

Double-Edged Civil Rights

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We have just come through the period of great debate over whether the Civil Rights Act of 1990 should become law. There has been a great deal of controversy over just how the proposed legislation would have affected the American workplace. While the point may be moot in light of President Bush's Oct. 22 veto, the legislation is sure to be introduced in some form again. If it is, lawmakers undoubtedly will appreciate provisions in the legislation expanding compensatory and punitive damages remedies that would have claims that are not litigated when such remedies are not available. Since even now plaintiffs tend to close most employment-discrimination cases, there is reason to expect that a great deal of the additional litigation ultimately would be won by the defendants, though only after the expenditure of substantial resources by the parties and the courts.

Some will argue, however, that bringing suits even with a marginal chance of success serves the public interest by causing employers constantly to examine their employment practices in order to avoid the prospect even of litigation that they are likely ultimately to win. That argument may have some merit - subject, that is, to one important qualification. The argument may be valid as to hiring-discrimination claims; it is grossly flawed with respect to the post-hire discrimination litigation. In fact, the prosecution of marginal post-hire claims may materially diminish opportunities for minorities and women. It is a particular irony of race- and sex-discrimination litigation that, although most such litigation concerns post-hire discrimination there is much reason to believe that most of the discrimination is in hiring. In making a hiring decision, an employer has limited information about actual qualifications and is more likely to rely on stereotypes.

Or, to avoid the value-laden work "stereotype," the employer simply relies on the average characteristics of the group when selecting among people who have similar objective qualifications. By engaging in this "statistical discrimination," the employer whose selection procedures cannot precisely identify the most qualified person for each opening does improve the

quality of his work force. This, of course, is a reason to expect employers often to engage in such discrimination.

In making post-hire decisions, however, having observed their employees on the job, employers usually will have to act consciously against their own best interests to allow race or gender to influence those decisions. This will be so even as to promotions, although certainly stereotyping and statistical discrimination continue to have effect in that area. Regarding termination decisions, it is hard to conceive of common circumstances in which these factors would play a significant role. Indeed, economic considerations should lead employers to treat minorities and women more favorably with respect to terminations, since they are much more likely to challenge terminations as discriminatory than are whites or men.

Moreover, employers must realize that a discriminatory denial of hire will rarely be challenged, partly because the victim usually will know little about the circumstances of that denial. The victim may not even know whether a position was in fact filled, much less the race, gender or qualifications of the person selected. In addition, an applicant often has applied to many employees and may not feel a concrete injury when any of them fails to respond. By contrast, an employee who is denied a promotion, and much more so one who is discharged, palpably appreciates that he or she has been injured.

These considerations give the employer who wishes to discriminate an incentive to do so principally in hiring. And even the employer who does not desire to discriminate at all may recognize that by nevertheless discriminating in hiring, he or she may be spared the danger of later claims of discrimination as to promotions and terminations.

In any event, with regard to how bringing marginal lawsuits should affect opportunities for minorities and women, concern about being sued for hiring discrimination should have a positive effect. At the same time, the hiring of minorities or women is likely

to increase the chance of later litigation. The prosecution of marginal promotion and termination cases, by further increasing that chance, gives the employer a substantial incentive to discriminate in hiring, where this practice will remain largely immune from challenge.

If these incentives are strong enough, minorities and women actually could be better off overall if there existed no cause of action for post-hire discrimination. Even if this were a certainty, however, the guarantee of an avenue of redress for discrimination in every phase of employment is an important enough individual right that few would seriously argue for the general elimination of a cause of action for discrimination that occurs after the initial hire.

But what should be done to encourage such litigation is quite another matter. In *Patterson v. McLean Credit Union* (1989), the Supreme Court took a major step toward reducing the incentive for the litigation of claims of post-hire race discrimination under 42 U.S.C. 1981. (109 S. Ct. 2363.) The court held that Sec. 1981's prohibition of race discrimination in the making of contracts did not apply to racial harassment in employment. By implication that holding also would seem to say that Sec. 1981 does not cover terminations, since an employer apparently can harass an employee until he quits. And, going rather farther than was necessary to resolve the case before it, the court called into question whether discrimination in promotions ordinarily would be covered by Sec. 1981. Subsequent lower court decisions have interpreted *Patterson*, probably correctly, to greatly restrict the scope of Sec. 1981 with regard to all post-hire race discrimination.

As a reasoned interpretation of the statute before the court, the *Patterson* decision is hard to defend. At the same time, from a policy standpoint, the decision was not without its merits. Compensatory and punitive damages remedies (available under Sec. 1981 but not Title VII) continue as incentives for plaintiffs to bring hiring-discrimination claims and for employers to avoid them by hiring more minorities. But, as a result of *Patterson*, those remedies no longer serve as incentives for plaintiffs to bring promotion and termination claims; correspondingly, employers have less incentive to reduce their hiring of minorities in order to avoid promotion and termination claims.

The Civil Rights Act of 1990 would have overruled *Patterson's* restrictive reading of Sec. 1981. The bill also would have made compensatory and punitive damages available under Title VII.

There are, to be sure, clear benefits to be derived from making compensatory and punitive damages available for all post-hiring employment discrimination, including assuring full relief to victims of such discrimination and discouraging such discrimination in the first place. And there are arguments that these remedies are particularly warranted in racial- and sexual- harassment cases in which there otherwise would be no monetary award in a successful litigation.

These considerations clearly are entitled to considerable weight. But it should also be clear that considerations are not limited to the danger that the availability of such remedies will promote wasteful litigation. The availability of such remedies for post-hiring discrimination also undeniably gives the employer additional incentive to discriminate in hiring. Whether many employers actually will respond to that incentive is an enormously difficult question. But no one ought to support any future legislation to broaden damage remedies without thoroughly considering that question and nevertheless concluding that these remedies ultimately will expand, rather than diminish, the employment opportunities of the groups on whose behalf the legislation has been proposed.

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