerical minority is an extremely unlikely site for a supremacist conspiracy. It is, on the other hand, a very likely site for a populist backlash against

---

**'How can a constitutional provision that flat-out prohibits discrimination for or against anybody violate the equal protection clause and "discriminate" against minorities.'**

---

an uncontrollable multiracial spoils system. To paraphrase CCRI sponsor Ward Connerly, California grants "Juan" a preference over "Chang" in 1997 because "James" grandfather discriminated against "Willie's" grandmother in 1937. California discriminates against Asians in college admissions and makes up for it by granting them preferences in contracting.

While popular referendums can be abused by majorities to trample on minorities, they more often are a useful corrective to the failures of the ordinary political process. Legislatures are dominated by powerful, deeply entrenched special interests, and pork barrel politics can spawn policies that nobody really wants and everybody is powerless to end—short of going directly to the voters.

Completely divorced from the original

affirmative action goal of remedying past discrimination, preferences had mushroomed into a racial spoils system. Most programs were not simply questionable policy but unconstitutional even before CCRI. (Under binding Supreme Court precedents, race-based programs must be "narrowly tailored" to remedy past discrimination.) Piecemeal reforms proved impossible. Massive institutional resistance, the power of an entrenched grievance industry and the prohibitive costs of bringing suits over every existing program protected the preference edifice.

Even when legislative reforms could have taken the steam out of the underfunded campaign for CCRI, the California legislature defeated attempts to do so. The basic lesson of CCRI's enactment is that an absurd system of preferences can't be reformed piece by piece and within the institutions that spawned it. It is best to end the preference game all at once, and a popular referendum provided the only way of doing so.

Perhaps the chief attraction of the referendum process is to compress an awkward and divisive brawl into a few months of open debate. The unpalatable alternative—and the explicit logic of the ACLU's position—is to extend the debate into endless battles before school boards and city councils in state after state.

For the courts, upholding CCRI against an implausible legal attack has the advantage that they need not be the ones to end this spectacle. They merely have to allow the voters to end it. In passing CCRI, the voters of California have offered the courts their last best chance to exit gracefully from a nasty debate. They won't miss the opportunity.

*Michael S. Greve is executive director of the Center for Individual Rights in Washington, a public interest law firm representing Californians Against Discrimination and Preferences, the defendant-intervenors in the Proposition 209 case.*

# Los Angeles Times

DATE: 2-14-91

PAGE: A-10

## ✓ A Deal on Immigrant Aid That Wilson Should Accept

*Clinton's plan makes sense; Wilson's response doesn't*

**G**ov. Pete Wilson is being shortsighted in refusing to accept the Clinton administration's proposal to restore federal funding of disability and medical benefits for legal immigrants. In effect, he is thumbing his nose at billions of dollars in federal aid that California badly needs.

The president's proposed plan would allow legal immigrants who become disabled after arriving in the United States to retain eligibility for full Medicaid health coverage and Supplemental Security Income for the poor who are elderly, disabled or blind.

Clinton has proposed allocating almost \$15 billion over four years for that purpose. If approved by Congress, his plan would also restore SSI and Medicaid eligibility for children of noncitizen legal immigrants, delay food stamp cutoffs for immigrants for six months, and extend the time in which refugees and political asylum beneficiaries may receive financial aid after entering the country.

For some years now, Wilson has been complaining about the cost to state governments of providing services for immigrants, particularly in California. He has even sued Washington

seeking reimbursement. Yet, now that he has the opportunity to draw on a large sum, the governor says the president's proposal is a "new entitlement," that it would act as a magnet for immigrants. There appears to be a contradiction here.

Granted, broadening Medicaid coverage may result in some additional costs to state government. California pays about 50% of the Medi-Cal program, as Medicaid is known here.

It is also true that the restoration of SSI could shave some of the millions that the state anticipates it may save. But while the state may spend some millions more, the Clinton proposal would put billions into state coffers. Why pass up a good deal? The governor's tired

*The governor's tired argument that immigrants are drawn to California by government benefits rather than jobs has never seemed weaker.*

argument that immigrants are drawn to California by government benefits rather than jobs has never seemed weaker.

Local officials, who bear the burden of administering aid to immigrants, should persuade the governor to overlook his anti-immigrant politics in this case. Perhaps they can even persuade Wilson to help sell Clinton's plan to a Republican-controlled Congress. It is too good a deal for California to pass up.

# Avis faces new claims of discrimination

By Ellen Neuborne  
USA TODAY

Avis Rent-A-Car, under fire for charges of racial bias at a franchise, now faces allegations from former employees who say they were told to discriminate against Jews.

Ex-workers at Avis' customer-service center in Tulsa, Okla., say that as recently as last month, supervisors told them to avoid giving corporate accounts or discounts to certain Jewish-owned businesses.

Six former Avis workers from the corporate accounts department known as Telesales say they were told to "watch out for yeshivas," a Hebrew word meaning school. But workers say it became the code word for businesses owned by ultra-orthodox Jews.

"'Yeshiva' became a derogatory term used to refer to anyone who had a name or a business that might sound Jewish."

— Former employee Bill Ward

"Telesales agents used the word 'yeshiva' to refer to Hasidic Jews," former employee Elaine Rodgers says in a sworn declaration filed Monday in Raleigh, N.C.

Agents who worked in the 15-employee department say they were told to listen for accents and be suspicious of callers from heavily Jewish areas, such as New York.

Rodgers worked for Avis in Tulsa from January 1991 until

last summer when she left voluntarily. Her statement about "yeshivas" was part of her testimony for a racial-bias suit filed in North Carolina.

John Carley, chief counsel for Avis, says the rental-car company has never had a policy to discriminate against Jews. Carley says that around 1990 there was a concern that callers to the Tulsa center, claiming to be affiliated with yeshivas, were setting up cor-

porate accounts, allowing persons under 25 to drive the cars and bringing the cars back damaged. Tulsa agents were alerted to the problem.

"Formally, there was no program called 'yeshiva.' If, anecdotally, the problem was described by people that way, my information is, yes, there was that phrase used to describe the problem," he says.

Late last year, three black women filed a class-action suit against Avis and a longtime franchisee, charging racial bias. The case is pending.

The car-rental company was acquired by HFS in October. Carley is part of the team brought in by CEO Henry Silverman of HFS. When Carley was made aware of the "yeshiva" allegations by former employees last month, he says, he

sent a memo to employees in Tulsa, ending what he calls "the underage renter policy."

Bill Ward, an employee of corporate sales until mid-January, says he understood the instructions to have a religious tone. "I know about the problems with underage drivers. But instead of coming up with a policy that looked at age, they established this unwritten code to apply to the religion," he said in an interview with USA TODAY. He says he was told he was fired for misusing a temporary account number.

Ward says firms might not realize they'd been discriminated against because he was often told to give them an account at a less favorable rate.

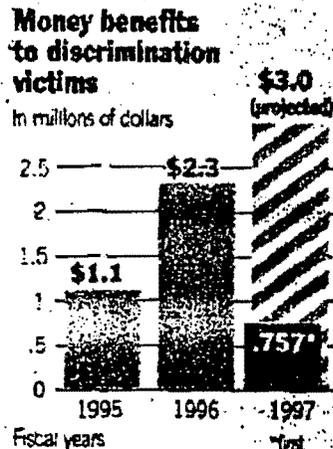
Legal experts say religious discrimination, like racial discrimination, is against the law.

# Job discrimination riskier now, bosses find

VIRGINIAN  
PILOT  
(NORFOLK)

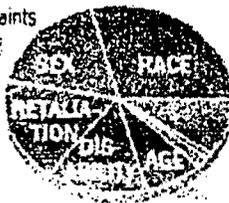
3-4-97

1/2



## Who complains?

652 complaints are pending at the Norfolk EEOC office.



Race	29%
Sex	18%
Retaliation	18%
Disability	14%
Age	9%
Religion	2%
National origin	1%
More than one	10%

SOURCE: Norfolk-area office of the EEOC

VP

## THREE CASES

Three cases filed by the EEOC in Norfolk federal court in the past year:

**Norfolk Airport Shuttle. Age discrimination:** On Jan. 13, EEOC sued Groome Transportation (trading as Norfolk Airport Shuttle). EEOC claims two men, ages 69 and 74, were not hired as shuttle drivers because of age. Case is pending.

**Wallops Island contractor. Sexual harassment:** On Sept. 30, EEOC sued George S. Alcaraz and his company, APP Ltd., which runs the Navy cafeteria. EEOC claimed sexual harassment of eight women employees. Alcaraz was ordered Jan. 24 to pay \$45,000 to the women.

**United Air Lines. Disability discrimination:** On June 19, EEOC filed a court order in a case against United Air Lines. A worker with multiple sclerosis claimed he was denied a job transfer because of his disability. United paid the man \$16,000.

EEOC's tighter focus has brought more penalties than ever against employers here.

BY MARC DAVIS  
STAFF WRITER

A1

It's been a bad couple of years for bosses who discriminate illegally against workers in Southeastern Virginia, and it's getting worse.

In 1995, victims of discrimination won \$1.1 million after filing complaints with the Norfolk office of the Equal Employment Opportunity Commission.

In 1996, that more than doubled, to \$2.5 million.

This year, the figure is on pace to hit \$3 million.

The reason: After years of investigators wasting time on unfounded or marginal complaints,

leaving some cases hanging for years at a time, the EEOC is focusing on the cases most likely to go to court.

The result: More employers in the Norfolk area, which includes all of Southeastern Virginia, are being hit with more penalties than ever before.

Credit, in part, a new director — Herbert Brown, a Portsmouth native who worked for two decades in the EEOC's Boston and St. Louis offices before coming home.

Credit, too, a national crackdown among EEOC offices, a new plan that quickly disposes of marginal cases to focus more on the hot potatoes.

"The system is working for us," Brown told the Norfolk and Portsmouth Bar Association earlier this month. "Not only that, but it is making an impact in the community. ... Today, the EEOC is perhaps better off than it's ever been in terms of teeth."

Local lawyers who represent employees agree.



FRONT  
PAGE

# EEOC News Clips

for

February 10-12, 1996



2:30  
Realt

*Compiled by  
The Office of Communications and Legislative Affairs*

# EEOC Chief Voices Frustration Over Case Backlog, Budget Cuts

By Kirstin Downey Grimsley  
Washington Post Staff Writer

Just 16 months after his appointment as chairman of the Equal Employment Opportunity Commission, Gilbert Casellas is an expert on how the nation has splintered politically over questions of race and sex discrimination.

Casellas, 43, presides over an agency that's supposed to enforce myriad anti-discrimination laws, but Americans are deeply divided over what, if anything, should or can be done about discrimination. Some argue that it is no longer a problem.

Those conflicting feelings about the EEOC's mission and effectiveness are reflected by the nation's leaders. Casellas has faced an often-hostile Congress. And while White House officials say they think he is doing a good job, Casellas said he has not met privately with the president since his confirmation nor has the White House returned his telephone calls.

"Nobody gives a crap about us," Casellas said.

His frustration has grown despite good reviews from lawyers for employers and civil rights activists alike about Casellas's work. Both praise the former trial attorney from Philadelphia for his openness and success at rebuilding the agency, which is facing a mountainous backlog of work, a limit-

ed budget and an entrenched and sometimes hostile bureaucracy.

"Personally I think he's very impressive," said Douglas McDowell, general counsel of the Equal Employment Advisory Council, which advises more than 300 of the nation's largest employers on EEOC issues. "He's done a lot to improve morale at the EEOC. He's not hunkering down and hiding behind the backlog of work. A very impressive man."

Casellas "has the world's hardest job," said R. Gaull Silberman, a Republican and former EEOC commissioner. She said the agency is charged with eradicating discrimination, which, in her opinion, is "a mission impossible."

Nancy Kreiter, research director of Chicago-based Women Employed, a women's job-training and advocacy organization, said she believes Casellas's frustration mirrors the feelings of many now in the civil rights community. "Everybody working on civil rights has a siege mentality," Kreiter said.

The EEOC, a bipartisan agency, last year received about 88,000 complaints of illegal discrimination based on race, gender, national origin, religion, age or disability. That's up about 42 percent from the 62,000 complaints registered in 1990, in part because Congress added disability discrimination cases to the EEOC's responsibilities in 1992.

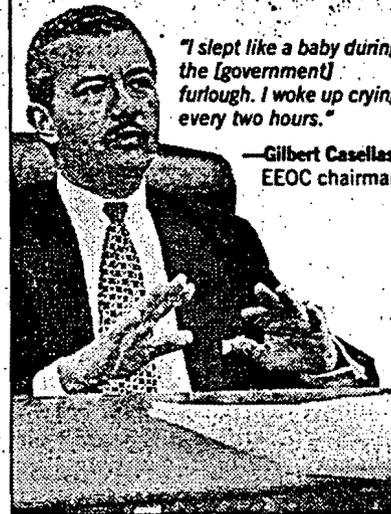
The agency's \$233 million budget, however, was not increased to handle the growing caseload. The average EEOC investigator handled 123 cases at a time last year, more than double the average of about 55 in 1990. It can take an agency lawyer a year or more to get to a case.

