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Raymond Gregory

THE ROLE OF THE ATTORNEY DURING THE LAST 50 YEARS IN THE ENFORCEMENT OF TITLE VII OF THE 1964 CIVIL RIGHTS ACT

RAYMOND GREGORY

When the provisions of the 1964 Civil Rights Act outlawing employment discrimination were first proposed, congressional supporters assigned the power to enforce the Act to a newly formed federal agency—the Equal Employment Opportunity Commission (EEOC). The opponents of the Act, however, were determined to strip the EEOC of any effective enforcement authority and thus undermine the Act itself. But these opponents committed two fundamental errors, each of which resulted in a greatly expanded and an enormously strengthened anti-discrimination law.

Representative Howard Smith of Virginia, one of the Act's outspoken opponents, epitomized all that was obsolete with Congress at that time. Smith, a 33-year veteran of the House of Representatives, had repeatedly delayed or weakened the enactment of any and all proposed progressive legislation.

The first fundamental error that resulted in an expanded anti-discrimination law occurred when Mr. Smith sought to amend the pending anti-discrimination legislation by adding sex to its prohibitions against employment discrimination. Rather than advancing the interests of women, his intent was to defeat the entire bill by complicating the debate and confusing some Representatives who, although fully supportive of the provisions insuring equality for African Americans, were less certain of the need to expand the legislation to include protections for women.

During the debate that ensued, Smith relayed to his colleagues that he had received a letter from a female constituent complaining of the existing "grave injustice" arising from the fact that females outnumbered males in this country and that as a consequence, some women were compelled to go through life without a husband. This story was greeted with much laughter on the floor of the House, but also with anger from the few women serving in Congress at that time. But Smith's ruse backfired. Once the question of discrimination against women was placed on the House floor, it was

difficult for many Representatives to ignore, and ultimately, much to Smith's chagrin, the amendment was adopted. Thus, what began as a ploy to defeat the legislation culminated in a statute that provided the broadest set of legal protections ever granted to American women.

The second fundamental error committed by opponents of the bill arose out of their opposition to any provision in the Act that would provide the EEOC with any effective powers of enforcement. As originally conceived, the EEOC was to be empowered to enforce its rulings through "cease and desist" orders. To gain support for the bill, supporters of the proposed legislation acceded to the opposition's demand that stripped the EEOC of that authority. Ultimately, opponents of the bill also were able to deny the EEOC the power to initiate its own lawsuits. At the time, the opposition's successes were considered a great victory because opponents thought that the final bill failed to provide the EEOC with any effective means of enforcing its provisions.

But the opposition's victory was short-lived. In the push to strip the EEOC of effective enforcement authority, opponents overlooked a provision in Title VII authorizing individual claimants, acting on their own behalf or through their attorneys, to initiate legal actions in federal courts. Once a worker filed a charge of discrimination against his or her employer and fulfilled other EEOC administrative requirements, the worker was free to turn to the federal courts to pursue the claim against the employer, and the Act did not require the EEOC's participation once the worker shifted his claim to the federal court. These workers subsequently retained attorneys who later became the basic means of enforcing the anti-discrimination provisions of Title VII.

Title VII, broad in scope, covers every aspect of employment—hiring, discharge, promotion, demotion, transfer, compensation, benefits, working conditions, harassment, retaliation and nearly everything else connected with the employment relationship. The ability of workers to sue their employers for damages, incurred as a consequence of discriminatory conduct, was crucial to the successful implementation of Title VII. The decision to empower the individual worker to sue his employer for violations of Title VII has proved to be an effective tool for implementing Title VII's broad precepts and reducing employment discrimination throughout the country. The legal structures that have developed as a consequence have, over the years, created a workplace environment far more adverse to discriminatory employer conduct.

Despite the limitations on the EEOC's enforcement authority, Congress charged it with administering the provisions of Title VII, directing it to

process race, color, national origin, religious, and sex claims filed pursuant to the Act. Franklin D. Roosevelt Jr., the first chairperson to lead the agency, quickly recognized the difficulties of the EEOC in administering the provisions of the Act. Those difficulties loomed large in July of 1965 when Title VII became effective and as at that time the agency had neither staff nor offices.

EEOC officials initially anticipated that 2,000 discrimination claims would be filed during the agency's first year, but instead, nearly 14,000 claims were filed in the first six months. Most of those claims alleged race discrimination. In 1964, the unemployment rate of non-white workers was twice that of white workers. Earlier Bureau of Census statistics disclosed that only 12 percent of non-white workers held professional, managerial and other white collar jobs, whereas 42 percent of white workers were employed in those positions. Almost one-half of all non-white workers were relegated to jobs requiring only unskilled qualifications.

