NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

(Advocates for Employee Rights)

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UNPROTECTED RIGHTS: THE INCREASING BARRIERS PREVENTING VICTIMS OF EMPLOYMENT DISCRIMINATION FROM OBTAINING LEGAL REPRESENTATION

A Report By The

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

May 1991

> The single most significant development in equal employment law has been the erosion of the ground from under plaintiffs' counsel....The situation has deteriorated to such a degree that private counsel representing plaintiffs in equal employment cases have become an endangered species. In many places already extinct.
>
> -- Ray Terry
> The Labor Lawyer[1]

INTRODUCTION[2]

The National Employment Lawyers Association (NELA) is a nonprofit professional organization comprised of almost one thousand (1,000) lawyers in forty-eight (48) states and the District of Columbia who represent individuals in employment-related matters. Formerly known as the Plaintiff Employment Lawyers Association (PELA), NELA was founded in 1985 with the specific mission of providing assistance to attorneys in protecting the rights of employees against the greater resources of their employers and the defense bar.

The typical NELA lawyer is a solo practitioner or a member of a small firm who handles employment discrimination and wrongful termination cases on behalf of non-union employees under federal and state laws. As a group, NELA has collectively represented thousands of individuals seeking equal opportunity in

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[1] Terry, Ray, "Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy," 5 The Labor Lawyer 27 (1989).

[2] This report was written by Terisa E. Chaw, Executive Director, National Employment Lawyers Association, with the assistance of the law firms of Spater, Gittes, Schulte & Kolman, Columbus, Ohio; Tobias & Kraus, Cincinnati, Ohio; and Saperstein, Seligman, Mayeda & Larkin, Oakland, California.

the workplace, a fundamental principle which Congress embodied in Title VII of the Civil Rights Act of 1964 and subsequent anti-employment discrimination laws. Our members are among the most experienced and respected employment lawyers in the country.

Although Congress has enacted numerous laws to protect the rights of working people to be free from unlawful employment discrimination, such rights are rendered meaningless if individuals are unable to secure competent counsel to assist them in the enforcement of those rights. Yet, there is increasing evidence of a critical lack of lawyers who are willing to represent individuals seeking to challenge unlawful discriminatory conduct in the workplace.[3]

In April of this year, NELA conducted a survey of its members and recent court decisions concerning the availability of lawyers to represent victims in employment discrimination cases. The purpose of our inquiry was to determine the extent to which statutory and court-created barriers are deterring lawyers from representing individuals in employment cases under the federal civil rights laws.[4] The results we obtained have enabled us to identify as well as document specific areas of the federal civil rights laws, primarily Title VII and Section 1981 of the Civil Rights Act of 1866, which require reform by Congress in order to encourage more lawyers to handle cases arising under these laws.

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[3] See, "The Vanishing Job-Bias Lawyers," The Washington Post, attached as "Appendix I".

[4] The survey is included in this report as "Appendix II."

While not an exhaustive one, we believe that our examination brings to the foreground the legal obstacles which must be dismantled if victims of employment discrimination are to obtain competent counsel to vindicate their rights.[5] The National Employment Lawyers Association strongly believes that passage of the Civil Rights Act of 1991 is necessary to eradicate these barriers so that the promise of equal employment opportunity can become a reality for all the working people of this country.

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[5] There are, of course, many plaintiffs employment lawyers who are not members of NELA and who, therefore, did not take part in our survey. We believe, however, that the our membership is representative of plaintiffs employment lawyers throughout the country and that they share similar experiences.

SUMMARY

This report demonstrates that victims of employment discrimination are finding it increasingly difficult to secure competent counsel to vindicate their rights under the federal civil rights laws. Forty-four percent (44%) of the lawyers responding to our survey decline to represent more than 90% of the individuals who seek their assistance. More than one-third indicated that the six employment discrimination decisions rendered by the United States Supreme Court in 1989 have forced them to reduce the number of actions they handle or to decline altogether cases that they otherwise had been taking prior to that time. Almost one-half stated that they are able to refer only ten percent (10%) or less of the meritorious cases they could not accept to other attorneys who are willing to provide legal representation.