This backlog ends up affecting employers and employees nationwide because the agency essentially serves as a clearinghouse for discrimination complaints. Everyone who brings such a charge is required by law to file a complaint with the EEOC, which must either dismiss, settle, pursue or pass on the case. People are prevented from taking their grievance to a court until the EEOC grants them a right-to-sue letter that allows them to proceed on their own or until the EEOC decides to sue on their behalf.

The agency, which is intended to expedite disputes, in too many cases instead serves as a bottleneck, critics said.

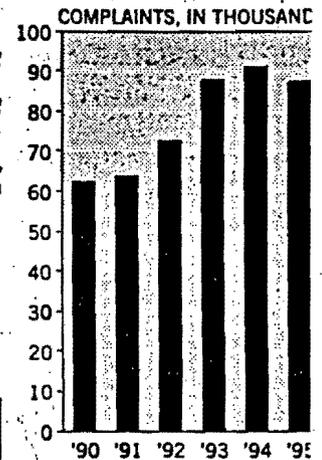
## SLIM RESOURCES

The EEOC's budget has not kept up with the increase in complaints filed with the agency.



"I slept like a baby during the [government] furlough. I woke up crying every two hours."

—Gilbert Casellas,  
EEOC chairman



BY CLARICE BORIO—THE WASHINGTON POST

Among the thousands awaiting action by the EEOC are several complaints alleging sex, race, disability or age discrimination at The Washington Post, including a class-action complaint by the Newspaper Guild, which represents many newsroom employees.

The partial government shut-downs this winter only made things

worse, Casellas said. He thought he had succeeded in whittling away some of the backlog, but saw it build right back up again when the government shut down and 90 percent of the agency's 2,700-person staff was furloughed, he said.

"I slept like a baby during the furlough," Casellas said at a recent commission meeting. "I woke up crying every two hours."

Casellas came to the EEOC after what he calls a "cushy" stint as general counsel for the Air Force in late 1993 and early 1994. Part of Casellas's frustration now stems from the contrast with that earlier position, where, as part of the generously-funded Defense Department, money was seldom a problem.

"I didn't have any budget issues then," he said. "There was no issue of having computers, for example. We took things for granted."

Cont'd 1 of 2

The Griggs decision did lead to class-action suits and was relied upon in numerous cases to strike down effective discrimination by race or gender. Controversial decisions led to substantially increased minority employment in municipal fire and police departments. In some cases where the courts decided that there had been past discrimination, or where there was significant underrepresentation of minorities and women in certain jobs, they ordered employers to adopt "goals" and "timetables" for meeting those goals. Thus, the courts ordered employers to undertake "affirmative action," if the employers had not already done so voluntarily—in order to avoid a lawsuit. The employers were required to make a "good-faith effort" to meet those goals—but weren't absolutely required to meet them if it proved impractical. (In one case, where the Supreme Court found repeated non-compliance with court orders, it ordered a rigid mathematical formula.) For decades, the federal government has mandated that federal contractors meet certain goals in employing minorities, and has reserved contracts in certain fields for minority-owned businesses.



tion. (Some civil-rights advocates wouldn't mind quotas at all, thinking they are the only fair way to make up for past discrimination, but in the current climate, they don't argue this aloud.) To many minds, anything that smacks of numerical equivalencies by race or gender is a quota, because as a practical matter, the only way to avoid burdensome and expensive lawsuits is to hire by the numbers. (Nevertheless, numerous businesses have learned to live comfortably with affirmative action and goals.) Civil-rights advocates think that their opponents are under the misapprehension that employers are being told to hire unqualified workers, or to meet a rigid numerical standard, whereas for many opponents, the real objection is to being told that they have to hire according to any numerical standard at all.

These are among the many ways in which participants in the debate are talking past each other. And while civil-rights lawyers can talk in cool and balanced terms about affirmative action and its justifications, and its lack of rigidity, many white workers have become inflamed and enraged at the idea that they might not get a job or promotion because of society's past discrimination against blacks. They feel that they are being passed over for less qualified workers, whether they are or not. To the extent that whites have not received jobs or promotions, or think that they won't receive jobs or promotions, because of affirmative action programs, a tremendous backlash against "reverse discrimination" has set in. Exploitation of this backlash has become a staple of our current politics, with a declining economy providing fertile ground.

One of the problems in the whole current debate about "quotas" is that different camps mean different things when they use the term. To civil-rights advocates, a goal, or a numerical remedy, is not a "quota," because people aren't being told to hire an unqualified worker, or to hire an absolute number. Though President Bush has said in the past that he supports affirmative action with goals but not quotas, the Administration now argues in effect that a goal is a quota—that an affirmative-action program can be a quota program because it may lead an employer to adopt a quota, hiring less qualified workers to meet the numerical goal. This is a radical view, which could undo decades of affirmative-action programs, including in government contracts. To the Administration, being compelled to hire a less qualified worker is a quota; to civil-rights advocates, other things being equal, or even if a given worker is somewhat less qualified, taking race into account in order to meet a numerical goal is appropriate affirmative ac-

Though the Administration asserts that the effect of the Griggs decision was to lead—or threaten to lead—employers to hire by the numbers in order to avoid an employment-discrimination suit, it offers no hard evidence to support this claim. No doubt many employers do engage in affirmative action in order to ward off lawsuits, and perhaps assign themselves quotas, or something close to them. Actually, this is what civil-rights advocates want employers to do, in order to give minorities more opportunity. It's probably blinking at reality PRESERVATION, PHOTOCOPY

# Introducing Ladybug



the new magazine for children ages 2 to 7 from CRICKET magazine

Discover the pleasure of quiet moments with your child, in a world of ideas, adventures, and activities. It's a delight to the eye, an adventure for the mind.

— Lloyd Alexander, author/Newbery medalist

**\$14.95** for an EIGHT-ISSUE TRIAL subscription. Send no money. We will bill you later. Save over \$10.00 off the regular twelve-issue price! Order now by calling toll-free or by sending us this coupon!

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City, State, Zip \_\_\_\_\_

LADYBUG, Box 58344, Boulder, CO 80322  
**1-800-BUG PALS** (1-800-284-7257 Ext. 5L)  
 5LC30



Over 130 Family Activities at America's Largest Maritime Museum. Call for Your 91 Visit Planner (203) 572-0711 Ext. 315

## MYSTIC SEAPORT

50 Greenmanville Ave., Mystic, CT 06355-0900

## Camden, Maine

A seacoast village where the mountains meet the sea. Enjoy this magic and beauty at a historic inn offering memorable meals, fine wines and spirits, tennis, sailing, boat cruises or quiet contemplation. Family operated since 1901.



## Whitehall Inn

Box NY, Camden, ME 04843 (207) 236-3391



### A MODERN CLASSIC

All-cotton pinpoint oxford, fly-front, pleated pockets, full cut, drop-shoulder, removable collar stays. Dress or casual. White, blue, pink, ecru, grey. Made in USA. \$99 + \$3 shipping. CA residents add 7% tax.

1-800-772-BLUE

BILLYBLUE, SAN FRANCISCO

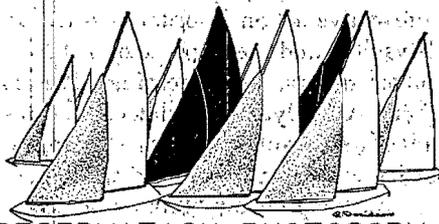
to suggest that employers don't hire by numbers in order to avoid lawsuits. But the courts have held that actual quotas, per se, are illegal, and that a white worker cannot be laid off to make room for a minority employee. On the question of quotas under Griggs, the Bush Administration deals mainly in assertion. The minority report issued by House Judiciary Committee Republicans on this year's civil-rights bill cites a *Fortune* poll that found that eighteen per cent of the chief executive officers of about two hundred large companies admitted that their companies had "specific quotas for hiring and promotion."

In the course of the nineteen-eighties, the Reagan Justice Department attacked all manner of presumably settled civil-rights law. It argued that the only job discrimination that should be actionable was proved past discrimination against individuals. It went at the concept of "disparate impact," arguing that reliance on numbers to prove discrimination inevitably led to the use of quotas. By 1989, the Supreme Court, now markedly different from the 1971 Court (and with Justice Byron White, a Kennedy appointee, changing his earlier view in the unanimous Griggs decision), was ready to pull back on Griggs. While it is commonly said that in 1989 the Court, in *Wards Cove Packing Company Inc. v. Atonio*, overturned Griggs, it actually preserved the concept of "disparate impact," but made it more difficult for plaintiffs to win a case. (White wrote the five-to-four decision.) Civil-rights advocates deliberately gave the "spin" to *Wards Cove* that it "overturned" Griggs, in order to heighten the emotional reaction to it.

The *Wards Cove* decision shifted the burden of proof, so that the plaintiffs had to show that the employment practices in question weren't required for the conduct of the business (rather than the employers having to show that they were necessary), and discarded the concept of "business necessity," requiring only that employers furnish a "business justification"—an easier standard to meet. The decision also required the plaintiffs to identify specifically the practice they regarded as discriminatory rather than, as in the past, challenge a group of practices. (This case had to do with the differing racial compositions of different parts of the work force of a canning factory.)

The current debate—uproar, actually—over quotas was foreshadowed in the majority opinion, which drawing upon an opinion by Sandra Day O'Connor the year before, said that for the plaintiffs to have prevailed would have meant that "any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his work force. The only practicable option for many employers will be to adopt racial quotas." The *Wards Cove* decision was depicted by civil-rights advocates as representing a major shift in the civil-rights law as it had stood for eighteen years and making it far more difficult for minorities who felt they had been discriminated against to bring and win suits. (Some people sympathetic to the civil-rights movement say that *Wards Cove* has had a less drastic impact than had been predicted—but it did make a difference.) *Wards Cove* was one of six decisions that year—but the most significant one—that pared back minority rights in employment cases. Civil-rights groups concluded that the Supreme Court had to be deterred from cutting back on minority rights, and that *Wards Cove* and the other job-discrimination decisions had to be overturned. Oddly enough, civil-rights advocates took their stand on *Wards Cove* rather than some other big civil-rights decisions because they thought that it wouldn't get them into a political fight over the emotionally charged issue of quotas.

THE stated goal of the civil-rights advocates last year was to return to the law under Griggs. So they proposed to return the burden of proof to the employer, but in drawing up their proposal, having a menu of interpretations of Griggs and its progeny to choose from, they chose for tactical purposes a decision subsequent to Griggs which gave it the strictest interpretation of what employers had to prove.



PRESERVATION PHOTOCOPY

The bill, co-sponsored by Senator Edward Kennedy and former Representative Augustus Hawkins, Democrat of California, was later modified to more nearly reflect the original Griggs decision. Though the Administration at first resisted introducing any bill at all, it finally submitted one of its own—also returning the burden of proof to the employer—and over many months there were negotiations between Democrats and Republicans that resulted in modification of the original Kennedy-Hawkins proposal, and between Kennedy and White House chief of staff John Sununu, with more changes being made in the congressional proposal. At various points, civil-rights advocates thought they had a deal between Kennedy and Sununu, only to see it fall through. Some business and conservative groups publicly took credit for preventing Sununu from "caving." Administration officials blamed Democrats for refusing to compromise further. By the accounts of some people within the Administration as well as opposed to it, the major instrument within the Administration keeping a deal from coming to pass was C. Boyden Gray, counsel to the President. Gray is an old friend of Bush's—he comes from the wealthy circles the President is most comfortable with (pork rinds notwithstanding)—who has been in on several Administration misadventures. He and his staff, which tends to come from right-wing political/legal circles, take a narrow view of civil-rights law. Last year, the Administration negotiators pressed for very loose standards that employers would have to meet in order to justify hiring practices, and at one point Gray went so far as to suggest language that would have allowed employers to take into account "legitimate community or customer relationship efforts." This was spiritually akin to the old argument that people shouldn't have to serve blacks in a restaurant if the other customers didn't like it. Even people within the Administration were horrified. In the end, the Administration declined to support a bipartisan deal that a number of Republicans had said they could go along with. The very conservative Orrin Hatch, Republican of Utah and a strong "anti-quota" man, had said at one point that he could go along with the final compromise proposal, but he backed away when the President wouldn't agree to

## LAW SCHOOLS

By Chris Klein

# Backlog Forces the EEOC To Go Back to Classroom—for Students

**T**HE FEDERAL Equal Employment Opportunity Commission has a perpetual backlog of cases at its 25 district offices, around the country. How bad is the backlog? Local administrative judges have tapped an unlikely source for help—law students.

