

Report and Recommendations:

The New York State Bar Association
Committee on Civil Rights Against Discrimination

November 1996

Approved by the House of Delegates on
November 2, 1996

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200



COMMITTEE ON CIVIL RIGHTS

GAIL J. WRIGHT-SIRMANS

Chair

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May 31, 1996

TO: Chairs, Interested Sections and Committees

FROM: Gail Wright Sirmans, Chair, Committee on Civil Rights

RE: Civil Rights Committee Resolution

It has recently come to my attention that there may have been some confusion regarding the wording of the Committee Report Cover sheet and the actual wording of the resolution which was sent to you on May 20, 1996, for preliminary consideration by the Executive Committee and House of Delegates at their June meeting in Cooperstown. The resolution below will be before the House and is correctly worded to correspond with the cover sheet previously mailed. Apologies for any confusion this discrepancy may have caused.

RESOLUTION AND RECOMMENDATION TO THE HOUSE OF DELEGATES

RESOLVED, That the New York State Bar Association;

- a. Opposes unlawful discrimination based on race, sex, national origin, religion, disability, or age in employment, education, housing, contracting and licensing.
- b. Encourages affirmative efforts to eradicate discrimination and bias.
- c. Endorses and affirms legal remedies and voluntary actions that take into account race, national origin, gender or disability to eliminate or prevent discrimination or otherwise serve a compelling societal interest.

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION

COMMISSION ON WOMEN IN THE PROFESSION

NATIONAL BAR ASSOCIATION

HISPANIC NATIONAL BAR ASSOCIATION

NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION

Recommendation

RESOLVED, That the American Bar Association endorses legal remedies and voluntary actions that take into account as a factor race, national origin, or gender to eliminate or prevent discrimination or otherwise serve a compelling societal interest.

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REPORT

Introduction and Summary

The country once again is examining its commitment to achieving racial and gender equality through the current debate on affirmative action.¹ The American Bar Association can play an important role in this debate by approving the proposed recommendation, which is a natural evolution from prior Association policies regarding nondiscrimination and affirmative action. These policies reflect the organization's ongoing support of the principle of nondiscrimination and the need for remedies and voluntary actions to address historical and current discrimination, as well as the need for diversity in employment, legal education, the judiciary and federal contracting.² The Association can contribute to the current debate by clarifying well established legal and policy imperatives underlying race- and gender-conscious remedies, including affirmative action. Progress toward racial and gender equity has

¹ For example, both the President and the Congress have requested comprehensive reviews of all federal affirmative action programs, and legislation is proposed or pending in Congress that would restrict or eliminate such programs. Voter initiatives that would restrict affirmative action programs also are being proposed in several states. In early June, Gov. Pete Wilson of California issued an executive order intended to roll back affirmative action programs in that state.

² The ABA does not have any specific policy supporting affirmative action as a general remedy for discrimination. However, the Association has policy supporting affirmative action in specific sectors affecting the legal community and has policy supporting specific programs to provide opportunities for members of disadvantaged groups. For example, in February 1995, the ABA adopted policy opposing bias and discrimination based on race and gender that prevent multicultural women from gaining full and equal participation in the legal profession. There also are other policies supporting studies of the existence, if any, of bias in the federal judicial system and the development of remedial steps to address and eliminate any bias found (1991); urging incorporation of affirmative action values in decisions on whom to recommend and appoint to judicial positions and encouraging executive agencies to implement equal employment opportunity and affirmative action plans and programs as they staff the courts (1990); condemning all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race, or national origin (1972); and encouraging development of law school admissions programs to attract and retain greater numbers of interested but disadvantaged members of minority groups who are capable of successful completion of law school (1978). In other contexts, Association policies range from urging creation of effective community reinvestment programs in all financial institutions to help avoid discrimination (1991), to urging the Office of Federal Procurement Policy to develop criteria for more effective implementation of the small-business programs in the procurement environment, particularly involving contracting with socially and economically disadvantaged persons (1976), to recognizing the need for correctional agencies and systems to increase the number of women and minority group employees at all staff levels and calling for special programs to attain this objective (1975).

discrimination or to prevent discrimination from recurring in the future.³ Examples of affirmative action include student assignments to promote public school desegregation, site selection for public housing to promote residential integration, efforts to promote and support women- and minority-owned businesses, and recruitment and hiring efforts to attract women and minorities into jobs from which they traditionally have been excluded. In every instance, affirmative action is a mechanism through which experience and ability are appropriately rewarded.