African Americans, who experienced continuous workplace discrimination, were among the first to take advantage of Title VII. The EEOC, therefore, had no alternative but to focus its initial efforts on the resolution of race complaints. At first, the EEOC did not seriously consider the proposition that sex discrimination constituted a substantial issue for women in the workplace. Reflecting upon the manner in which sex discrimination had been added to the Civil Rights Act through the antics of Virginia Congressman Howard Smith, the first EEOC Director characterized the prohibition against sex discrimination as a statutory "fluke . . . conceived out of wedlock."[1]

As a consequence, in the early days of its existence, the EEOC devoted far less effort to eliminating sex discrimination than to eliminating race discrimination from the workplace. But women had other ideas. In increasing numbers, women filed sex discrimination claims, and the EEOC's list of unresolved sex claims soon equaled its list of unresolved race claims.

Agency personnel were limited to investigating a claimant's discrimination charges because Congress had deprived the EEOC of any significant enforcement authority. When appropriate, EEOC personnel entered into conciliation or settlement discussions with the employer. The EEOC had been given the power to conciliate, but not the power to compel. The EEOC had been given no teeth.[2] At this point in its existence, the

1 Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1178 (1988).

2 William B. Gould IV, *Black Workers in White Unions: Job Discrimination in the United States*

EEOC was described as a "poor, enfeebled thing."[3]

Claimants quickly learned that the EEOC did not possess the authority or power to litigate their claims. With the growing backlog of unresolved claims, a claimant often opted to abandon the EEOC by exercising his or her right to sue and thus turn to the federal courts for judicial relief. Although Title VII requires a claimant to first file a discrimination claim with the EEOC, at several points in the administrative process that follows, claimants may elect to quit the process and proceed on their own account in federal court. Thus, many claimants filed suit in federal court.

In the early years of Title VII, thousands of discrimination claimants elected to litigate their claims in federal court. Within a year of Title VII's effective date, the federal courts located in many of the nation's major cities were inundated with Title VII lawsuits. Few lawyers were available to manage this litigation, as the legal profession was unprepared to handle claims asserted under this newly minted law that lawyers found complicated and confusing. When lawyers were unavailable, claimants often resorted to representing themselves. "Pro se" plaintiffs, plaintiffs who represented themselves, presented enormous difficulties for the judges presiding at the litigation of their claims. Since these plaintiffs were not versed in the intricacies of the litigation process, the judge to whom a pro se case was assigned had to guide the pro se plaintiff through that process, consuming a great deal of time and effort and usually tying up the judge's trial calendar, much to the annoyance of plaintiffs and defendants litigating other types of cases.

In 1967, Judge Sidney Sugarman, Chief Judge of the Southern District of New York, confronted these circumstances. When pro se Title VII claimants threatened to overwhelm his court, he asked New York City lawyers to volunteer their services to represent pro se claimants. This was a lot to ask a lawyer, as it involved pro bono work that required volunteers to steep themselves in the intricacies of a law that, for the most part, remained nearly unknown to the legal profession. Lawyers then expended countless hours shepherding claims through the federal court processes. Nonetheless, the New York bar immediately responded to Judge Sugarman's plea, and in short order he had a lengthy list of volunteers to whom court officials thereafter regularly assigned pro se Title VII cases.

Some of the attorneys who responded to Judge Sugarman's plea for assistance were among the first lawyers in the country to participate as trial

39 (1977).

3 Michael I. Sovern ,*Legal Restraints on Racial Discrimination in Employment*, 205 (1966).

counsel in Title VII employment discrimination cases. These lawyers were also among the first to experience the difficulties and frustrations that lawyers representing discrimination claimants commonly confront and among the first to share in the exuberance that follows a victory in a discrimination case.

After about a year, Judge Sugarman terminated the volunteer program. Lawyers increasingly represented Title VII claimants, thus lessoning the need for pro bono lawyers. When Judge Sugarman terminated the program, he ordered court officials to turn over the list of pro bono lawyers to the EEOC, thus presenting the agency with a ready-made assemblage of attorneys experienced in Title VII law. Thereafter, when claimants opted to shift their claims from the EEOC to the courts, the EEOC had available to them this list of attorneys from which to select. Ultimately, in New York City, a small contingent of lawyers began to specialize in Title VII law, and lawyers across the nation followed suit. These lawyers used Title VII as a powerful tool in the battle to eliminate discrimination from the American workplace.