The federal agency has designed a national program in an effort to resolve discrimination charges more swiftly, instead of sending them on a long, costly legal journey: Disputes the students can't settle may then go through the full EEOC investigation and trial process.

Many law schools and regional offices of the EEOC are still deciding how to implement the program. But the University of San Francisco School of Law and Nova University Shepard Broad Law Center were ahead of the pack thanks to persistent professors and sympathetic administrative judges such as Judge Michael Baldonado in San Francisco and Judge Patrick Kokenge in South Florida. It also may have helped both schools to have friends in high places: Judge Baldonado is an alumnus of USF and Judge Kokenge graduated from Nova. Students from Nova and USF are set to mediate employment bias disputes under the guidance of the EEOC starting in January 1997.

Judge Kokenge of the EEOC office in Miami said: "The reason I think [the program] is so good is that it helps us move faster. The students get experience, the public gets quality mediation, and we get to reduce our inventory. There's a saying, 'Justice delayed is justice denied.'"

Yet the mediation program has been delayed, and was almost denied. Donna Swanson, the Washington, D.C.-based program coordinator for the EEOC, said getting to the starting point has been rough going. There were budget snags, a recent change in agency administration, and the expiration of the Administrative Dispute Resolution Act in October 1995. Federal agencies are normally not allowed to use volunteers, but the ADR Act exempted volunteer mediators from the rule. The act was reinstated in 1996. In addition, Ms. Swanson said, the agency "ran into problems" when EEOC commissioners expressed concerns about the mediators' experience.

"The commissioners were worried that the mediations would be conducted by students who had no experience in the workplace," Ms. Swanson recalled. But she assured them that "we were not talking about sophomore English lit majors who were doing this just for fun," but about law students engaged in a continuing course of study who would be supervised by their professors.

For their part, professors in charge of the program at USF and Nova said they have chosen the student mediators with discretion and care. USF's Prof. Robert E. Talbot said he was looking for maturity and life experience in assembling the group of eight students. Among them are a certified public accountant, a crisis counselor from a domestic violence shelter and a manager of a group home for the severely handicapped.

Prof. Fran L. Tetunic of Nova said she looked for people with backgrounds in the social sciences and older students

1 of 2

2 of 2

who had raised children. And she only considered students with experience in other areas of mediation—available through the school's clinics—such as small claims court or family court.

"No one needs to worry about the experience level of these students," said Judge Kokenge. The Nova group "has over 2,000 mediations between them."

Ms. Swanson said the initial returns might not be visibly beneficial to the EEOC. "We're taking baby steps," she said. The student mediators will only be involved in certain types of charges, ones that, in Ms. Swanson's view, lend themselves to mediation, such as actions brought under the Americans With Disabilities Act. Ms. Swanson said that the proportion of cases that would be mediated was still unclear.

Regardless of content, Professor Talbot believes employment bias disputes will generally be easier than other types for the students to mediate. The students will have more time and guidance. In small claims court, "we're there taking cases right from the judge," the professor said. "We never know in advance what

the cases will be about, and then we have to get done in about 45 minutes." With the EEOC program, however, students will know the legal issues in advance. "Also, administrative law judges will be right there," the professor adds. "If legal issues come up, the judges come in and give an explanation."

## 'Caseload for U.S. attorneys growing

By Jerry Seper  
THE WASHINGTON TIMES

U.S. attorneys' offices prosecuted more cases against more criminals last year than in 1995 and increased their conviction rate against violent criminals and drug traffickers, the Justice Department announced yesterday.

According to statistics released by the department's executive office for U.S. attorneys, 38,250 criminal cases were initiated last year against 58,141 defendants — a 4 percent increase in cases compared with 1995. It was the second year in a row that criminal case filings grew by more than 3 percent.

Prosecutors in the 94 U.S. attorneys' offices completed 34,882 criminal cases against 52,366 de-

fendants — a 4 percent increase over the previous year — with an 87 percent conviction rate.

Of those convicted, the department said, 73 percent received prison sentences with 268 defendants sentenced to life terms.

"Our efforts are paying off, in large part because U.S. attorneys' offices are working so closely with their partners in state and local law enforcement, said Attorney General Janet Reno.

The department, in a report, said federal prosecutors' caseload last year was more diverse than ever before, including cases involving violent crime and international terrorism; drug trafficking and organized crime; financial and computer fraud; public corruption; and cases involving multiple defendants and international orga-

nizations.

Highlights of the report:

- **Violent offenders:** Federal prosecutors filed 6,178 cases against 8,291 violent offenders, an 8 percent increase in cases over 1995 but a 10 percent decrease in defendants. A total of 6,124 cases were completed against 8,197 defendants, with a conviction rate of 86 percent.

- **Drugs:** 10,487 drug cases against 21,505 defendants were filed in 1996, with cases completed against 19,145 defendants. The conviction rate was 86 percent, with 88 percent of all convicted defendants being sentenced to prison.

- **Immigration cases:** Federal prosecutors, all with other Justice Department agencies, filed 5,754 immigration cases against 6,357

defendants — a 42 percent increase in cases over 1995 and a 37 percent jump in defendants. Cases were completed against 5,781 defendants, with a conviction rate of 96 percent. Of those convicted, 77 percent were sent to prison.

- **Health care fraud:** The government filed 245 health care fraud cases against 449 defendants, a 7 percent increase over 1995, with 348 defendants seeing their cases completed in court. Of those, 88 percent were convicted and 50 percent were sentenced.

- **Civil cases:** Federal prosecutors filed or responded to 87,917 civil cases, 6 percent more than in 1995. The courts issued judgments in 20,200 of these cases, with 84 percent in favor of the government. An additional 30 percent were settled.

In March 11 letters to Bromwich and Rep. Harold Rogers, chairman of the House subcommittee, Freeh admitted that his March 5 testimony "was incomplete." He acknowledged that Whitehurst's refusal to cooperate with the leak probe also was a basis for the suspension.

In his letter to Bromwich, Freeh also acknowledged that the draft report does not recommend Whitehurst's suspension, adding, "I did not intend to imply that to the subcommittee."

But Freeh disclosed that the draft report recommends the FBI consider whether Whitehurst can continue to usefully serve the FBI in any capacity.

Freeh said the FBI would have been remiss in not taking temporary action, because "Whitehurst is the only FBI employee whose suitability for continued employment you question. Your findings also make clear that the majority of Mr. Whitehurst's allegations are unfounded and that he is often unable to distinguish fact from conjecture."

Grassley said Freeh "wants the public to think he was forced by the IG to take action against a whistle-blower."

"Freeh, in his letter to the IG, ... believes that he can interpret the IG's report better than the IG can. ... He then plays a game of semantics and interprets the IG report as he wishes, not as the IG intended."

Bromwich testified to Congress in February that his investigators "have found substantial problems (in the lab) based on the allegations that Dr. Whitehurst made to us."

Earlier, U.S. District Judge Gladys Kessler denied requests by Whitehurst and the National Association of Criminal Defense Lawyers to obtain copies of the draft report, noting the final report is to be made public by mid-April.

3-17-97

## Clinton's contempt of court

**N**ever let the law stand in the way of political opportunism!

That is the notorious motto of the Clinton administration.

The latest chapter of the assault on the rule of law was penned on March 24 by Norma V. Cantu, assistant secretary, Office of Civil Rights, U.S. Department of Education. The subject was affirmative action in collegiate admissions, i.e., racial, ethnic, and gender preferences dear to the hearts of President Clinton's liberal voting constituency. And the target of attack was the constitutional ruling of the U.S. 5th Circuit Court of Appeals in Texas vs. Hopwood (1996) nixing minority preferences in admissions to the University of Texas School of Law.

The Hopwood decision was no judicial frolic. The appeals court rooted its reasoning to recent and unambiguous precedents of the U.S. Supreme Court. The high court declared in *Adarand Constructors Inc. vs. Peña* (1995) that government-sponsored racial preferences or classifications of any type are presumptively unconstitutional because of the equal protection imperatives of the Fifth and 14th Amendments. They can be saved only by hard government proof of necessity to overcome nontrivial present effects of specific past racially discriminatory practices. According to the court of appeals in Hopwood, no such proof of necessity was forthcoming by Texas to justify the law school's fastening an

admissions handicap on applicants solely because of membership in the white race.

Texas countered by insisting that the solo voice of Supreme Court Justice Lewis Powell in *Regents, University of California vs. Bakke* (1978) blessed racial preferences in higher education admissions to further a diverse student body, an objective advanced by its handicapping of white applicants. The court of appeals answered by denying author-

itative dignity to the view of a single justice that failed to command the concurrence of either a high court majority or plurality. (Neither the chief justice nor any of his eight associates, no matter how venerated, are empowered a la

President Abraham Lincoln in polling himself and his Cabinet to pronounce: "Eight eyes and one nay; the nays have won.") The Hopwood court thus held that seeking student body diversity could never constitutionally vindicate racial discrimination in admissions. The Supreme Court declined to review the 5th Circuit ruling last July.

The Hopwood decision cast suspicion on a battery of affirmative action programs operated by the University of Texas College of Education. The state attorney general, Daniel C. Morales, advised the chancellor of the University of Houston system that all such programs must generally be abandoned, including racial preferences in admissions, financial aid, scholarships, fellowships and recruitment and retention. They could be maintained, Mr. Morales explained,

only if the discriminating college or institution assembles evidence of a necessity to overcome present effects of past racial prejudice within the University of Texas system.

The Hopwood precedent is constitutionally binding on Texas, Louisiana and Mississippi, the three states within the 5th Circuit, unless it is reversed by the Supreme Court or an en banc circuit panel. The affirmative action advice of Attorney General Morales was both impeccable and a cornerstone of the rule of law. A legal casuist might argue that Hopwood binds the defendant Texas School of Law, but not state colleges and universities that were not parties in the case. Thus, the latter would not be in contempt of the Hopwood judgment for continuing affirmative action programs for reasons the court of appeals concluded were invalid. New lawsuits against each discriminating institution would be needed to put an end to the constitutional violations.

That casuistry has a history in the annals of racial discrimination, and it is ugly. After landmark Supreme Court and lower court rulings denouncing racial discrimination in public education and voting in the South during the 1950s and 1960s, many politically cynical figures attempted to blunt or circumvent their impact by applying the court precedents only to the named parties to the cases, but excluding application to nonparties even if their practices were indistinguishable from those that had received a constitutional axe. That begrudging "Massive Resistance" to federal court rulings generated endless litigation, delayed justice for countless individuals, and provoked Congress to throw many Southern states into a type of federal receivership.

Assistant Secretary Cantu, however, has unsheathed a Clinton administration edition of *Massive Resistance*. She asserted in a letter to Mr. Morales on March 24 that Hopwood must be confined to its facts and parties and should not be employed to scuttle scores of affirmative action programs featured among state universities and colleges that share the constitutional

*Ms. Cantu is exhorting Texas to imitate "Massive Resistance" against the Hopwood decree, a shocking sabotage of the rule of law.*

# The Washington Times

DATE: 4/1/97  
PAGE: A14

## Son of CCRI

She was born to a 17-year-old mother-turned-single parent, one of four siblings her mother raised alone. She did janitorial work, construction — anything, she told the Seattle Times, to pay the bills. And while she worked full time during the day, she also took classes at night to make something of herself. The work paid off when she graduated cum laude with a degree in business in 1992. Then she took entrance tests for law school, scoring in the 94th percentile. And she waited for admission to the University of Washington Law School, where she had done here undergrad work. That admission would never come.

For all the disadvantages Katuria Smith overcame to live out her version of the American dream, there was a trivial but still intractable one standing in her way: her skin color. It seems that a former dean at the University of Washington Law School, Wallace Loh, added skin color to the institution's admissions standards in the interest of racial diversity.

"A commitment to 'diversity' — that shorthand label for the aspiration to racial, gender and other forms of equality of opportunity in higher education and in the work force — is not only the right thing to do, it's the pragmatic thing to do in the global arena of tomorrow," Mr. Loh said in 1994. Unless, of course, you happen to be the wrong color. Between 1990 and 1994, the percentage of minorities at the University of Washington Law School rose from 17.5 percent in 1989 to 43.3 percent in 1994. That didn't leave much room for the Katuria Smiths of the world.

Ms. Smith has since filed suit against the school, charging that it discriminated against her illegally. Helping her is the Washington, D.C.-based Center for Individual Rights, an organization that specializes in dismantling state-sponsored racial quotas as well as the arguments of pious law school deans.

There is still more help on the way for residents

of Washington state. In the wake of the successful California Civil Rights Initiative, proponents of a Washington State Civil Rights Initiative announced last week that they have begun the formal process of collecting signatures to put the issue to a vote as early as 1998. "We don't want some government official deciding which group is preferred and which group will be discriminated against," said Tim Eymann, one of the initiative's organizers, in a statement.