Affirmative action always has enjoyed substantial bipartisan support in the Executive Branch and in Congress. The impetus for affirmative action in employment began during World War II, when President Roosevelt signed an Executive Order requiring nondiscrimination in hiring because all workers were needed to support the wartime effort. Succeeding Presidential Executive Orders reinforced the nondiscrimination principle. At the same time, there was a growing recognition that advocating nondiscrimination was not enough. The Nixon Administration developed what would become the current standards for affirmative action, including the concepts of goals and timetables, in Executive Order 11246.⁴ During the Reagan administration, the majority of the Cabinet, joined by strong bipartisan majorities in Congress, reinforced the importance of that order in the face of some opposition. The Bush administration's Department of Labor released the first "Glass Ceiling" study.⁵ Finally, bipartisan majorities in the Congress have defeated anti-affirmative action proposals in several past Congressional sessions.

Most current federal affirmative action programs affect employment, education, housing, and contracting and licensing. In the employment field, Title VII of the Civil Rights Act of 1964, the primary federal law governing equal opportunity, provides for affirmative action as a remedy upon a showing of unlawful discrimination.⁶ The Civil Rights Act of 1991, which amends Title VII, specifically provides that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies,

³ See U.S. Commission on Civil Rights, Statement on Affirmative Action, Clearinghouse Pub. 54 (October, 1977).

⁴ Executive Order 11246 prohibits discrimination by federal contractors, and, further, requires contractors to use affirmative action.

⁵ Pipelines for Progress: A Status Report on the Glass Ceiling, U.S. Department of Labor (1992). In the same year, the Merit Systems Protection Board released a companion report glass ceiling for federal employees. A Question of Equity: Women and the Glass Ceiling in the Federal Government, Merit Systems Protection Board (1992).

⁶ 42 U.S.C. §§ 2000e-1 et seq. (1988 & Supp. V 1993). Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin.

U.S. Department of Transportation's (DOT) Disadvantaged Business Enterprise (DBE) program similarly aims to help eliminate the effects of historical discrimination by assisting small businesses owned and controlled by socially and economically disadvantaged individuals. Under this program, states receiving federal transportation grants are required to set goals and award contracts so that not less than 10 percent of their federal aid highway funds go to firms in the program. The Surface Transportation Assistance Act of 1982 required that states spend at least 10% of their funds under the federal aid highway program through contracting with minority-owned firms.

Discrimination Persists

The current debate regarding affirmative action is based in part upon the misperception that discrimination no longer exists, or that even if it does, simple legal prohibitions against discrimination will suffice. The perception, while perhaps understandable, is inaccurate. Notwithstanding the substantial gains made by women and people of color to date, largely through enforcement of the civil rights laws and use of programs such as those described above, discrimination remains a stark reality in most spheres of American life.

Nowhere is the persistence of discrimination clearer than in the labor market. The Glass Ceiling Commission's report, issued in March 1995, finds an "enduring aptness to the 'glass ceiling' metaphor" in the area of employment.¹² The report concludes that women and people of color rarely reach the highest levels of business and that, even when they do, they receive lower compensation than whites in comparable positions.¹³ At Fortune 1000 industrial and Fortune 500 companies, 97% of senior managers are white. In Fortune 2000 industrial and service companies, only 5% of senior managers are women, and virtually all of them are white. Very few women or people of color are even in the "pipeline" positions leading to top jobs.¹⁴

African Americans, who constitute 11% of the total work force, made up less than 4% of the following occupations as of 1993: lawyers and judges (2.7%); dentists (1.9%); doctors (3.7%); industrial engineers (3.4%); engineers (3.7%); managers in marketing, advertising, and public relations (3.1%).¹⁵ Hispanics make up 7.9% of the labor force, yet they are all but invisible in corporate decision-making positions. Similarly, Asian and Pacific Islander Americans constitute more than 7.3%

¹² "Good for Business: Making Full Use of the Nation's Human Capital," Fact-Finding Report of the Glass Ceiling Commission (U.S. Department of Labor, March 16, 1995) (Special BNA Supplement) (hereafter "Glass Ceiling Report").