Over the years, the number of claims filed with the EEOC continued to increase— to over 72,000 in 1992 and to nearly 94,000 in 2013.[4] From the beginning, the EEOC was overwhelmed by this vast number of discrimination filings, and in attempting to respond to these claims, the EEOC fell further and further behind. As one commentator later noted, with the enormous number of charges filed, the uncertainty of what the law required, the lack of expertise among most of the agency's personnel, and the absence of an internal check on what kinds of evidence were necessary and appropriate, the EEOC investigations were not marked by any degree of care or thoroughness.[5]

Nonetheless, the EEOC continued to play a significant role, using its limited authority to its advantage. In processing a discrimination claim, the EEOC possessed the authority to issue a "reasonable cause finding," and in that process it often issued written opinions, supported by underlying legal rationale. Consequently, the EEOC became involved in developing guidelines that often established the framework for court decisions that followed upon suits filed by individual workers.[6]

4 Charge Statistics FY 1997 Through FY 2013, U.S. Equal Emp. Opportunity Commission (last visited Oct. 22, 2014), *available at* eeoc.gov/eeoc/statistics/enforcement/charges.cfm (including retaliation claims).

5 William B. Gould, *Black Workers in White Unions: Job Discrimination in the United States* 40 (1977).

6 *Id*.

The EEOC was also well-served by the willingness of its officials to hold public hearings that often dramatized discrimination issues. "The bright light of publicity was not a substitute for judicial action—but many business and labor leaders were sensitive about airing their dirty linen before a critical public."[7] The mere prospect of a public hearing often times proved sufficient to move an employer to settle a discrimination claim and clean up its workplace.

Once claimants began to file federal court actions, the EEOC and the federal courts had to define, with some specificity, the types of employer conduct that were actionable under Title VII, and how a worker claiming to have been subjected to such conduct should go about proving that the employer's conduct was, in fact, discriminatory. Proving that an employer intended to discriminate against an employee is critical to establishing its liability in cases of this nature. The worker and his lawyer must produce evidence sufficient to prove that a discriminatory intent was a determining factor in the employer's decision adversely affecting that worker.

Proving that an employer's intent was discriminatory is never an easy task. Employers later learned to mask acts of employment discrimination with the appearance of business propriety. As the Supreme Court observed, employers neither admit discriminatory animus nor leave a paper trail disclosing it. Thus, few employment discrimination cases turn on direct or "smoking gun" evidence of racial, color, sex, national origin, or religious bias. Even the least sophisticated of employers are careful not to leave a trail of discriminatory conduct, and it would be rare indeed for a corporate executive to take the witness stand and freely affirm he acted adversely to the interests of a worker because of his biased attitudes.[8]

Employment discrimination litigation involves numerous, complex legal procedures that do not readily lend themselves to the resolution of these cases, thus rendering it more difficult for claimants to succeed in establishing a viable claim. Moreover, the complexity of the issues that arise in these cases provides employers with opportunities to create barriers blocking plaintiff workers from achieving their litigation goals. For example, the complexities of corporate decision-making often times cannot be adequately analyzed in the adversarial framework of the courtroom. The litigation process nevertheless insists on an explanation that a discriminatory motive either was or was not the ground of a particular employment decision. Moreover, in employment discrimination litigation,

7 *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983).
8 Rhode, *supra* note 1, at 1195.

unambiguous villains and victims are increasingly more difficult to identify.[9] How then does a discrimination complainant—while simultaneously avoiding employer initiated barriers and contending with unwieldy legal procedures — prove that a discriminatory intent, rather than a legitimate business reason, motivated an employment decision adversely affecting her employment status? These are the issues that workers' attorneys have consistently confronted over the past 50 years.

As a practical matter, workers who believe they have been discriminated against will have to pursue the matter with little or no assistance from the EEOC. More than 95 percent of the employment discrimination cases now adjudicated in the federal courts are guided through the court system, not by the EEOC, but by attorneys retained by individual workers.[10] Thus, the most far-reaching innovation of the 1964 Civil Rights Act has been the individual right to sue. The individual right to sue has become the driving force behind the enforcement of the statute.