The language of the Washington state initiative is simple and straightforward: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The measure would not apply to private-sector programs.

It is a measure of how far this country has drifted from the goals and timetables of the civil rights movement — not to mention the power of a judiciary hostile to the plain meaning of landmark federal anti-discrimination statutes — that 30 years later such an initiative is still necessary. One of the prime supporters of the 1964 Civil Rights Act, Hubert Humphrey, insisted that "the simple and complete truth" about the act is that it forbids discrimination against anyone on account of race. The concept remains popular even today. Backers of the Washington initiative cite a statewide poll in January that showed 71 percent of registered voters oppose discrimination or preferences based on race, sex, color, ethnicity or national origin.

No doubt there are some among the remaining 29 percent, like Mr. Loh, who think there's a case to be made for quotas and preferences. Let's start the debate, then, by allowing them to explain to Katuria Smith why her skin color matters more than her hard work when it comes to law school admissions.

flaw of the Law School's admissions preferences. Ms. Cantu declared, for example, that the court of appeals precedent "should not be used to invalidate the affirmative action admission program used by the University of Texas' College of Education to assist in creating a diverse student enrollment for educational purposes." The Hopwood opinion, however, expressly rejected student diversity as a justification for race-based admissions preferences. Ms. Cantu is exhorting Texas to imitate "Massive Resistance" against the Hopwood decree, a shocking sabotage of the rule of law.

There is nothing wrong with a state or the federal government from selecting a test case to seek re-examination of a court precedent when the possibility of an overruling is non-frivolous. Otherwise the law would fossilize. But a test case can generally be created by seeking a declaratory judgment without offending prevailing court interpretations of the Constitution. In contrast, if court precedents are routinely ignored and confined to parties on the theory that a future overruling is always possible, then the rule of law degenerates to largely sound and fury signifying nothing.

Is that what the Clinton administration is scheming at while it holds the grips of power?

---

*Bruce Fein is a lawyer and freelance writer specializing in legal issues.*

# The New York Times

DATE: 4-1-97

PAGE: D-2

## F.B.I. Reported Examining Hospital Operator in Ohio

### Columbia/HCA Acquisitions Seen as Focus

By KURT EICHENWALD

Agents with the Federal Bureau of Investigation are examining the Columbia/HCA Healthcare Corporation's deals to acquire control of certain hospitals in northeastern Ohio, people with knowledge of the inquiry said yesterday.

The inquiry comes amid growing Federal scrutiny of the company and its business practices. But the examination by Federal agents in Ohio, a state that has been a flashpoint for criticism about certain of the company's deals, takes the active Federal inquiries into a new area: How the company has acquired its assets.

Investor concern about the Federal inquiries of Columbia yesterday led to a selloff of the company's shares, with its stock value losing about 10 percent.

The stock was unable to begin trading for an hour yesterday, as the number of shares for sale far exceeded the buying demand. Shortly after opening, the stock fell more than \$7 a share. By the end of trading, shares had recovered somewhat, closing at \$33.625, down \$3.875, amid a broader market selloff.

Since the disclosure two weeks ago that Federal investigators armed with search warrants seized truckloads of documents from the company operations in El Paso, Columbia stock has lost about a quarter of its market value.

An article on Friday in The New York Times reported that law enforcement officials and several Government agencies were investigating an array of business practices at Columbia, the nation's largest health care company.

In particular, the article said that the Federal Medicare agency was investigating certain Columbia hospitals for possible improper billing. The report also said that the Government was examining issues concerning Columbia's financial relationships with its doctors.

In a statement yesterday, Columbia said it had not been notified by the Medicare agency, the Health Care Financing Administration, of the billing inquiry, but said it wanted

to meet with the agency's administrator, Bruce Vladeck.

The Columbia statement also said that the company believed that both its billing procedures and financial dealings with doctors were in compliance with the law. But if there were any legal transgressions, the statement said, the company planned to correct them.

Columbia said it could not specifically address the findings of a computer analysis by The Times, which found that the company's hospitals more frequently billed for certain higher-paying conditions than its competitors and that its use of outpatient treatment cost Medicare far more than elsewhere.

"Columbia was not provided an opportunity to review the Times data and was given only a limited description of their methodology," the statement said. "Thus, we cannot specifically address their findings or interpretations."

A spokeswoman for The Times, Nancy Nielsen, said that the paper had provided Columbia with its findings and relevant data, along with full descriptions of its research methods, in writing and in interviews over a period of several months.

Columbia controls several hospitals in northeastern Ohio, including St. John West Shore Hospital and St. Vincent Charity Hospital in Cleveland, and Timken Mercy Medical Center in Canton. Before Columbia gained control, all three hospitals were operated by the Sisters of Charity of St. Augustine, based in Richfield, Ohio.

While it was not immediately clear how far along the agents were in their inquiry, in the last several weeks they have already interviewed several people with knowledge of the situations.

The deal for Timken Mercy has previously attracted considerable criticism from its former board members. Prior to that transaction, a meeting of the board of the not-for-profit hospital was convened in April 1995. At the meeting, board members were asked to provide a vote that would allow the hospital to sign

letter of intent for a deal with a for-profit hospital company.

The members requested more information, including the terms of the letter of intent and the name of the for-profit company. But, board members have said, both requests were denied; consequently, the board voted unanimously to take no action.

The next month, the 12 board members were served with written notice that they had been dismissed, according to testimony before a state legislative committee. The next day, several new trustees were appointed, and a new vote was held on signing of the letter of intent. The deal was approved.

Lindy Richardson, a Columbia spokeswoman, said that she had not been able to locate anyone aware of the matter.

Columbia's biggest deal in Ohio would have been the proposed \$299.5 million acquisition of the assets of Blue Cross and Blue Shield of Ohio. That deal, in which a group of Blue Cross executives would have received payouts of some \$19 million, was rejected last month by the Ohio Department of Insurance. The regulators, who will issue their order reflecting the transaction on May 9, challenged the bid as inadequate.

## ✓ Diversity of Ideas Is What's Really Needed

■ **Affirmative action:** The only way to end racism on campuses is to end programs that reinforce racial separatism.

By **MICHAEL S. BERLINER**  
and **GARY HULL**

Is ethnic diversity an "absolute essential" of a college education? UCLA's Chancellor Charles Young thinks so. Ethnic diversity is clearly the purpose of affirmative action, which Young has been defending lately against a long-overdue assault. But far from being essential to a college education, such diversity is a sure road to its destruction. Ethnic diversity is merely racism in a politically correct disguise.

Many people have a very superficial view of racism. They see it as merely the belief that one race is superior to another. It is much more than that. It is a fundamental (and fundamentally wrong) view of human nature. Racism is the notion that one's race determines one's identity. It is the belief that one's convictions, values and character are determined not by the judgment of one's mind but by one's anatomy or blood.

The diversity movement claims that its goal is to extinguish racism and build tolerance of differences. This is a complete sham. One cannot teach students that their identity is determined by skin color and expect them to become colorblind. One cannot espouse multiculturalism and expect students to see each other as individual human beings. One cannot preach the need for self-esteem while destroying the faculty that makes it possible: reason. One cannot teach collective identity and expect students to have self-esteem.

Advocates of diversity are true racists in the basic meaning of that term: They see the world through colored lenses, colored by race and gender. To the multiculturalist, race is what counts—for values, for thinking, for human identity in general. No wonder racism is increasing. Colorblindness is now considered evil, if not impossible. No wonder people don't treat each other as individuals; to the multiculturalist, they aren't.

Advocates of diversity claim that it will teach students to tolerate and celebrate their differences. But the differences they have in mind are racial differences, which means we're being urged to glorify race, which means we're being asked to institu-

tionize separatism.

Racial identity erects an unbridgeable gulf between people, as though they were different species, with nothing fundamental in common. If that were true—if racial identity determined one's values and thinking methods—there would be no possibility for understanding or cooperation among people of different races.

Advocates of diversity claim that because the real world is diverse, the campus should reflect that fact. But why should a campus population "reflect" the general population (particularly the ethnic population)? The purpose of a university is to impart knowledge and develop reasoning, not to be a demographic mirror of society.

Racism, not any meaningful sense of diversity, guides today's intellectuals. The educationally significant diversity that exists in "the real world" is intellectual

---

**'One cannot preach the need for self-esteem while destroying the faculty that makes it possible: reason. One cannot teach collective identity and expect students to have self-esteem.'**

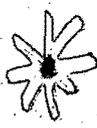
---

diversity, i.e., the diversity of ideas. But such diversity—far from being sought after—is virtually forbidden on campus. The existence of "political correctness" blasts the academics' pretense at valuing real diversity. What they want is abject conformity.

The only way to eradicate racism on campus is to scrap racist programs and the philosophic ideas that feed racism. Racism will become an ugly memory only when universities teach a valid concept of human nature: one based on the tenets that the individual's mind is competent, that the human intellect is efficacious, that we possess free will, that individuals are to be judged as individuals, and that deriving one's identity from one's race is a corruption, a corruption appropriate to Nazi Germany, not to a nation based on freedom and independence.

*Michael S. Berliner is executive director of the Ayn Rand Institute in Marina del Rey. Gary Hull teaches business ethics at the Claremont Graduate School.*

## The Ban on Bannekers



SIXTY-FIVE YEARS AGO, a young Thurgood Marshall was denied admission to the University of Maryland Law School. The future Supreme Court justice was turned down because the entire university was solidly segregated then, and it continued to resist all but token integration even after the landmark cases and legislation of the '60s mandated change. During those civil rights years, the Rev. Martin Luther King Jr. was openly discouraged from speaking on campus, while Alabama Gov. George Wallace was received as a hero. The few black students had great difficulty getting campus jobs and university support for their extracurricular programs. And the federal government repeatedly pressed the university to take affirmative steps to integrate the institution.

Given this history, it is ironic that one aspect of the university's efforts to respond to this situation—an effort that has by all accounts been singularly successful—must now be abandoned. The Banneker scholarship program—which was founded in 1978 to provide full room, board and tuition grants to minority students and was restricted to African Americans in 1988—was found to be unconstitutional by the U.S. Court of Appeals for the Fourth Circuit last year. Racial distinctions in the law are inherently suspect and must be subject to the most exacting standards of judicial examination. The Banneker program, which excluded not only whites but all minorities other than African Americans, was challenged by a Hispanic applicant who qualified for the aid in every respect except race.

The appeals court found that the university had

failed to present evidence of present effects of past discrimination sufficient to justify a race-based remedy and had also failed to create a remedy narrowly tailored to the problem. On Monday, the U.S. Supreme Court refused to hear an appeal in the case. While the high court's action does not set a precedent and will have no impact outside the Fourth Circuit (Maryland, Virginia, West Virginia and North and South Carolina), supporters of affirmative action fear it signals a diminishing concern on the part of the courts for remedying the effects of past discrimination.

In spite of this setback, the university is not without options. Its leaders are determined to continue the progress that has been made and will now explore other avenues for increasing diversity and attracting more minority students to the College Park campus. They should do so—and with energy, speed and determination. Programs in other institutions that achieve comparable results but are not so clearly or narrowly based on a formal racial requirement have been approved by courts. And university administrators have great flexibility in using general scholarship money to create the kind of student body they want. Meanwhile, Banneker-type programs in other parts of the country will certainly be tested, and eventually the Supreme Court will have to resolve a conflict in the circuit courts and provide clear guidance. As this sorting-out continues, it is essential to acknowledge that the work of integration is unfinished and to encourage new and creative approaches to aiding minorities that will survive the constitutional scrutiny of the courts.

# 2072 Military Moves

THE NEW YORK TIMES NATIONAL WEDNESDAY, APRIL 5, 1995

while at the same time providing additional training and education so that larger numbers of candidates can meet them. And it is constantly taking the pulse of its work force to see if its policies, including those regarding advancement, are perceived as fair.

"If you don't have standards that you apply across the board, then your white employees are going to be very disturbed by it," said Maj. Gen. Wallace Arnold, the Army Deputy Chief of Staff for personnel. "Your minorities are going to be disturbed by it as well because it puts them in a situation where they are then looked down on and scorned."

As late as September, the Navy had only four black admirals and the Air Force, six black generals. The Marine Corps had none, although it recently promoted one black to brigadier general and another has been recommended for such a promotion.

For Hispanic people, progress has been slower still. Though they make up 5.4 percent of active duty personnel, there are only 11 Hispanic generals and admirals in all of the four services.

There is no question, experts say, that the Army's success stems in part from its ability to attract blacks. A 1994 Pentagon report noted that 30 percent of enlistees the previous year had been black, higher than any other service and nearly triple the percentage of blacks, 18 to 44 years old, in the civilian population. Blacks not only enlist in higher proportions than do whites, they are also more likely to re-enlist.