The reason for the paucity of lawyers who are willing to represent victims of employment discrimination can be attributed to the substantial obstacles that they confront in litigating such cases. These include inadequate remedies, the inability to recover the costs of litigation and expert witnesses in addition to attorneys' fees, the unavailability of jury trials, the expense of protracted litigation, and an impractical statute of limitations period in which to file Title VII actions. Recent case developments in employment law which severely undermine the ability of victims to prevail on their claims and a federal

judiciary hostile to civil rights also deter lawyers from pursuing such matters.

These factors, alone or in combination, have forced many plaintiffs employment lawyers to reduce the number of cases they are willing to accept. In addition, they have caused frustrated lawyers to leave the field for other pursuits and have discouraged others from entering it. As a result, victims of employment discrimination are having an extremely difficult time in attracting competent counsel to vindicate their rights. Indeed, many victims are unable to obtain counsel at all and even meritorious cases are not being prosecuted as a result.

THE DEARTH OF PLAINTIFFS EMPLOYMENT LAWYERS

The inability of victims of employment discrimination to obtain competent counsel is a problem that our members confront on a daily basis. Sixty-five percent (65%) knew of individuals who have had difficulty in securing legal representation. Almost two-thirds (61%) stated that they reject 80% or more of the requests they receive for legal representation. Forty-four percent (44%) decline to represent more than 90% of the individuals who seek their assistance.

One solo practitioner wrote that she had "a client who had gone to twenty-seven lawyers" before retaining her. Another member stated, "While we do not keep track of the thirty to fifty calls the firm receives a week, we talk with a lot of potential clients who have been through several lawyers who were unwilling to take their cases." A member from Oklahoma responded,

"Although I did not keep their names and numbers, I would testify under oath that I have turned down over two hundred meritorious cases in the past three years."

Nor are these attorneys able to find other lawyers who will take on the cases of the vast number of victims who they are unable to represent. Approximately one-half (47.8%) stated that at most they are able to refer only ten percent (10%) or less of the meritorious cases they cannot handle to other attorneys who are willing to provide legal representation. Of this number, forty-two percent (42%) are unable to refer any individuals to attorneys. In contrast, less than three percent (2.5%) of the members participating in the survey said that they are able to refer more than fifty-percent of their cases to other lawyers. Others (18%) responded that while they attempt to refer individuals to attorneys, they do not actually know if such persons ultimately obtain representation.

Our members listed a litany of factors in explaining why employment discrimination victims with meritorious claims are having difficulty finding counsel. These include the individual's inability to pay fees and costs, the scarcity of lawyers who handle plaintiffs employment discrimination cases in any one particular locale, and the fact that there are few lawyers willing to take such cases on a contingency basis.

BARRIERS TO VINDICATING VICTIMS' RIGHTS

Almost one-half (47.8%) of the members who currently litigate claims under federal civil rights employment

discrimination laws expressed that they are reluctant to accept such cases because of statutory and court-created barriers. They also listed a panoply of practical considerations that have affected their willingness to handle these cases.

Those who reported that they are not reluctant to take employment discrimination cases qualified their answers. Many stated that they are "now very careful and selective" about the cases they are willing to take, that the "claims must be reasonable" and have "sufficient damages", and the individual must be able to "pay at least expenses or perhaps a reduced rate against a contingency."

Our members identified scores of lawyers who have stopped representing victims of employment discrimination altogether. These long-time employee advocates decided to leave the field because they could no longer earn a living, or found it difficult or near impossible to win cases on behalf of employment discrimination victims under the current state of the law. An example is Denis Murphy, former president of the Columbus Bar Association in Ohio, who represented discrimination victims for many years. Mr. Murphy will now only handle employment cases on behalf of defendants unless the victim is able to pay an hourly rate and costs like the employers that he routinely represents.

Statutory Barriers

Several statutory deficiencies in the laws, primarily Title VII and Section 1981, have given a substantial number of our members great pause in pursuing employment claims under these

laws. These include the unavailability of jury trials; the inability to recover costs for litigation and expert witnesses in addition to attorney's fees; the lack of compensatory and punitive damages under Title VII; and the short statute of limitations period for Title VII claims.

In this regard, it is important to mention that nine percent (9%) of the lawyers responding to the survey found the federal civil rights laws to be inadequate in protecting the rights of their clients compared to the state laws in their jurisdiction. Consequently, they no longer litigate employment discrimination cases under the federal civil rights laws and instead bring them under state fair employment laws. One lawyer explained that he has stopped filing Title VII actions due to "no jury and limited recoveries" Another said, "The remedies are better under state law and I also have the right to a jury trial. I feel I have no choice but to pursue [the claims] under state laws."