Even before enactment of the legislation requiring employers to pay the attorney's fees of prevailing discrimination complainants, dedicated lawyers assumed lead roles in protecting the American worker from employer discrimination. One of the effects of the fee statute has been the growth of the number of lawyers willing to specialize in this area of law. Most attorneys who represent workers are either members of small law firms or solo practitioners, and their litigation contests with major corporate counsel are frequently fought in "David and Goliath" circumstances. To gain mutual support, lawyers representing workers banded together in 1985 to form the National Employment Lawyers Association (NELA), the only professional organization in the country exclusively comprised of lawyers dedicated to representing workers in discrimination and other employment cases. Today, NELA and its 69 state and local affiliates have more than 4,000 members.[11]

There are far easier ways to make a living than as a lawyer representing an employment discrimination complainant. The David and Goliath description is not an exaggeration; it literally exists in nearly every employment discrimination litigation case. Employers take discrimination claims as seriously as if they were charged with fraud or theft, and they rely for their defense on the best and most experienced counsel available,

9 *Id*. at 1195.

10 Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 Ohio ST. L.J. 1, 6, n.17 (1996).

11 NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, http://www.nela.org/NELA (last visited Oct. 23, 2014).

generally found in the country's largest law firms. Although, the workers' lawyers have grown accustomed to practicing law in these circumstances, it has not become easier with the passage of time. The constant struggles against the vast resources brought to the litigation by employers and their counsel create circumstances that these lawyers representing complaintants must cope with throughout their careers.

Plaintiff's lawyers face still another hurdle. Most trials of employment discrimination cases turn on a single issue—has the plaintiff proved that the defendant company intentionally discriminated against the employee? Whether the employer acted intentionally is a question of fact, and it is the responsibility of the jury—not the judge—to decide issues of fact. If the jury finds that the defendant acted intentionally, one would expect that in most instances the plaintiff's victory at trial would be affirmed on appeal, as the role of the appellate court is to decide questions of law, not questions of fact. Yet on defendants' appeals of jury verdicts in favor of the plaintiff, appellate courts have reversed 41 percent of those rulings. In contrast, when plaintiffs have appealed adverse jury rulings, only 9 percent of those rulings are reversed.[12] Defendant companies, in contrast to plaintiff workers, emerge from the appellate court in much better position than when they left the trial court.[13] Two Cornell University law professors, Kevin M. Clermont and Stewart J. Schwab, find this disturbing:

> The subtle question of the defendant's intent is likely to be the key issue in a non-frivolous employment discrimination case that reaches trial, putting the credibility of witnesses into play. When the plaintiff has convinced the [jury] of the defendant's wrongful intent, that finding should be largely immune from appellate reversal, just as defendant's trial victories are. Reversal of plaintiffs' trial victories in employment cases should be unusually uncommon. Yet we find the opposite.[14]

Employers are less likely to settle employment discrimination claims than settle other litigation claims, thus compelling plaintiff workers to proceed to trial. Is it possible that employers are less willing to settle discrimination cases because they know that even if they lose at trial, they are likely to win on appeal? The Cornell law professors believe that is the case: "The anti-plaintiff effect on appeal raises the specter that federal

12 Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 111 (2009).

13 *Id*.

14 *Id*. at 112.

appellate courts have a double standard for employment discrimination cases, scrutinizing employees' victories [in the trial courts] while gazing benignly at employers' victories."[15]

The Cornell law professors do not stand alone. Other observers[16] have also concluded that the low victory rate experienced by employment discrimination plaintiffs results from the bias that judges bring to their courtrooms:

> Judges exercise enormous discretion in civil litigation in general, a discretion that has only increased with recent decisions of the Supreme Court. The Court has directed that judges, when considering motions to dismiss, should exercise "common sense" in evaluating the plaintiff's claim in light of other "plausible" explanations for a defendant's conduct. The trial court's "common sense" view of what is or is not "plausible" affects employment litigation perhaps more than any other type of litigation. Studies have shown that judicial biases significantly influence summary judgment outcomes in discrimination cases. Indeed, many commentators have noted that employment discrimination plaintiffs face an unusually uphill battle. As a general matter, doctrinal developments in the past two decades have quite consistently made it more difficult for plaintiffs to establish their discrimination claims. In addition, many of these doctrines have increased the role of judicial judgment—and, concomitantly, the role of judicial bias—in the life cycle of an employment discrimination case.[17]

A study of thousands of votes of federal appellate judges, who sit on three-judge panels and render decisions by majority vote, confirms the presence of judicial bias in employment discrimination cases. Not surprisingly, the study found that judges appointed by Republican presidents were more conservative, while Democratic appointees were more liberal, and that political ideology was reflected in their decision-

15 *Id*. at 15-16.