"Show me another organization in America besides the N.F.L. and the N.B.A. where you have so many blacks," said John Butler, head of the sociology department at the University of Texas, speaking of the professional football and basketball leagues.

The high retention rate has resulted in blacks making up more than 30 percent of the Army's sergeants. That means, some experts say, that there is a good chance for many enlisted soldiers to have an immediate supervisor who is black, providing a role model for all races and sweeping away stereotypes about blacks in positions of authority.

"The military is the only place in America where blacks routinely boss whites around," said Charles Moskos, a sociology professor at Northwestern University.

But black success in the Army is not merely an accident of numbers. The service establishes affirmative action goals and permits boards to



George Brainard for The New York Times

With affirmative action reported working well in the armed services, there is a good chance that many soldiers will have a minority supervisor. Sgt. Carlos

Jackson, right, and members of the First Platoon, C Company, Second Battalion, Seventh Cavalry Regiment, on duty recently at Fort Hood, Tex.

## *The ideal affirmative action program is reported to be in the military.*

take into account race and diversity when granting promotions. Army officials demand explanations if goals are not met. But no timetables are set for achieving them, and no sanctions are exacted for falling short. As a result, Army officials say, the pressure to cut corners to make the numbers look good is lessened.

Perhaps most important, the Army has placed a great emphasis on education, providing basic skills in reading and mathematics, paying 75 percent of tuition to soldiers who want to earn college degrees and running management training schools for soldiers considered worthy of promotion to sergeant.

When the anti-war protests in the 1960's at predominantly white colleges forced the Army to withdraw its Reserve Officers Training Corps from many campuses, it expanded

R.O.T.C. at historically black colleges and universities. In the 1980's, when it found that a high percentage of blacks receiving their commissions from these programs were failing their officers' training courses because of academic deficiencies, the Army established a tutorial program at black colleges with emphasis on math and communications skills.

As a result, in 1992 about half of the 563 blacks who were commissioned as officers by way of R.O.T.C. came from historically black colleges, according to a study by Mr. Butler and Mr. Moskos.

The Army also trains a cadre of sergeants and commissioned officers to conduct seminars on race and sex, to monitor commendations and disciplinary proceedings, to investigate bias complaints and to advise commanders on the state of race relations in their units, including conducting annual "climate surveys."

These surveys, which include many questions on a unit's attitudes

on race, allow soldiers to express their views anonymously on a variety of issues from the quality of food to their trust in their commanders.

Still, the experts say there are limits to which the Army can teach the country how to deal with racial interactions.

Few companies or other institutions have the financial resources to devote to training and education on the scale that the Army does. And it would virtually be impossible for a corporation to bring some of its top management to Washington every year, as the Army does, to spend up to six weeks examining the records of people eligible for promotion.

And virtually no segment of the society maintains the discipline found in the armed forces.

"The reason I think the Army works best in this area is discipline," said Sgt. Jody Church, a tank gunner. "The civilians, they don't have discipline. You can show them all this stuff and they go right out the door and blow it off."

# Time and Money Producing Racial Harmony in Military

By STEVEN A. HOLMES

FORT HOOD, Tex., April 1 — As a young Army officer in Korea in 1970, Frank L. Miller found himself in a racial climate so volatile among American troops that his post averaged more than 100 racial assaults a week.

These days, the experiences of Mr. Miller, now a major general and the deputy commander of the Army III Corps, are far different. Outside his office on this sprawling base, black, Hispanic and white soldiers maintain their M1A1 tanks and Bradley fighting Vehicles, train in Apache helicopters, attend classes, eat, work and laugh together — all with a lack of rancor that makes those tempestuous days in Korea seem a distant memory.

In the last two decades the military has achieved notable improvements in racial harmony by devoting time, energy and money to the vexing problem of race relations. While the rest of America is engaged in strident combat over the issue of affirmative action, its armed forces — primarily the Army — have quietly transformed themselves into perhaps the most integrated institutions in the country.

To be sure, the progress of blacks in the military — especially at the upper ranks — has not been achieved across the board. The Army boasts of 22 black gen-

## Sexual Harassment Grows

A Congressional study found that women at military academies say they are sexually harassed at the same rate, or higher, than in the past. Page B8.

erals and the only African-American ever to become Chairman of the Joint Chiefs of Staff, Colin L. Powell. The other three services, which have traditionally been less hospitable to blacks, have a combined total of 11 black generals and admirals.

Nevertheless, some Democrats, including President Clinton — who have been placed on the defensive by an increasingly strident conservative onslaught against affirmative action — are holding up the military as a model of how to give minorities and women a leg up without generating resentment among white males.

"I take it there is virtually no opposition to the affirmative action programs that are the most successful in our country, which are the ones adopted by the United States military," Mr. Clinton said at a news conference last month. "Those have not resulted in people of inferior quality or ability getting preferential treatment but has resulted in an intense effort to develop the capacities of everybody who joins the military so they can fully participate and contribute as much as possible."

According to the Pentagon, minorities, mainly blacks, made up 29.2 percent of active-duty personnel in the four armed services as of last September.

The Army led the way with 39.5 percent. The Navy had 29.3 percent, the Marines 28.6 percent and the Air Force 22.5.

Minorities also made up 5.8 percent of all the male generals and admirals on active duty, compared with a 1.1 percent minority representation among the male senior-level managers at the country's largest corporations.

Pentagon officials note that even as the armed forces have reduced the number of active duty personnel to about 1.6 million from more than 2.2 million in 1987, the percentage of minorities has increased in the enlisted ranks and the officer corps alike.

"Our society is becoming more diverse and that diversity has been reflected in the force, not only in aggregate numbers but in the various grades as well," said Fred Pang, Assistant Secretary of Defense for force management policy.

For blacks, equal opportunity in

## BY THE NUMBERS

### Integrating the Officer Ranks

Blacks as a percentage of people at each rank in each branch of the armed forces. Figures are for men only.

	1994	1980
<b>ARMY</b>		
 Generals	6.5%	5.5%
Colonels	4.9	4.6
Lieutenant Colonels	8.3	4.8
Majors	12.5	4.4
Captains	12.4	7.7
Lieutenants	11.5	10.5
<b>NAVY</b>		
 Admirals	1.7%	1.2%
Captains	1.7	0.8
Commanders	3.2	0.6
Lieutenant Commanders	3.7	1.2
Lieutenants	5.2	2.6
Lieutenant (J.G.) and Ensigns	7.0	3.6
<b>AIR FORCE</b>		
 Generals	2.0%	2.8%
Colonels	2.1	1.8
Lieutenant Colonels	4.9	2.1
Majors	7.4	2.3
Captains	5.5	4.4
Lieutenants	5.6	8.2
<b>MARINES</b>		
 Generals	0%	1.5%
Colonels	2.9	0
Lieutenant Colonels	3.9	0.6
Majors	4.0	1.6
Captains	4.8	4.4
Lieutenants	6.0	5.0

Source: Defense Department

the military has had its rewards, but it has also exacted its costs: of the 266 soldiers killed in the Persian Gulf War, 15 percent were black.

In part the military's success stems from factors that only are unique to the armed services. Military life requires maintaining strict order and discipline so that orders, including ones to diversify the work force, are obeyed without question. The armed forces grow all of the managers; there is no such thing as hiring from outside the organization. Consequently, it can better influence the racial mix and the quality of promotions.

And there never has been a shortage of blacks seeking to enter the military.

Nonetheless, the armed forces also provide instructive lessons for society at large. It has adhered to tough standards for advancement

Cont'd  
192

... to say, is that the federal government could provide solutions to America's problems. The Republican Contract [With America] view reflects in many cases an outright hostility to governmental action, although in some cases a curious willingness to increase the federal government's control over our daily lives. My view, what has loosely been called the new Democratic view or the New Covenant view, is to be skeptical of government but to recognize that it has a role in our lives and a partnership role to play.

We have made the government smaller; we have given more power to states and localities and to private citizens. Our proposals would further accelerate those trends. We have, as you learned here in this room just a few days ago, been working for months on a serious effort to reduce the burden of unnecessary regulation. But we believe government has important work to do: to expand opportunity, to give people the tools they need to make the most of their own lives, to enhance our security. That's why we support adding 100,000 police. That's why we support more affordable college loans. That's why we supported the family leave bill. That's why I support the minimum wage legislation now before Congress, and why I do not want to reduce our investment in education in our future.

The Republicans now have proposed to cut education, nutritional help for mothers and school children, anti-drug efforts in our schools, and other things which to me appear to target children in order to pay for tax cuts for upper-income Americans. I do not believe that that is consistent with our interests as we build America into the 21st century and we move into this new global economy.

So my job, it seems to me, is to continue to push my view, what I believe is the essence of the New Covenant: more opportunity; more responsibility; reform welfare, but don't punish people, require work. This is the sort of thing we need more of. And I look forward to this debate. I think it's healthy, I think it's good for the American people. . . .

## Defection by a Democrat

**Did you try to talk Senator [Ben Nighthorse] Campbell [D-Cole.] out of jumping ship? What does it portend for the Democratic Party, and what does it mean in terms of your leadership?**

Well, I talked to him this morning because he called the White House and said he wanted to talk to me, and so I called him. And we had a good conversation. And he pointed out that he had voted with me over 80 percent of the time in the last two years, that he essentially supported our economic policies, our education policies and our social policies, and that he would not change that.

It was obvious to me that there were some Colorado-specific factors at work. I wish he hadn't done it. I think it was a mistake. But I hope he will continue to vote in the way he has in the past.

**Do you think there will be more defectors?**

No. I have no reason to believe it. He had been talking about this for some time, we had heard, because of—apparently because of some things that happened out there that I'm not fully familiar with. I wish he hadn't done it, but it's done. All I can do now is hope that he'll keep voting the way he has the last two years. If he does, it will make a contribution to moving the country forward.

## Balanced Budget Amendment

**You indicated yesterday agreement with the Democratic senators who balked on the balanced budget amendment because of their objections to the current and continuing practice of borrowing surplus Social Security funds to offset the deficit. In light of your attitude on that, sir, I wondered if you're prepared to take the lead on that issue by bringing**



**President Clinton listens to a question from a reporter during**

results. And I have been, throughout my public career. I have always been for trying to help people develop their capacities so they could fully participate. . . .

I have asked for a review of all the federal government's so-called affirmative action programs because I think it's important that we analyze, number one, what they do and what—a lot of times people mean different things when they use 'affirmative action.' For example, I take it there is virtually no opposition to the affirmative action programs that are the most successful in our country, which are the ones adopted by the United States military, which have not resulted in people of inferior quality or ability getting preferential treatment, but have resulted in an intense effort to develop the capacities of everybody who joins the military so they can fully participate and contribute as much as possible, and has resulted in the most integrated institution in our society.

So I want to know what these programs are exactly, I want to know whether they are working, I want to know whether there is some other way we can reach any objective without giving a preference by race or gender in some of these programs. . . .

There are still a lot of people who aren't living up to their capacity in this country and it's hurting the rest of us. . . . The American people want an end to discrimination. They want discrimination where it exists to be punished. They don't want people to have an unfair break that is unwarranted. We can work this out, and I'm determined to do it.

## Challengers for the Presidency

**It seems like every day another Republican is jumping in to the presidential race. It also seems like every day we are reading about your election campaign and who is in and who is out. I wonder if you could tell us a little bit about the kind of organization that you're putting together. And I also wanted to ask you about a comment that Senator [Robert J.] Dole [R-Kan.] made yesterday when he was asked about why he didn't meet the Democrats' demand to take Social Security out of the fight over the balanced budget amendment. He said you have a president who has abdicated his responsibility; if you had a real president down there, we might think about it. What's your response to that in the context of his presidential aspirations?**

My response to that is that Senator Dole has [unintelligible]

## Swiss Used Nazi Victims' Money For War Payments, Files Reveal

By ALAN COWELL

BONN, Oct. 23 — The unclaimed accounts of presumed Holocaust victims were used to ease Switzerland's postwar compensation disputes with Poland and Hungary under secret agreements, according to documents made public today by a Swiss historian.

The disclosure, based on research in the Swiss National Archives by the historian, Dr. Peter Hug, represented a further blow to Switzerland's self-image and fueled assertions by American Jewish groups that, despite Switzerland's reputation for probity and neutrality, it drew financial benefit in many ways from the Holocaust.

On at least three occasions between 1960 and 1975, Dr. Hug said in a telephone interview from Bern, the Swiss invoked the secret agreements with Poland and Hungary to compensate Swiss businesses.

On one of those occasions, Dr. Hug said, money from dormant accounts of presumed Holocaust victims was "distributed directly among Swiss businessmen" to meet their claims for compensation for assets seized in Hungary after the Communist takeover.

And for the compensations in Poland, Swiss authorities paid over 460,000 Swiss francs (around \$390,000 at present rates) into a separate Polish Government account at the Swiss National Bank — known as "Account N" — that was eventually used to pay Swiss businessmen.