¹³ Glass Ceiling Report, Introduction by Secretary of Labor, pp. S2-3.

¹⁴ *Id.*

¹⁵ Statistical Abstract, Table No. 622 at 393, Table No. 637 at 407-410.

Unequal access to education is equally problematic for both people of color and women. Between 1976 and 1980, targeted outreach resulted in a 5% increase in the number of African Americans enrolled.²² There was, however, a 3.8% decrease in black college enrollment from 1980 to 1984. In 1993, while 22.6% of whites had college degrees, only 12.2% of African Americans and 9% of Hispanics did. The picture grows even dimmer for postgraduate degree recipients; in 1993, African Americans received only 2.8% of 39,754 doctorates awarded in this country.²⁴ Further, despite the perception that "too much" scholarship money is set aside for black students, the reality is that minority-targeted scholarships accounted for a small proportion of total scholarships and scholarship dollars in 1991-1992, and race and ethnicity were rarely the sole criterion.²⁵

Although women have surpassed men to make up 56% of students enrolled in undergraduate institutions,²⁶ women are still most often found in traditional majors, leading to careers in which they continue to earn less than their male counterparts. For example, an examination by gender of the degrees granted in 1994 demonstrates that men are overrepresented in high-paying fields, such as engineering and business management (receiving 79% and 53%, respectively), which lead to top salaries for recent graduates.²⁷

In the area of housing, much of the pervasive residential segregation that persists is caused by discrimination. For example, a 1991 HUD study using black and white testers found that African Americans experienced discrimination 59% of the time they tried to buy homes and 53% of the time they tried to rent homes. Blacks also are twice as likely to be denied mortgages as whites at the

²² The Status of Blacks in Higher Education: National Association for Equal Opportunity in Higher Education (1989).

²⁴ *Id.*

²⁵ *Id.*, citing GAO Report on Minority Scholarships, January 14, 1994.

²⁶ National Center for Education Statistics, Digest of Education Statistics, 128 (U.S. Department of Education, Office of Education Research and Improvement, 1994) (hereafter "Education Digest").

²⁷ Education Digest. However, the barriers surface well before young women select majors in college. Sexual harassment, biased standardized tests, underrepresentation in math and science programs, adolescent pregnancy, and inequality in vocational and athletics programs inhibit young women from making a full contribution to American society. See Verna Williams and Steven Hodge, "In Search of A Vision: Gender Equity in Education in the Clinton Administration," New Challenges: The Civil Rights Record of the Clinton Administration Mid-Term, Report of the Citizens' Commission on Civil Rights (1995) (hereafter, New Challenges).

such plans. Courts also have ordered race- and gender-conscious relief as an effective remedy for workplace discrimination. In Local 28 of Sheet Metal Workers v. EEOC,³² the Supreme Court held that race-conscious relief may be ordered as a Title VII remedy for past discrimination "where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."³³ However, the Court cautioned, such relief cannot be invoked to create a racially balanced work force and should be tailored to fit the nature of the violation that it seeks to correct.³⁴ The Court decided in Local 93 v. City of Cleveland³⁵ that Title VII does not preclude entry of a consent decree that provides for race-conscious relief through promotional goals to individuals who were not actual victims of discrimination. Finally, in United States v. Paradise,³⁶ the Court addressed the constitutionality of a remedial order requiring that a black employee be promoted for each white employee promoted in the Alabama Department of Public Safety. Noting the long history of discrimination in the department and the unavailability of any other effective remedy, the Court upheld the order as relief narrowly tailored to serve a compelling governmental purpose.³⁷

Similarly, the Court has supported employers' voluntary affirmative action measures that take race and gender into account. In United Steel Workers of America v. Weber,³⁸ the Court held that, under Title VII, a private employer and a union lawfully could adopt voluntary race-conscious measures that were specifically "designed to break down old patterns of racial segregation and hierarchy" that had been implicit in the membership practices of the union in order to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."³⁹ In Wygant v. Jackson

³² 478 U.S. 421 (1986).

³³ *Id.* at 445.

³⁴ The Court approved a remedy that provided for a numerical hiring goal of 29 % nonwhite union membership, based upon the percentage of nonwhites in the relevant labor pool.

³⁵ 478 U.S. 501 (1986).

³⁶ 480 U.S. 149 (1987).