16 *See, e.g.*, Michael Selmi, *Why are Employment Discrimination Cases So Hart to Win?*, 61 LA L. REV. 555, 561-62 (2001); David Benjamin Oppenheimer, Verdicts *Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 559-60 (2003); Judge N. Gertner & Melissa Hart, *Implicit Bias in Employment Discrimination Litigation*, 2 (Univ. Colo. Law Sch. Legal Studies Research Paper Series, Working Paper No. 12-07, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079759.

17. Gartner and Hart, *supra* note 16.

18. David A. Schkade and Cass R. Sunstein, Op-Ed, *Judging by Where You Sit*, N.Y. TIMES, June 11, 2003.

making. The likely outcome of the appeal of an employment discrimination decision made at the trial court level depended upon the political ideology of the judges sitting on the appellate panel. Before a panel of three Democratic appointees, plaintiffs win 75 percent of the time. Before a panel of two Democratic and one Republican appointee, plaintiffs win 49 percent of the time. Before a panel of one Democratic and two Republican appointees, plaintiffs' win rate is 38 percent. Before a panel of three Republican appointees, plaintiffs' win rate is 31 percent.[18]

Political bias is not the only factor at play. For example, some judges approach race discrimination cases with deep skepticism, while others view sex discrimination cases with jaundiced eye, and still others approach all discrimination cases with considerable impatience and disdain. Other judges have concluded that employment discrimination plays a diminished role in contemporary America and they are unwilling to find discrimination in the workplace in the absence of overwhelming evidence.[19]

The Supreme Court appears to slant its decisions in favor of business. The primary purpose of the National Litigation Center of the U.S. Chamber of Commerce is to represent business interests before the courts. The Chamber's board of directors includes officers of the nation's largest companies, including Ford, Verizon, Lockheed Martin, Chevron, and AT&T. According to one of the Chamber's lead attorneys, "Except for the solicitor general representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the National Chamber Litigation Center."[20] In the Supreme Court's 2009-2010 term, parties supported by the Chamber won in thirteen of sixteen cases.

Other forces also may lead to conditions that owe their existence to judicial bias. For example, some judges may fully accept the concepts embraced by Title VII yet feel that the enforcement of its concepts has gone too far, that those committed to enforcing these statutes have become radicalized and that judges should be compelled to moderate their actions.

Over the years, the task of establishing an employment discrimination claim in a court of law has become increasingly more onerous. Consequently, victims of employment discrimination have frequently failed in their endeavor to establish valid claims, and have been denied a just result.

19 Selmi, *supra* note 16, at 563.

20 Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES (Dec. 18, 2010), http://www.nytimes.com/2010/12/19/us/19roberts.html?pagewanted=all&_r=0.

Litigation is certainly not the ideal way of coping with a hostile and offensive work environment, but it is the best means currently available. The fear of public disclosure in a legal forum undoubtedly deters employers from engaging in discriminatory conduct and encourages employers to adopt measures assuring a discrimination-free workplace. More litigation today may diminish its need tomorrow.

In the years to come, the role of the claimant attorney will grow in parallel with the growing numbers of employment discrimination complaints. As attorneys in the past have been successful in providing American workers with broad protection against discrimination in the workplace, they will likely continue in the future to play a significant role in the continuing development of employment discrimination law and in the protection of workers from workplace discriminatory conduct.

The battle to eradicate workplace discrimination, fought in the nation's courtrooms over the past 50 years, is a story of triumph, a triumph attained in the face of overwhelming odds. Despite the huge sums of money and manpower employers commonly invest in the defense of a Title VII case, and despite the existence of lower court judicial bias against worker complainants, and despite the Supreme Court's favoring of the business world, attorneys representing workers in employment discrimination cases have not been deterred. Conversely, lawyers have consistently fought to overcome those barriers. Title VII would never have achieved its present status without the efforts of the lawyers who engaged in those battles. Surely, lawyers will continue to play a major role in the continuing development of Title VII concepts and in the protection of workers from discriminatory conduct.

In light of the difficulties confronting discrimination complainants and their attorneys, will discriminatory conduct ever be wholly eradicated from the workplace? Is a workplace, entirely devoid of discriminatory animus, even conceivable? Certainly, we have seen immense progress in the past 50 years. We should celebrate that progress, but at the same time not ignore the fact that workplace discrimination remains with us. It is inconceivable that we would ever move backwards, returning to the times of open hostility to African American and foreign born workers, and to the denigration of women, the aged, and members of certain religions; but will we move forward?

Whether a workplace free of discrimination can be transformed from an ideal to a reality is a question for the future. We must believe that such a workplace is possible. And we must work to achieve it.