The disclosures have added to a widening furor among American Jews and the Swiss themselves about the extensive and still largely secret dealings not only between Swiss banks and Nazi Germany but also about the subsequent fate of untold amounts of money left in Swiss accounts and insurance funds by Holocaust victims.

The confrontation, particularly with American Jewish groups, has left Swiss officials grappling with a widening stream of disclosures suggesting that their forebears cynically manipulated the Nazi era and the Holocaust for profit.

At that time, many Jews in Ger-

many and Eastern Europe saw Switzerland as the only safe haven for their assets because of Switzerland's neutrality and because the Swiss set up banking secrecy laws in 1934 to protect their clients' deposits from Nazi scrutiny.

Over the past two months, however, documents discovered in the United States, Britain and now Switzerland have chronicled allegations that gold looted by the Nazis, stolen from individual Jews or taken from the teeth of Holocaust victims was sold to the Swiss National Bank. The postwar fate of the bullion remains unclear, according to United States groups.

Additionally, Swiss newspapers have reported that the Swiss traded freely with Nazi Germany in stolen artworks and jewelry, while leading Nazis did their personal banking in Switzerland.

Today the Swiss authorities announced the formation of two new investigative panels. They are designed to provide speedy and full disclosure of any secret deals struck with former Communist East European countries to use dormant accounts of Holocaust victims to compensate Swiss businesses for expropriated assets.

"We want to clear up completely this important and painful matter as quickly as possible," the Swiss Foreign Minister, Flavio Cotti, said. However, the setting up of two more inquiries — in addition to three already under way or promised — suggested a deepening alarm among the Swiss authorities that their credibility is in tatters.

Nowhere has that been more graphically illustrated than in the past few days, when Switzerland first denied that it struck a secret compensation deal with Poland in 1949, only to find evidence disclosed from its own archives that agreements were made with Poland, Hungary, Romania, Bulgaria and the former Yugoslavia.

In addition, money from supposed dormant accounts was actually disbursed in dealings with Poland and Hungary.

In both the telephone interview and in a lengthy newspaper article today, Dr. Hug, an historian at Bern University, said Swiss negotiators

also promised to pay Poland some two million Swiss francs from unclaimed Polish accounts to persuade Poland to strike a compensation agreement in 1949.

But that promise was never kept. Instead, in 1960 and to Polish protests, Switzerland paid only an initial sum of 16,347 Swiss francs — around \$13,000 — to the Polish Government.

Unique among such deals, and at the insistence of Swiss banks, the secret agreement also provided for Poland, not Switzerland, to act as guarantor that legitimate heirs would inherit the dormant accounts. But when Switzerland deposited the money it did not provide a list of those in whose names the accounts were registered, Dr. Hug said.

"That is where I see the real moral problem," he said. "Switzerland never gave Poland the chance to do any research."

The agreement, he said, set up a clearing account at the Swiss National Bank in which Polish receipts from the sale of its coal to Switzerland, money from supposed dormant accounts held by Poles before 1939 and Swiss claims to compensation for expropriated assets were all to be accounted for and offset against each other.

Dr. Hug said his research was based on an initial examination of some 6,500 boxes of files in the Swiss National Archives and was not conclusive since he had not studied all the files and had not had access to other sources of material held by cantonal authorities, courts and banks.

However, he said, he was "99 percent certain" that money related to secret compensation agreements had been disbursed only in dealings with Hungary and Poland.

Under a system set up by Switzerland in 1962, any monies found in dormant accounts on which no claim had been made for five years were put into a special Government account to gather together unclaimed deposits thought to belong to Holocaust victims. The special account is to be used to support charitable organizations.

The Swiss used this account to make its secret payments to Hungary and Poland.

workplace — ethnic, religious and political," he said.

Although government affirmative action programs are under attack, particularly with a major ballot initiative in California Nov. 5, thousands of companies remain committed to diversifying their labor force, regardless of what government does.

While companies search for ways to achieve workplace harmony, they must pay close attention to:

- **The Family and Medical Leave Act.** BE&K already had provisions granting unpaid leaves for family issues when the federal law was enacted in 1993. But Carol Morgan, company attorney, said the act added paperwork and the obligation to do "everything according to the law."

- **The Americans With Disabilities Act.** It prompted businesses to do much more than add ramps in front of their buildings. Employers screening prospective workers no longer may inquire about their general health. Many companies have had to rewrite thousands of job descriptions and overhaul application forms. The ADA is a particular challenge for BE&K, where many of the construction jobs are physically demanding. "We can ask about the specific demands of the job," Miss Morgan said. "If the job requires climbing, we can ask if a person is able to climb, but we can't ask general questions. We haven't had any difficulty with this. This just requires you to look at a person for his quality as a pipefitter and not at other areas."

- **The graying of America.** "With the life expectancy growing longer, in 20 years 65 may no longer be an acceptable retirement age," Mr. Goodrich said. "It will be interesting to see how companies deal with that."

For most jobs, federal law has already done away with 65 as a mandatory retirement age. Mr. Fottler predicts that companies will continue downsizing, with older workers often the first to lose their

jobs. "There will be an increasing number of lawsuits filed by older employees who say they were picked on because of their age," Mr. Fottler said.

Lockheed Martin, the nation's largest defense and aerospace contractor, is battling a federal class-action lawsuit on behalf of 3,100 workers over age 40 who were laid off from 1990 to 1993. The company denies allegations of age discrimination.

- **Employees with AIDS or the virus that causes it.** Much like the case dramatized in the movie "Philadelphia," Eric Kline, a Knoxville, Tenn., accountant, said he was abruptly fired two days after he told his employer he had AIDS.

Mr. Kline, a hemophiliac who contracted AIDS through a transfusion, died last month, but his family is pursuing his suit against the Pinkstaff, Daniels & Simpson accounting firm. Company officers said they fired Mr. Kline for poor job performance and did not know he had AIDS when they decided to dismiss him.

Some companies go well beyond these issues. Managers at the Pierpont Inn in Ventura, Calif., equipped controller Claudia Gosard with a \$2,500 home computer to help her juggle her work with raising two young sons.

"You do put yourself on the line and you take more chances," general manager Rod Houck said. "But I think the return is increased productivity. I think people tend to stay with you longer, and that saves us money."

Baptist Health System is working to solve employee complaints through peer review. "What we are saying with this is, 'If there's a problem, let's work it out between us,'" Mr. Sanders said.

In today's climate, if the company doesn't work it out, lawyers will.

---

*Bob Johnson is a reporter for the Post-Herald in Birmingham, Ala.*

**BOB JOHNSON**

*Last of a four-part series.*  
**H**ere's the problem: You're the boss and one of your employees has a Bible on his desk.

You would violate his rights by telling him to remove it. But if you allow him to pick up the Bible and start preaching to other workers, you're violating their rights not to be exposed to someone else's religion.

It's the type of situation employers increasingly face as the workplace becomes the ultimate battleground in the fight over rights in America.

Being a boss today means maneuvering delicately through a web of government regulations, arbitration, diversity outreach programs, real and potential lawsuits and a myriad of training initiatives aimed at protecting rights and keeping employees happy.

"All this diminishes the ability of the company to carry out business functions," said Tom Sanders, senior vice president for human resources and administration for the 10,000-employee Baptist Health System, which operates 11 hospitals in Alabama.

The workplace has become a stage for many of the rights disputes of the '90s. Employers are being asked to ensure that their workers are not discriminated against because of race, age, sex or disabilities.

At the end of last year, the Equal Employment Opportunity Commission put its total of new and pending cases at 190,043 complaints from individuals who said they were discriminated against by either an employer or a potential employer.

Apart from EEOC cases, the number of employment-related civil rights lawsuits in U.S. district courts rose from 8,370 in 1991 to 19,059 in 1995 — an increase of 128 percent.

Almost no company or government agency is immune to suits and employee complaints — even

## Rights battlefield in the workplace

those with programs to protect workers' rights. Claims have been filed in recent years against mom-and-pop grocery stores, the CIA and virtually every kind of organization in between — even the EEOC itself.

In Memphis, a federal judge ruled last May that the agency had



discriminated against Joseph Ray Terry Jr., one of its attorneys. Mr. Terry had complained since the mid-1980s that he was not promoted to top management because he is a white male. A witness testified that the EEOC's Memphis operation was "an old-boy network that was black." Mr. Terry was named a deputy general counsel for the EEOC in Washington. The agency was ordered to pay him \$364,000 in back pay, bonuses and leave and \$355,000 in legal fees.

Small businesses have had the most difficulty in dealing with rights issues, said Myron Fottler, a nationally recognized professor of management and director of the Ph.D. program in administration-health services at the University of Alabama at Birmingham.

"Big businesses have large human-resource departments that can monitor the law and make recommendations," he said. "Small businesses... simply don't have the staff to keep them out of trouble."

Employers big and small feel the

effects of the rights clash in the pocketbook.

"The fear of being sued has driven up the cost of doing business across the board," Mr. Fottler said.

Cost increases stem from revamping employment applications, building wheelchair ramps for disabled workers and handling increased clerical duties to comply with federal mandates such as the 1993 American Family and Medical Leave Act.

While thousands of companies downsize, one area of employment is growing — human resources. "One of the reasons companies are having to add human-resource employees is the rights issues," Mr. Fottler said. Many companies also hire outside expertise. Consultants come in, design new forms and then leave," Mr. Fottler said. "An entire industry has popped up to deal with these problems."

Dealing with the rights of employees has become a full-time business, a trend reflected at both Baptist Health System and BE&K, a worldwide construction company headquartered in Birmingham. Evidence can be seen at almost every work station. BE&K has programs aimed at settling disputes and stopping sexual harassment. The company operates its own day-care facility. Even work hours have been adjusted to make commuting easier.

"We try to be inventive with our programs, policies and benefits because all we have is our employees," said Mike Goodrich, chief executive officer of BE&K. Mr. Goodrich said what's happening in the workplace reflects a changing society. "There's a great premium on diversity, and you see it in the

Gadzichowski, a Justice Department lawyer who oversaw the test's development, has testified, "I think it's beyond question that the exam . . . is valid. It predicts job success."

Meanwhile, the test provides the Justice Department with a new tool for coerc-

ing police departments into proportional hiring. The New Jersey State Police and the Suffolk County, N.Y., Police Department were among the first to feel the heat this year. The former has been sued by the NAACP and the latter subjected to a heavy-handed "compliance review" by the Justice Department. The alleged disparate impact of their exams is a focus of complaint in both cases, and both departments have been told that they might end their new legal troubles by adopting the Nassau County test.

The Nassau County test destroys what it purports to embody—merit hiring. In the name of fairness, it removes competence as an advantage, denying job opportunities to talented individuals of all races. Thus the quality of policing can be expected to fall. This new form of racial preferences poses a clear and present danger to public safety.

---

*Ms. Gottfredson is a professor of educational studies at the University of Delaware.*

SAN FRANCISCO  
 the lima beans of Cal-  
 politics. Everybody  
 how important water  
 land. Everybody under-  
 water. Captured from the  
 mountains and moved south  
 that makes the desert  
 that lubricates urban  
 and that is precious. Water is  
 Water is good for  
 stuff of history. Water is good for  
 Water also is a bore.

Now not everybody will admit this.  
 Not as not everybody will cop to slip-  
 lima beans under the plate when  
 the cook looks away. The average  
 Californian—if any such person  
 exists—has some notion of the basic  
 hydraulics involved with California  
 water. They might nod knowingly  
 when some writer or pol trots out  
 Twain's now tired aphorism about  
 whiskey being for drinkin' and water  
 for fightin'.

They probably are aware that for  
 some Californians water is, in fact, a  
 blood sport, and that the battles have  
 raged across centuries. Water war-  
 riors, the combatants are called. They  
 fight over salinity in the delta, tem-  
 peratures below Mt. Shasta, toxic  
 ponds in the western San Joaquin. It's  
 all quite interesting, to them. Those  
 not directly involved—most  
 Californians—come as spectators to the  
 engagements, feigning interest.

All of which is an overly long pre-  
 lude to a sad announcement about this  
 particular column: It is about Califor-  
 nia water and politics. And there now  
 will follow a five-minute intermission,  
 allowing those so inclined to make  
 tracks for the sports section....

story: Something odd is at work on  
 the California water front. The various  
 water factions—farmers, environ-  
 mentalists and urban water agencies—  
 amazingly have come together as  
 allies to put on the November ballot a  
 \$1-billion bond measure. Proposition  
 204, the "Safe, Clean, Reliable Water  
 Supply Act," would finance a multi-  
 tude of good works: restoring the delta,  
 shoring up flood control systems,  
 cleaning water supplies, saving fish,  
 and so forth.