Court-Created Barriers

The six employment discrimination decisions which the United States Supreme Court rendered in 1989[6] have had a profound impact

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[6] The cases in which these decisions were rendered are Patterson v. McLean Credit Union, __ U.S. __ , 109 S.Ct 2363 (1989) (42 U.S.C. Section 1981 only prohibits racially discriminatory conduct in the formation of employment contracts and does not prohibit such discrimination after the contractual relationship has been established); Martin v. Wilks, __ U.S. __, 109 S.Ct. 2180 (1989) (white male fire fighters, who had failed to intervene in earlier employment discrimination proceedings in which consent decrees where entered, could challenge employment decisions made pursuant to those decrees); Wards Cove v. Atonio, __ U.S. __, 109 S.Ct. 2115 (1989) (racial imbalance in work force not sufficient for prima facie showing of disparate impact and plaintiffs must point to specific employer practice); Lorance v.

on the practice of plaintiffs employment law.[7] From the standpoint of lawyers representing victims of discrimination, these decisions have created so much risk and uncertainty as to cause them to become even more cautious about the types of cases they are willing to accept.

More than one-third (37.8%) of the lawyers responding to our survey indicated that the 1989 decisions have forced them to reduce the number of actions they handle or to decline cases that they otherwise had been taking prior to 1989. The following comments demonstrate the chilling effect of these decisions on the practices of plaintiffs employment lawyers:

AT & T Technologies, Inc., __ U.S. __, 109 S.Ct. 2261 (1989) (challenges to seniority systems must be made at time plan is adopted not when individual learns of plan's discriminatory effects on him/her), Independent Federation of Flight Attendants v. Zipes, __ U.S. __, 109 S.Ct 2732 (1989) (Title VII attorney's fees may only be awarded against losing intervenors where intervenors' action was frivolous and without foundation); and Price Waterhouse v. Hopkins, __ U.S. __, 109 S.Ct. 1771 (1989) (where employment decision is based on a mixture of lawful and unlawful considerations, employer must prove by a preponderance of the evidence that it would have made the same decision for lawful reasons).

[7] See "Appendix III," "Statement of Robert B. Fitzpatrick of the Plaintiff Employment Lawyers Association on the Civil Rights Act of 1990," for a more detailed analysis of how these decisions affect victims of employment discrimination. See also, "The Impact of Patterson v. McLean Credit Union," NAACP Legal Defense and Educational Fund, Inc.; "Justice Denied: The Continuing Impact of the Supreme Court's 1989 Decisions on Title VII of the 1964 Civil Rights Act," People for the American Way Action Fund; "The Unjust Workplace: The Impact of the Patterson Decision on Women," Women's Legal Defense Fund; "Martin v. Wilks and the Attempted Unraveling of Affirmative Action," Lawyers Committee for Civil Rights Under Law; and "Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy," National Women's Law Center.

I haven't filed a Section 1981 case since Patterson.

The alteration in the burden of proof and definition of business necessity under Wards Cove make nearly all potential new disparate impact cases extremely risky to take on. Racial harassment cases under Section 1981 are now impossible under Patterson. Some racial harassment cases may rise to the level of intentional torts under state law, and some discharge cases may be actionable for equitable relief under Title VII, although overall, the number of these types of cases we are willing to undertake has been substantially reduced.

These decisions make what was once difficult far more difficult, if not impossible, so that they probably discourage me from taking them even more.

Patterson, Wards Cove and Price Waterhouse are all relevant to further limiting the cases I take.

Practical Barriers

In addition to the above statutory and court-created barriers, lawyers also cited a plethora of practical obstacles affecting their willingness to represent victims of employment discrimination. These include the client's inability to pay costs and fees; hostility of the federal judiciary to employment discrimination cases; difficulty in recovering attorney's fees; caseload; employer advantage in litigation; and hurdles in pre-litigation investigations.

Due to the fact that most of our members practice solo or in small firms, the financial feasibility of representing employment discrimination victims is of special concern. The overwhelming majority of them do not have the luxury of having their practices sustained by partners involved in the more lucrative areas of the

law while they are engaged in costly, time-consuming, complex and protracted litigation. One member explained, "Effective plaintiffs' attorneys can spend the same or less than they do on employment cases on personal injury cases and stand to recover much larger fees than they would on an employment case." Another lamented that the "economic feasibility issues make these cases very difficult to handle profitably." A solo practitioner simply stated that she could not afford to take cases "where the damages are less than $20,000."