³⁷ The promotion order was justified by a compelling interest in remedying persistent discrimination in hiring and promotion. There was no other remedy available; further, the order was flexible in application (it could be waived), it was temporary, it did not impose an undue burden on innocent third parties, and it required that only qualified African American troopers be promoted.

³⁸ 443 U.S. 193 (1979).

³⁹ Weber, 443 U.S. at 208.

that "strict scrutiny is the standard of all racial classifications, whether imposed by a federal, state or local actor." Although governmental race-conscious actions will be subject to the highest standard of scrutiny under the Equal Protection Clause, such actions still will be appropriate where they serve a compelling governmental interest and are narrowly tailored.

Adarand thus adopted the standard that had been applied to local governmental actors in City of Richmond v. J.A. Croson Co.⁴⁶ In Croson, the Court rejected a Minority Business Utilization Plan adopted by the City of Richmond, Virginia, that required non-minority owned prime contractors who received city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more qualified minority business enterprises (MBEs).⁴⁷ The Court invalidated the plan because it found that the city had failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race and that its plan was not narrowly tailored to any remedial goal, except the impermissible goal of maintaining racial balance.

Prior to Adarand, the standard for federal contracting and licensing programs had been established by Fullilove v. Klutznick,⁴⁸ which dealt with the minority set-aside program enacted by Congress as part of the Public Works Employment Act of 1977 (PWEA) to govern distribution of funds for construction of public works projects to state and local government grantees.⁴⁹ The Court found that when enacting the PWEA, Congress had before it "abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination."⁵⁰ Given that evidence, the Court upheld enactment of the PWEA "as a strictly remedial measure" to address society-wide discrimination throughout the nation.⁵¹ And in Metro Broadcasting, Inc. v. FCC,⁵² the

⁴⁶488 U.S. 469 (1989).

⁴⁷The 30 percent target was roughly halfway between the 50 percent minority population of Richmond and the 0.67 percent of Richmond-based minority contractors. 488 U.S. at 751.

⁴⁸448 U.S. 448 (1980).

⁴⁹Under the program, absent an administrative waiver, at least 10 percent of federal funds granted for local grantees to purchase services or supplies from qualified minority business enterprises (MBEs). MBEs are defined as businesses owned by United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

⁵⁰*Id.* at 477-78.

⁵¹*Id.* at 481.

⁵²497 U.S. 547 (1990).

discriminatory views, overt or unconscious," and that "[w]e need affirmative action to keep the insight and knowledge of higher education open to every aspirant."⁵⁴

Gains Made to Date Show That Affirmative Action Works

Although equal opportunity is not yet a reality for many minorities and women, the significant gains that minorities and women have made over the past 30 years are clearly attributable in large part to effective affirmative action programs at both governmental and private levels. A 1984 study by the Citizens' Commission on Civil Rights that evaluated the impact of affirmative action for minorities and women concluded that affirmative action had reduced job segregation significantly and had improved occupational status and mobility.⁵⁵ Other studies conducted by the Department of Labor and numerous other groups during the 1970s and 1980s underscore that minorities and women made substantially greater gains in employment where affirmative action programs were in place.⁵⁶

At the same time, the evidence shows minimal negative impact on white males. Records compiled by the EEOC for fiscal year 1994 indicate that charges of "reverse discrimination" filed constitute approximately 2% of all charges filed with the agency.⁵⁷ A recent U.S. Department of Labor-sponsored study of more than 3,000 discrimination cases over a four-year period found that reverse discrimination is not a significant problem.⁵⁸

⁵⁴ Statement of the American Association of University Professors, March 16, 1995. The AAUP is the national organization representing faculty members at 1200 colleges and universities.

⁵⁵ Citizens' Commission on Civil Rights, Affirmative Action to Open the Doors of Job Opportunity, 123-129 (1984).

⁵⁶ See, e.g., J. Leonard, The Effectiveness of Equal Employment Law and Affirmative Action Regulation (School of Business Administration, Univ. of California, Berkeley 1985); J. Field, Affirmative Action: A Fresh Look at the Record 22 Years After the Beginning (Center for National Policy Review); J. O'Neill, The Economic Progress of Black Men in America (U.S. Commission on Civil Rights, 1986); EEO Policies and Programs, Personnel Policies Forum Survey No. 141 (BNA 1986); H. Hammerman, A Decade of New Opportunity: Affirmative Action in the 1970s (Potomac Institute 1985).

