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Introduction: Civil Rights in the Workplace of the 1990s

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SPECIAL PROJECT: CIVIL RIGHTS IN THE WORKPLACE OF THE 1990s

I. INTRODUCTION

Throughout history courts and legislatures alternatively have enlarged and diminished civil rights protections.[1] Today, employment discrimination claims are the most commonly litigated civil rights cases.[2] A succession of cases decided by a new conservative majority of Justices during the 1988 Supreme Court Term has altered radically the delicate balance of civil rights in the workplace.[3] The then prevailing economic, political, and legal environment seemed to be impervious to any advances in employment discrimination protections.

Since that Term, courts and legislatures at the state and federal levels have promulgated a confusing combination of advances and re-

1. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106-15 (1977); Note, *Reconstruction, Deconstruction, and the Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 478-501 (1990).

2. Shapiro, *Using State Civil Rights Statutes in Federal Civil Rights Litigation*, 35 FED. B. NEWS & J. 113 (1988) (noting that the "most common civil rights cases in federal courts today are those involving claims of employment discrimination").

3. This series of decisions includes the following cases: Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989); Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

treats in employment discrimination law.[4] This uncertain climate poses substantial risks to workplace rights and yet, at the same time, holds great potential for improvement of civil rights in the workplace. The developments of the 1990s will play a pivotal role in determining the future of workplace rights.[5]

This Special Project addresses four evolving areas of employment discrimination law. The Special Project begins by examining the most controversial issues[6] raised by the vetoed Civil Rights Act of 1990.[7] Congress had introduced the Act in an attempt to restore both Title VII[8] and section 1981[9] protections that the Supreme Court had limited during its 1988 Term.[10] The Project suggests compromises that both Congress and the President should make in the continuing quest for acceptable civil rights legislation.

The Project then considers both the recent trend toward a more conservative federal judiciary and the changes in state employment discrimination law in light of *Yellow Freight System, Inc. v. Donnelly*,[11] a case holding that state and federal courts share concurrent jurisdiction over Title VII claims. The Project explores a restructuring of the parity debate in an attempt to develop an analytical framework for forum se-

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4. *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 110 S. Ct. 1566 (1990) (holding that state and federal courts have concurrent jurisdiction in Title VII cases); Walker v. Anderson Elec. Connectors, 742 F. Supp. 591, 592 (N.D. Ala. 1990) (holding that Title VII plaintiffs are entitled to jury trials); Lynch v. City of Des Moines, 454 N.W.2d 827, 833 n.5 (Iowa 1990) (noting that Title VII decisions may be persuasive, though not binding, in interpreting the Iowa Civil Rights Act); Turner v. IDS Fin. Servs., 459 N.W.2d 143, 146-47 (Minn. Ct. App. 1990) (refusing to follow Supreme Court decisions concerning Title VII's statute of limitations in applying state law); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 29, 42, and 47 U.S.C.A.) (attempting to integrate disabled individuals into the workplace and society); Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. H9522-55 (daily ed. Oct. 12, 1990) (attempting, though failing, to overturn the series of employment discrimination cases decided during the 1988 Supreme Court Term).

5. Note, *supra* note 1, at 504. The author notes that the 1988 Court decisions could result in "a reversion to a period of court-supported practices of discrimination under reinterpreted laws" unless Congress responds to their limitations. *Id.* Moreover, the Note argues that a "failure to correct *Price-Waterhouse* could severely dampen the enthusiasm of civil rights lawyers and plaintiffs to initiate mixed motive cases." *Id.* at 536.

6. These issues include factors affecting the disparate impact analysis, such as burdens of proof, business necessity, and specificity; Title VII and § 1981 remedies; consent decrees and the impermissible collateral attack doctrine; and the recovery of attorney's fees. *See generally Civil Rights Act of 1990: Hearing Before the Senate Comm. on Labor and Human Recourses on S. 2104*, 101st Cong., 1st Sess. (1989).

7. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. H9552-55 (daily ed. Oct. 12, 1990). President Bush vetoed the Act, and the Senate failed to override the veto. 136 CONG. REC. S16,457 (daily ed. Oct. 22, 1990); 136 CONG. REC. S16,562-89 (daily ed. Oct. 24, 1990).

8. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1988).

9. 42 U.S.C. § 1981 (1988).

10. *See supra* note 3 and accompanying text.

11. 110 S. Ct. at 1566.

lection in a concurrent system of employment discrimination litigation.

The *Yellow Freight* decision illustrates the expanding role that state law can play in employment discrimination litigation. Recognizing this expansion, the Special Project next discusses the common-law doctrine of employment at will and the exceptions developed by state courts and legislatures to provide employees with greater protection from arbitrary discharge.[12] Based on economic and moral considerations, the Project advocates a reversal of the presumption of employment at will in favor of a rebuttable presumption that employers can fire their employees only for just cause.

Finally, the Project again looks at the contraction of federal employment discrimination protections by examining the Americans with Disabilities Act of 1990 (ADA).[13] The examination focuses on the extent of coverage afforded to alcoholics and drug addicts under the ADA in comparison to the broader protections once afforded to these addicts under the ADA's predecessor, the Rehabilitation Act of 1973.[14] Although the ADA narrows the scope of coverage, the Project concludes that the ADA strikes a proper balance between the legitimate concerns of employers and employees and proposes an interpretation of the ADA that will clarify the scope of coverage now afforded addicts.

The four areas of law identified above will impact significantly on employment discrimination litigation. The Project outlines the present state of the law in each of the areas. The Project also describes current, unsettled issues in these areas and proposes new approaches for litigation or legislation. These proposals would allay risks now posed to workplace rights and play a pivotal role in improving civil rights in the workplace of the 1990s.

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Special Project Editor

12. These exceptions include the public policy exception, the implied contract exception, the covenant of good faith and fair dealing, and statutory exceptions. *See* Note, *Reversing the Presumption of Employment at Will*, 44 VAND. L. REV. 691, 695-703 (1991).

13. Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 29, 42, and 47 U.S.C.A.). The ADA is a comprehensive plan for integrating disabled individuals into society. Ironically, however, through its definition of "disability" the ADA narrows the scope of coverage once afforded to addicts. *See id.* § 3, 104 Stat. 329 (codified at 42 U.S.C.A. § 12,102 (West Supp. Dec. 1990)).

14. 29 U.S.C. §§ 701-796 (1988).