It is important that these comments not be misinterpreted as simply a cry for more money by employment lawyers. In the words of one member, "If I were only interested in the money, I wouldn't do it at all." As Justice Brennan so aptly stated in his dissent in Evans v. Jeff D., 475 U.S. 717, 758 (1986), "It does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of practicing law, and that, like other business people, they are and must be concerned with earning a living."

Even restoring the law to its pre-1989 status will not make civil rights law among the more lucrative areas of legal practice. As previously discussed, the nature of civil rights litigation precludes attorneys from maintaining concurrent profitable caseloads. In addition, many of these cases involve challenging the most powerful corporate and governmental institutions in our society. Along with this, comes the "civil rights" stigma which "tends to deter fee-paying clients from

seeking assistance from that lawyer,"[8] and prevents such attorneys from "attracting other sophisticated federal practice."[9]

THE EFFECT OF THESE BARRIERS ON VICTIMS OF DISCRIMINATION

The statutory, court-created and practical obstacles to representing victims in employment discrimination litigation discussed above have made it difficult for them to find counsel among the already small pool of plaintiffs employment lawyers. An unfortunate consequence is that many are forced to either proceed pro se[10] or to forego their claims altogether when they are unable to find legal representation.

One example is Jannette Solomon, a Black professional psychiatric social worker in Albany, Georgia, who has impeccable academic and professional credentials. Ms. Solomon was denied promotions on two separate occasions in favor of less qualified white women who were eventually terminated from the position for which Ms. Solomon had applied because of incompetence and mismanagement. The state then transferred her to a job for which she was overqualified, thus functionally demoted her. She was never given a reason for the transfer, which was accompanied by

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[8] Hilde v. Geneva County Bd. of Educ., 681 F. Supp. 752 (M.D. Ala. 1988).

[9] York v. Alabama State Bd. of Educ., 631 F. Supp. 78, 85 (M.D. Ala. 1986).

[10] In an informal random polling of a limited number of federal district court clerks offices we learned that the filings of pro se Title VII cases have increased significantly since these decisions were rendered in 1989.

numerous acts of on-the-job harassment. Ms. Solomon was able to find a NELA lawyer to successfully assist her before the state personnel board to regain her former position. Unfortunately, the NELA lawyer was unwilling to represent Ms. Solomon in her employment discrimination claims because of the adverse effects of the Patterson decision on her case. After approaching six other attorneys, Ms. Solomon was forced to forego her claims because the statute of limitations for filing a lawsuit had expired.

Another example is Jimmy Henderson of Dallas, Texas. Mr. Henderson is a Black man who was employed as a short-order cook. After two years of service, he was promised a promotion by the restaurant's owner, but later passed over in favor of a less qualified white man who Mr. Henderson was required to train for the job. After questioning his employer as to why he was not promoted, Mr. Henderson was terminated. The employer told Mr. Henderson he was fired because he failed to report to work one day. That day just happened to be the first day of Mr. Henderson's vacation. Mr. Henderson has contacted eight to nine lawyers without success. Some lawyers said that they could not take his case because the damages are too minimal. Others told him that they did not handle employment cases and were unfamiliar with any lawyers in Dallas who do. At the time of this report, Mr. Henderson was still trying to find a lawyer to represent him.

"JUDICIAL NOTICE" OF THE PROBLEM

Numerous courts across the country have recognized the dearth of attorneys willing to represent victims in federal civil rights employment discrimination cases. They have recounted the problems confronted by local bar associations, lawyer referral services and even the courts themselves (in court-appointed cases) in finding attorneys to accept such cases.[11] A federal district court judge in Alabama noted in one case that there is "a severe and critical shortage of lawyers regularly willing to handle employment discrimination cases...in this state; and those who are alleged victims of employment discrimination are, therefore, finding it increasingly more difficult to find counsel."[12]

The harrowing experiences that individuals endure in trying to attract competent counsel to litigate employment discrimination cases, especially on a contingency basis, is well known to both the bench and bar. "[T]he shortage of counsel willing to accept employment discrimination cases on a contingency basis is a fact and not a mere speculative