⁵⁷ U.S. Equal Employment Opportunity Commission, "Charge Statistics Reflecting Types of Reverse Discrimination FY 1987-1994."

⁵⁸ "No 'Widespread Abuse' in Job Cases, Few Reverse Bias Claims, Study Says," Daily Labor Report (BNA), March 23, 1995, p. AA-1, quoting A.W. Blumrosen, "How the Courts are Handling Reverse Discrimination Claims," Daily Labor Report (BNA) March 23, 1995, Appendix A.

families, and the nation in all areas affected by affirmative action programs. More fundamentally, however, abandoning affirmative action will not move us toward our desired goal of a color-blind and gender-neutral society-and may well divide us even more into a society of "haves" and "have nots." The Association must make clear its unequivocal support for a policy that embodies this nation's promise of equal opportunity for all.

Respectfully Submitted,
Rebecca J. Westerfield, Chair
Section of Individual Rights and Responsibilities

August 1995

New York State Bar Association[®]

COMMITTEE ON MENTAL AND PHYSICAL DISABILITY

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June 26, 1996

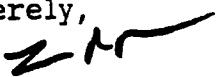
John A. Williamson, Jr.
Associate Executive Director
New York State Bar Association
One Elk Street
Albany, New York 12207

Dear Mr. Williamson,

At its meeting on June 19, 1996, the Committee on Mental and Physical Disability considered the resolution submitted by the Committee on Civil Rights. The Committee decided that the resolution needed amendment to include marital status and sexual orientation in the list of categories covered, that the language should be strengthened and that persons affiliated with the subject groups should be covered. A Committee resolution to that effect passed with one opposed and one abstention. I have enclosed a copy of the Committee resolution.

Thank you.

Sincerely,



Lawrence R. Faulkner

a:bar:cr



Greater Upstate Law Project, Inc.

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September 24, 1996

John A. Williamson
Associate Executive Director
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Re: Resolution of the Committee on Civil Rights

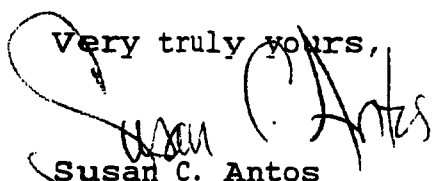
Dear Mr. Williamson:

At its meeting on September 13, 1996, the Committee on Social Services considered the resolution of the Civil Rights Committee regarding affirmative action.

The Social Services Committee agreed to support the proposal, but would prefer that it include the attached modifications. We believe our proposal is nearly similar to the resolution adopted by The Committee on Mental and Physical Disabilities, except that we change the word "sex" to "gender" and include "pregnancy" in the list of conditions that should not be subject to discrimination.

Please feel free to call me if you have any questions or concerns.

Very truly yours,


Susan C. Antos
Staff Attorney

SCA:cl

Enclosures

cc: Ron Kennedy
Gail J. Wright Sirmans

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The Greater Upstate Law Project, Inc. provides litigation assistance, training and legislative monitoring to legal services programs in New York and free legal services to New York's low income residents.

New York State Bar Association

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CHAIR EMERITUS:

Frank A. Nema

October 2, 1996

John A. Williamson, Jr., Associate Executive Director
New York State Bar Association
One Elk Street
Albany, New York 12207

Re: Civil Rights Committee Report
on Affirmative Action

Dear John:

The Executive Committee of the Labor and Employment Law Section considered, at its September 27th meeting, the resolution in support of affirmative action submitted by the Committee on Civil Rights to the House of Delegates.

The Labor and Employment Law Section consists of attorneys representing labor, management, individual employees, public agencies, and those who serve as neutrals in labor disputes. The Section has consistently taken the position that it would not support any proposal as to which a consensus could not be reached among the various constituent groups. After discussion on September 27th, it is clear that our Section is not able, at this time, to reach a consensus with respect to the Civil Rights Committee's resolution.

The Section wishes to note that to the extent that subparagraph (a) of the resolution states the opposition of the Association to unlawful discrimination, such a statement seems unnecessary. One member of the Section's Executive Committee suggested that subparagraph (a) would be more appropriately found within a "whereas" statement since the Bar Association opposes all unlawful action, including unlawful discrimination.