The list of supporters is almost  
 comical in its breadth. Bill Clinton  
 endorses Prop. 204, as does Bob Dole,  
 as do Pete Wilson and Barbara Boxer  
 and Dianne Feinstein. The Sierra Club  
 endorses it. So does the Kern County  
 Farm Bureau. And Apple Computer  
 and Paine Webber and the Mission  
 Viejo Co. and Western Boaters Safety  
 Group and, one imagines, Mr. Rogers  
 and Barney, Sonny and Cher, Mick  
 Jagger and Paul, George and Ringo.

And yet, despite all its good inten-  
 tions and extraordinary coalition of  
 official supporters, Prop. 204 does  
 have a problem: No, it has several  
 problems. It is about water, yawn. It is  
 about bonds, yikes, a funding device  
 increasingly viewed by voters as syn-  
 onymous with taxes. And it has landed  
 on a ballot overloaded with noisier  
 campaigns. A large segment of the  
 voting populace still knows nothing  
 about Prop. 204, which might be its  
 biggest problem of all. It's tough to go  
 cold into the booth and spring for a

Los Angeles Superior Court Judge John Ouderkirk recused himself after a challenge from Knight's defense lawyers, who argued that the judge might be called as a witness to testify about his conversations—if any—with Knight's probation officers as well as defense lawyers and prosecutor Lawrence M. Longo.

Longo is under investigation by the district attorney's office because of financial

On the recommendation of Longo's Knight's lead defense attorney, Encino lawyer David Kenner, Ouderkirk imposed a nine-year suspended prison sentence and five years probation. Among the terms of probation were that Knight undergo drug testing and notify a probation officer before foreign travel.

On Jan. 2, 1996, Longo's daughter, Gina, Please see JUDGE, B2

On the recommendation of Longo's Knight's lead defense attorney, Encino lawyer David Kenner, Ouderkirk imposed a nine-year suspended prison sentence and five years probation. Among the terms of probation were that Knight undergo drug testing and notify a probation officer before foreign travel.

On Jan. 2, 1996, Longo's daughter, Gina, Please see JUDGE, B2



KEN LUBAS / Los Angeles Times  
 Judge John Ouderkirk recused self because he might be called as witness.



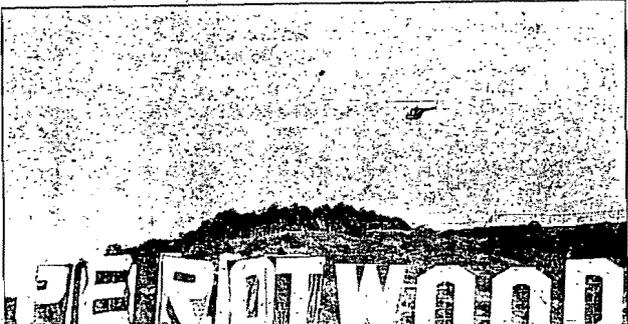
KIRK MCKOY / Los Angeles Times  
 Activists Christine O'Brien and Dino Williams oppose altering sign that towers over their neighborhood.

# Howls in Hollywood

## Dogfight Looms Over Disney Bid to Put Spots on Landmark Sign

By LARRY GORDON  
 TIMES STAFF WRITER

The landmark Hollywood sign could be breaking out in giant black spots soon. Don't suspect fungus or graffiti on the 45-foot-high letters. Instead, anticipate a proposed marketing stunt for the Nov. 27 opening of a movie about a big bunch of two-toned canines. And expect a snarly dogfight over the possible use of Los Angeles' Historic Cultural Monument No. 111 to promote the live-action



# Proposition 209 Is a Blueprint for Court Fights, Scholars Say

■ **Politics:** Legal experts disagree on where and how widely its social impact would be felt. But they are certain it would raise issues that might take years to resolve.

By BETTINA BOXALL, TIMES STAFF WRITER

At a mere 23 lines, Proposition 209 is one of the shortest and simplest initiatives on next week's ballot. But if the measure passes, its reach will be long. From voluntary school desegregation programs to police hiring to the awarding of contracts, Proposition 209 could cut a broad swath through the public sector.

Legal scholars say its precise impact is in many ways impossible to predict because the initiative raises a host of questions that will probably take years of court battles to resolve.

But interviews with professors from the state's leading law schools and lawyers representing state agencies point to a broad array of programs and policies that could run afoul of the initiative, which bans local and state government-sponsored affirmative action for women and minorities.

This is a major reshaping of public institutions in the state," said UC Berkeley law professor Dan Rodriguez.

The measure could do much more than eliminate obvious affirmative action preferences, such as giving women or minorities extra consideration in public hiring or college admissions.

For example, the independent state legislative analyst's office says the future of UC's Mathematics, Engineering and Science Achievement (MESA) mentoring and study program would be in doubt because the 25-year-old project targets minority students at the elementary through university levels and tries to draw them into math and science fields.

Under 209, dozens of privately endowed scholarship funds in the UC system would be subject to legal challenge because they are limited to women or particular ethnic groups, according to the UC general counsel.

Voluntary magnet and school desegregation programs will be vulnerable to the extent that they take students' race into account, according to the state Education Department's general counsel.

The legislative analyst's office predicts that a police department could be challenged for launching a recruiting drive specifically aimed at women or minorities.

Proponents do not dispute that 209 will affect a variety of programs. But they argue that much affirmative action can simply be refashioned to replace race and gender considerations with some other factor, such as socioeconomic background.

Please see PROP. 209, B4

**Continued from B1**

"We'll see a new thinking in the way government approaches affirmative action," said Yes on 209 spokeswoman Jennifer Nelson.

Opponents have seized on 209's effect on such outreach efforts as MESA in arguing that the initiative will do far more than the public realizes, gutting programs that have helped women and minorities get into everything from medical school to contracting.

Compared with many of the tortuously long initiatives on the state ballot, Proposition 209 appears readily understandable.

The proposed constitutional amendment bars state and local governments from discriminating or granting "preferential treatment" on the basis of race, ethnicity, national origin or gender in public contracting, employment and education.

But just what is preferential treatment?

In interviews with *The Times*, 11 constitutional and discrimination law experts—who have not been in the forefront of campaigning for either side—generally agreed that the term is not that well defined legally.

"The concept of a preference is extremely vague," UCLA law professor Evan Caminker said. "It will require some judicial interpretation to figure out what preferential treatment means."

**'The concept of a preference is extremely vague. It will require some judicial interpretation to figure out what preferential treatment means.'**

EVAN CAMINKER  
UCLA law professor

A number of practices involving efforts such as recruiting and outreach may or may not survive, depending on how they are run and how narrowly or broadly judges interpret the initiative.

"The language isn't clear," UCLA law professor Julian Eule said. "There's an awful lot of leeway here about what courts are going to do."

Both Caminker and Eule question the measure's constitutionality.

"It's an attempt to use a bypass of the ordinary legislative process to undo the gains minorities have achieved," Eule said. "When it is used to reassert majority rule—and the entire goal of the Constitution is to prevent, and create checks against, pure majority preferences—that's deeply constitutionally problematic."

But others interviewed said 209 should pass constitutional muster, particularly because it includes a nondiscrimination clause. "I'd be quite surprised if it was found to be unconstitutional," said UC

reject that interpretation, however.

"I don't see that it is going to change sex discrimination law," said Stanford University law professor Tom Grey.

He and others say Clause C applies only to the initiative and does not amend other sections of the Constitution. Still, Grey added, "there's no guarantee of how courts will construe the language. It's open to the other reading."

Gauging the initiative's impact is further complicated by a provision exempting court orders or consent decrees in force when the measure goes into effect.

A number of existing gender- and race-based affirmative action programs adopted under court order would therefore be preserved, such as the Los Angeles Police Department's hiring goals for women and minorities.

Education will perhaps feel the greatest impact if Proposition 209 becomes law.

The initiative would spell the end of race and gender preferences in public college admissions and hiring—although University of California regents stole that thunder when they voted last year to stop using race, gender or ethnicity as criteria in admissions as of Jan. 1, 1997, and in hiring and contracting beginning last January.

The policy change will result in a significant drop in the number of Latino, African American and Native American students admitted, while the enrollment of white and Asian students will rise, according to a UC report.

Beyond admissions, a number of long-standing programs could also be affected.

Public university scholarships restricted to women or minorities would be illegal, according to UC Berkeley professor Jesse Choper.

Terry Colvin, spokesman for the UC president's office, said the UC general counsel believes that racial, ethnic and gender preferences would have to be dropped from about \$28 million in financial aid programs, including \$7 million in privately endowed scholarships targeting groups, such as Portuguese men or undergraduate women at UC Berkeley.

Several legal scholars, including Stanford law professor John Donohue, said that under a broad reading of the initiative, funding for a women's center or an African American cultural center on a public campus could be challenged.

Joseph Symkowick, general counsel of the state Department of Education, said magnet schools—which offer enriched programs to attract a diverse student body—would be threatened in their present form because many of them take race into account in admitting students.

The enrollment criteria would have to be changed, undercutting magnet programs' primary purpose: integration.

Similarly, Symkowick said voluntary desegregation programs, including busing and remediation efforts, would violate 209 because of their racial considerations.

There is a twist, however: Many existing magnet and involuntary school desegregation programs would be saved because they are under court order.

Richard Mason, general counsel for the Los Angeles Unified School District, said the

A number of experts said that if a police department trying to diversify its force was considering two equally qualified applicants—one an African American woman and one a white man—the woman could not be chosen on the basis of her race and gender.

But what could a public agency do to diversify its pool of applicants, to make sure minorities and women apply? Could a police department or school district encourage Latinos or Asians to apply?

"Whether that constitutes a preference, I don't think anyone can tell you," Post said.

State hiring practices have already been revised by Gov. Pete Wilson, who last year rolled back some state affirmative action programs. As a result, the state Civil Service system stopped considering race and gender in its hiring, said Ted Edwards, affirmative action manager at the State Personnel Board.

State departments, nonetheless retained hiring goals and timetables as a way of "monitoring" work force composition, said Edwards, who predicted that they would survive 209 because they do not factor into the ultimate hiring decision.

The legislative analyst's office is not so sure.

"We're pretty confident that hiring goals and timetables would be gone" because they create a dynamic that favors

**'It's an attempt to use a bypass of the ordinary legislative process to undo the gains minorities have achieved. When it is used to reassert majority rule—and the entire goal of the Constitution is to prevent, and create checks against, pure majority preferences—that's deeply constitutionally problematic.'**

JULIAN EULE  
UCLA law professor

"underrepresented" groups, said Robert Turnage, of the legislative analyst's office.

Six law professors, including UCLA's Jonathan Varat and UC Hastings law professor Joseph Grodin, a retired state Supreme Court justice, said it is conceivable 209 could be used to challenge maternity benefits at public agencies that do not offer comparable paternity benefits.

The extent to which 209 would limit future court orders is another murky area.

The legal experts say that under the federal supremacy doctrine, federal judges in California would not be bound by Proposition 209. Similarly, they said, state judges invoking federal law could continue to order affirmative action as a remedy for discrimination.

But Linda Hamilton Krieger, acting law professor at UC Berkeley, predicted that

## Ducking *Hopwood*: The Passive Virtues

**A**t first blush, it seemed an abdication of responsibility when the Supreme Court declined to review the 5th Circuit's sweeping decision barring all consideration of race in admissions at the University of Texas School of Law.

The July 1 denial of certiorari in *Texas v. Hopwood* sowed confusion—probably into the next millennium—as to the legality of racial preferences in

admissions everywhere. It left institutions in different states subject to disparate interpretations of the Constitution.

State universities in most of the country will presumably feel free to continue

using racial preferences, reasoning that the Court's 1978 decision in *Regents of the University of California v. Bakke* remains the law of the land.

But those in Texas, Louisiana, and Mississippi are subject to the 5th Circuit's broad directives in *Hopwood* that *Bakke* is no longer good law, that universities may not consider race, and that any who do so risk punitive damage awards to rejected white applicants.

(While the 5th Circuit did say that preferences could theoretically be used to remedy an institution's recent history of proven discrimination against minorities, no university appears to have such a recent history.)

Justice Ruth Bader Ginsburg's one-page explanation for her vote to deny certiorari, joined by Justice David Souter, was less than convincing.

Ginsburg noted that Texas no longer defended the crude, quota-like admissions process that the law school had used in 1992 (when the case was filed), and that the record shed little light on the operation of the school's current regime of racial preferences.

Such factors might warrant passing up an ordinary case. But this case involved pressing issues of huge national importance. And it will probably take at least four years for another university admissions case to make its way to the Court and present the justices with another opportunity to resolve the state of confusion they have helped create.

Besides, the Court has often made broad pronouncements with no more guidance from the record before it than it had in *Hopwood*. A leading example is Justice Lewis Powell Jr.'s pivotal opinion in the 5-4 *Bakke* decision. Powell endorsed as a model the use of minority racial status as a "plus" factor in a Harvard College plan that was before the Court only via an amicus brief.