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[11] Lattimore v. Oman Contr., 868 F.2d 437, 439 (11th Cir. 1989). See also Stokes v. City of Montgomery, Ala., 706 F. Supp. 811, 817 (M.D. Ala. 1988); Searcy v. Crim, 692 F. Supp. 1363, 1366 (N.D. Ga. 1988); Caston v. Sears, Roebuck & Co., Hattiesburg, Miss., 556 F.2d 1305, 1309 (1977); White v. City of Richmond, 559 F.Supp. 127, 134 (1982); In Re Mahone, 333 F. Supp. 259, 260 (1971), Weisberg v. U.S. Dept. of Justice, 720 F. Supp. 1, 2 (D.D.C. 1989).

[12] Stokes, supra, at 817.

exercise."[13] Courts are cognizant of the alarming number of attorneys which civil rights victims must approach in order to find counsel willing to accept their cases. One of the most extraordinary examples involved a woman who contacted thirty-five lawyers before finding one who would represent her on a contingency basis in an ultimately successful Title VII suit.[14] In another case, an alleged race discrimination victim filed his complaint pro se after eight lawyers and a legal aid organization declined to take his case.[15] Although this particular plaintiff eventually found an attorney to continue the fight he began, many courts have reported cases of pro se employment discrimination litigants who file and pursue litigation without ever finding an attorney to represent them.[16]

In addition, courts have observed that lawyers who "once undertook employment discrimination cases on a contingency basis"

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[13] McKenzie v. Kennickell, 684 F. Supp. 1097, 1103 (D.D.C. 1988) (nine plaintiffs were unable to secure counsel in Title VII action and proceeded pro se).

[14] Fadhl v. City & County of San Franciso, 859 F.2d 649, 651 (9th Cir. 1986). See also, Clark v. City of Los Angeles, 803 F.2d 987, 991 (9th Cir. 1986) and Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301, 1319 (9th Cir. 1981), where the plaintiffs in each case contacted at least ten attorneys before finding counsel to represent them in the employment discrimination suit.

[15] Jackson v. Rheem Mfg. Co., 904 F.2d 15 (8th Cir. 1990).

[16] McKenzie v. Kennickell, supra.

are no longer doing so,[17] and that few lawyers are entering the practice of civil rights and employment discrimination law.[18] Such observations are often accompanied by references to the adverse economic consequences which many practitioners suffer in order to pursue civil rights litigation.[19] One court remarked that attorneys "undoubtedly view taking Title VII cases undesirable due to, among other things, the limited financial resources of plaintiffs, the greater resources of most defendants, and, of course, the contingent nature of any attorney's fees," in light of the factual complexity, time consuming nature, and high cost of this type of litigation.[20]

CONCLUSION

In enacting the federal civil rights employment discrimination laws, Congress contemplated that they would be primarily enforced by private individuals and the private bar.[21] As this report demonstrates, there have been increasing obstacles to victims of employment discrimination in obtaining lawyers who will represent them in vindicating their rights. The legislation now pending before Congress eliminates or ameliorates some of

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[17] Norwood v. Charlotte Memorial Hospital and Medical Center, 720 F. Supp. 543, 554-55 (W.D.N.C. 1989).

[18] Stokes, supra.

[19] See, e.g., Norwood v. Charlotte Memorial Hosp. & Med. Center, supra., Missouri v. Jenkins, 109 S.Ct. 2453 (1989);

[20] Jones v. Federated Department Stores, Inc., 527 F. Supp. 912, 917 (1983). See also, In Re Mahone, supra.

[21] See, 95 S. Rep. No. 1011, 94 Cong., 2d Sess. 2 (1976).

these obstacles. In particular, the proposed legislation would reverse the effects of the 1989 United States Supreme Court decisions on federal civil rights employment discrimination laws. It also would provide for an extension of the statute of limitations in Title VII actions, as well as compensatory and punitive damages and the right to a jury trial not previously available to some discrimination victims. In addition, the bill would expressly authorize the recovery of essential litigation expenses such as expert witness fees.

In the absence of these changes, the victims of employment discrimination will continue to find ever increasing difficulty in obtaining attorneys to vindicate their rights. The number of attorneys willing to take these cases will dwindle and the nation's promise of equal employment opportunity will remain unfulfilled. The results of this report demonstrate strongly the need for the passage of the Civil Rights Act of 1991 to reverse this trend.