I'd wager that the four more liberal justices would have jumped at the chance to reverse *Hopwood* had they been confident of a fifth vote; that the three more conservative justices would have done the same had they been confident of five votes to affirm; and that the real reason for the outcome was that neither bloc wanted to gamble on what Justice Sandra Day O'Connor (and perhaps Justice Anthony Kennedy) would do.

But for all this, I lean to the view that the Court may have made the least bad choice when it ducked *Hopwood*, because the alternative would have been worse: rendering a climactic decision, probably by a 5-4 margin, that could have pre-empted evolutionary, democratic decision-making on an issue of vital national importance as to which the country and the Court alike are deeply divided.

Maybe this is just a rationalization for the fact that I am as conflicted about racial preferences in admissions as I imagine Justice O'Connor to be. But consider the possible outcomes if the Court had taken up *Hopwood*.

If it had affirmed the 5th Circuit—virtually outlawing racial preferences—it would have required a radical change in admissions procedures nationwide, over the bitter opposition of the vast majority of educators. If rigorously enforced, such a

decision might produce something close to de facto resegregation of most elite universities.

Any such ruling would be seen by a great many minorities, rightly or wrongly, as a pretext for returning to the bad old days of racial hierarchy. It would also lack legitimacy in many eyes as having been imposed, with no popular mandate, by a bare majority of nine unelected judges, with four dissenters excoriating the Court for perverting the Constitution.

"[T]he Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent," as Alexander Bickel wrote. "The Court . . . must lead opinion, not merely impose its own; and . . . it labors under the obligation to succeed."

As one who hopes to see the nation weaned from racial preferences before we descend ever deeper into tribalism, I nonetheless think it would be unwise for the Court to impose the kind of cold-turkey withdrawal by judicial fiat mandated by the 5th Circuit.

### CLOSING ARGUMENT

BY STUART TAYLOR JR.

91

cont'd

Does this mean that the Court should have taken up the *Hopwood* case and reversed?

Not necessarily. For even the narrowest possible Supreme Court endorsement of racial preferences in admissions would be taken by predominantly liberal university administrators as a mandate for the perpetual entrenchment of what has become a pervasive regime of heavily race-based admissions.

That's what happened after *Bakke*, even though the Court there voted to bar racial quotas and endorsed only quite limited use of racial preferences. The outcome hinged on Justice Powell's view that race could be considered in seeking "a diverse student body." But he implied (by quoting the Harvard plan with approval) that race should come into play only in choosing between closely matched individuals, as a marginal factor that "may tip the balance in [an applicant's] favor just as [may the] geographic region [of] a farm boy from Idaho."

Notwithstanding the narrowness of this endorsement, *Bakke* has been used to justify pursuit of stated or unstated numerical "goals" that are met with such consistency as to be almost indistinguishable from the quotas that the Court condemned. Consider the remarkable record in *Hopwood* itself, involving one of the nation's top law schools.

Decades after discrimination against minorities had ended at the University of Texas, the law school was pursuing fixed goals of admitting at least 10 percent Mexican-Americans and 5 percent blacks in each class. It granted "presumptive admit" status to black and Mexican-American applicants—including those from affluent families and other states—whose rank on the Texas Index (a composite of undergraduate GPA and LSAT scores) was above 188, while rejecting almost all whites (and others) whose rank was below 193. Applications were color-coded by race. And the admissions process was segregated by race, with a special "minority subcommittee" for the two preferred groups.

The experience after *Bakke* thus shows that when the Court gives university administrators an inch, they take a mile. Any new decision putting the Court's moral authority behind preferential admissions would probably be used to perpetuate, with largely cosmetic modifications, programs that aim for a similar racial-balance-at-any-cost bottom line.

Nor is it clear that preferential admissions really help all, or even most, of the purported beneficiaries.

The end result is often that promising minority students—who could be academic stars at most universities—are lured to intensely competitive schools where disproportionate numbers drop out, struggle academically, become alienated, and seek solace through self-segregation.

Meanwhile, perhaps in part because of the legal uncertainty that the Court has created, there is at least a glimmer of hope that our institutions—and our democratic process—may be starting to feel their way toward a tolerable resolution of the controversy over racial preferences.

With the threat of judicial invalidation looming, and with preferences under growing political attack, people of diverse ideological perspectives are scrambling to find alternatives to race-based programs. And some are seeking to redirect social

energies toward the most intractable sources of inequality: the woefully inadequate primary and secondary education received by many minority children, and the dispiriting cultural and economic environment in which many are raised.

Meanwhile, it seems likely that the University of Texas will find ways to continue admitting substantial numbers of blacks and Mexican-Americans without overt consideration of race—for instance, by giving less weight to standardized test scores and by giving special consideration to applicants of all races who have shown unusual potential by overcoming poverty or adversity.

Similar adjustments seem likely to develop in California, where the state Board of Regents has ordered abandonment of racial preferences in admissions, and where an initiative slated for the November ballot would bar the state from using racial and gender preferences in education, employment, and contracting.

Where all this will lead is hard to foresee. But there are times when it is best for the Supreme Court to let events take their own course. This may be one of those times.

*Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer magazine. His e-mail address is stuart.taylor@counsel.com. "Closing Argument" appears weekly in Legal Times.*



# EEOC fax

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS  
1801 L STREET, N.W.  
WASHINGTON, D. C. 20507  
FAX: (202) 663-4912

DATE: *11/20/96* TIME: *3:00 pm*

TO: *Steve Karnath*

FAX NUMBER: *456-7028*

SENDER: *CLAIRE GONZALES*

SENDER'S TELEPHONE NUMBER: *(202) 663-4915*

DOCUMENT:

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): *2*

SPECIAL INSTRUCTIONS:

*EEOC Intervention in Texaco*

PLEASE TELEPHONE SENDER IF YOU DO NOT RECEIVE ALL DOCUMENTS.

**U.S. Equal Employment Opportunity Commission****NEWS**

FOR IMMEDIATE RELEASE  
Wednesday, November 20, 1996

CONTACT: Claire Gonzales  
Michael Widomski  
(202) 663-4900  
TDD: (202) 663-4494

**EEOC ANNOUNCES INTERVENTION IN TEXACO, INC. LAWSUIT**

Washington -- The U.S. Equal Employment Opportunity Commission (EEOC) today filed a motion to intervene in the private employment discrimination lawsuit pending against TEXACO, Inc. The Commission's action is based on its investigative finding of class-wide racial discrimination against African Americans in the area of promotion.

In reaching its decision to intervene at this time, EEOC Chairman Gilbert Casellas said, "The Commission collectively agreed that because active settlement discussions are ongoing in this case, it is more appropriate and productive for the agency to be involved earlier in the settlement process rather than later. Intervention will enable the Commission to assist in the resolution of all outstanding issues, including the class claims, prior to the required submission of the settlement agreement to the court for its final approval."

"It is the Commission's responsibility to ensure that the public's interest in the resolution of these claims is represented in the terms of the final settlement," Casellas went on to say. "The EEOC applauds the enormous progress made by the private plaintiffs and TEXACO, which resulted in the historic proposal announced last Friday. The monetary terms that have been announced appear to be adequate. The EEOC's objective in intervening in this litigation is to secure clear, fair, and enforceable standards which will produce the structural changes needed to provide real, long term relief at TEXACO."

The EEOC has been actively involved in this case for the past year and a half. It is the Commission's finding of a clear pattern and practice of discrimination against an entire class of African American employees that serves as a principal basis for the proposed settlement.

EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act; the Equal Pay Act; sections of the Civil Rights Act of 1991; Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments; and prohibitions against discrimination affecting individuals with disabilities in the federal government.

# # #

PROP 209: NBC's Ifill: "The White House, which supports affirmative action, has decided at least for now not to intervene in a California court challenge to a new anti-affirmative action law. ... Although the Clinton Administration has been prepared to join in the court challenge to the law, White House and Justice Department lawyers decided late last night that the administration needs more time to find a legal justification for getting involved." President Clinton: "As all of you know, I oppose publicly, and strongly, 209. I thought it was bad policy for the people of California and a bad example for America. Whether it is unconstitutional is a different question" ("Today," 12/

# The Washington Times

DATE: 8/11/96  
PAGE: A14

## Affirmative action battle moves from voting booth to courtroom

By Annie Nakao  
SAN FRANCISCO EXAMINER

SAN FRANCISCO — The vote to stop some kinds of affirmative action in California has sparked three lawsuits, an executive order by Gov. Pete Wilson, noisy protests and wholesale confusion among public agencies unsure whether their programs are now illegal.

"We've got magnet schools, and we've had them for 28 years," said Berkeley schools Superintendent Jack McLaughlin. "We do not believe proponents of [the ballot initiative] Proposition 209 intended to dismantle these voluntary desegregation programs. But we're not sure. . . . That's our major, major concern."

[Police arrested 23 students yesterday to end the occupation of the University of California bell tower in a protest against the referendum that would end preference programs based on race and gender, the Associated Press reported.]

The new state law — which bans consideration of race and gender in public hiring, contracting and education — prompted Mr. Wilson to give state agencies three weeks to list offending programs. He also ordered that regulations barring such preferences be drafted.

"Beginning today (Wednesday), Californians will be judged by one standard and one standard alone: their individual merit," said Mr. Wilson, a leading proponent of the measure.

There was other swift reaction. A trio of lawsuits has already been filed — two trying to block 209's implementation and a third trying to enforce it.

"We are confident that [Proposition] 209 will not see the light of

day," said Mark Rosenbaum, legal director of the Southern California chapter of the American Civil Liberties Union, which filed the class-action suit in U.S. District Court in San Francisco.

The suit names Mr. Wilson, Attorney General Dan Lungren and other state officials, as well as San Francisco and several other counties, in an attempt to protect affirmative action programs in virtually all public agencies.

Another federal suit, brought in San Francisco by the law firm of Morrison & Foerster, challenges 209 on behalf of three city contractors, two owned by minorities and one owned by women.

The third suit, which seeks to implement the measure, was filed in Sacramento County Superior Court by the conservative Pacific Legal Foundation.

The suit wants to stop the California community colleges, the state Lottery Commission and the Department of General Services from granting preferences based on race and sex.

The ACLU suit may be combined with a pending federal suit involving San Francisco's contracting program for women and minorities.

It's likely the ACLU would prefer the case be heard by U.S. District Judge Thelton Henderson, who is presiding over the pending suit. He is believed to be more inclined to grant a temporary restraining order than Judge Vaughn Walker, a more conservative jurist randomly assigned to the new case.

The suit, filed jointly by the ACLU, the Lawyers' Committee for Civil Rights, the Employment Law Center in San Francisco and other civil rights groups, is on be-

half of 11 individuals — including seven high school and college students — and 12 organizations representing labor, education, women's business groups and minority organizations.

Lawyers in the ACLU suit already have focused on key constitutional grounds: equal protection provisions of the 14th Amendment and the supremacy clause of the U.S. Constitution, which decrees federal law preempts state and local measures.

[Meanwhile in Washington, Attorney General Janet Reno said yesterday that federal law banning marijuana will be enforced despite voters' approval of its use for medicinal purposes in California and Arizona, the Hearst newspapers reported.]

"The requirements of federal law are still in place," Miss Reno said at a meeting with reporters. "It will be enforced and people should be advised of that."

[Miss Reno wasn't the only Clinton administration official sounding an alarm against the ballot initiatives, which would permit physicians to recommend marijuana for ailments including AIDS and cancer and would allow patients to possess or cultivate it.]

[On NBC's "Today" show yesterday, retired Gen. Barry McCaffrey, director of the White House Office of National Drug Control Policy, said the initiatives send "a disastrous message to children and (are) fundamentally in conflict with federal law."]

[At the press briefing, Miss Reno said officials would enforce the federal law "on a case by case basis."]

• Distributed by Scripps Howard

902

They were suspended with pay pending the outcome of an internal investigation, Bijur said. Meade is assistant general manager of Texaco's fuel and marine marketing division and Keough is chief financial officer of the Texaco subsidiary, Heddington Insurance.

Keough, who lives in Bermuda, has an unlisted phone number. Meade declined to comment from his suburban New York home.

Lundwall was among the executives who had given depositions in a \$540 million class-action lawsuit brought on behalf of 1,500 black workers of the oil company who claim they were denied promotions and advancement opportunities because of their race.

In San Diego, George Mitrovich, co-founder of the San Diego Coalition for Equality, said he and his wife cut up their credit cards and mailed the pieces to Bijur.

"A boycott will send a clear message: You engage in an act of racism ... at your economic peril, which sadly is the only threat some people fear," Mitrovich said.

Texaco hired former U.S. Court of Appeals Judge A. Leon Higginbotham to review the company's fairness policies. The company is also creating a committee to be headed by New York University's former president, John Brademas, to review Texaco's diversity programs.