As to the second subparagraph of the resolution, by which the Bar Association would encourage affirmative efforts to eradicate discrimination and bias, the Labor and Employment Law Section could reach consensus in support.

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September 27, 1996

John Williamson, Esq.
New York State Bar Association
One Elk Street
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Re: Affirmative Action Resolution

Dear John:

I consulted my committee members with respect to the proposed resolution of the Committee on Civil Rights. The consensus was to support the resolution excluding clause C, which of course we recognize is the important clause. For one thing, there were objections that the key clause does not give us any idea of what compelling societal interests a preference may lawfully serve.

More importantly, it is fair to say that the consensus of my committee was that racial and gender preferences should be limited to remedying specific demonstrable instances of past denials of equal opportunity for racial, national, or gender groups. Beyond those and perhaps other unique circumstances, preferences (voluntary or state supported) are antithetical to the goal of equal protection.

Consequently, this committee opposes the resolution as drafted, although this committee could support the resolution without clause C.

Very truly yours,



James R. Griffith

JRG/plf



New York State Bar Association

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COMMITTEE ON WOMEN IN THE LAW

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September 27, 1996

M. Catherine Richardson, Esq., President
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Dear Ms. Richardson:

At the September 5, 1996 meeting of the Committee on Women in the Law, the Committee considered the resolution propose by the Committee on Civil Rights. After considerable debate, the Committee on Women in the Law agreed to support the resolution with the proposed modifications below.

The consensus of the Committee was that the resolution is so broad as to have little effect on the issue of unlawful discrimination against the protected classes listed in the resolution. In addition, the resolution does not address the issue of discrimination with regard to sexual orientation or the rights of pregnant women to be protected from unlawful discrimination during pregnancy and a guarantee of employment after maternity leave. Finally, the Committee opposes the use of the term "sex" in paragraph (a) and recommends replacing that term with the word in common usage today, "gender."

With regard to paragraph (c), the Committee finds the language too broad and lacking specificity. Clearly, one would hope that all members of the legal community and society at large would support remedial action to eliminate or prevent discrimination against others.

Given that the resolution of the Committee on Civil Rights is predicated on a report issued by committees of the American Bar Association (ABA), it is worth noting that the members of the Committee on Women in the Law found the ABA report to be incomplete. In certain sections of the ABA report, the authors are very clear to footnote their conclusions and assertions with relevant statistical data and legal precedent. However, in other areas the report makes assertions without adequate information to substantiate its claims.

The ABA report cites United States Supreme Court cases that are seemingly pro-plaintiff but it fails to mention that, as described in the attached article prepared by Elaine H. Witty and Bracha Teglas-Kaplan, in recent years it has become more difficult for an individual suing under Title VII to successfully litigate a discrimination lawsuit because of the shifting burdens of proof which are present. Initially, the member of the protected class when suing may cite discrimination as the cause for not being hired or promoted but the employer may respond to such allegations by showing a "legitimate business necessity." Once the business necessity defense is raised, the burden of proof shifts back from the defendant-employer to the plaintiff-employee.

Lawful Employment Discrimination
by Elaine H. Witty, Esq.* and Bracha Teglas-Kaplan, J.D.**

Title VII of the Civil Rights Act of 1964 was enacted in the shadow of a presidential assassination and domestic unrest. It was designed to achieve the elimination of discriminatory practices with minimal interference in management's realm. Its stated purpose was "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."¹ The Act in its present form includes amendments that prohibit discrimination against individuals based on sex, age, and disability.² The Act lists "protected classes" who are the beneficiaries of the legislation and for whom the remedies are to be applied. In 1991, the Congress amended the Civil Rights Act to legislatively reverse the Supreme Court in decisions that were deemed an affront to the original intent and purpose of the Act.³

It is outside the scope of this article to address all the issues attending the area of civil rights. Rather, it is the authors' intention to challenge the members of our profession both personally and professionally, to consider the limitations of the law in its present form and the impact of the law on each of us as members of society.

Employment practices covered [by Title VII] include advertising, recruitment or training, hiring or selection processes, classification, assignment or transfer, compensation including salary and fringe benefits, working environment, promotion or demotion, retaliation, harassment, discipline including discharge and any other aspect of employment constituting a term or condition of employment.⁴

The operative section of the law for protection against employment discrimination is 42 U.S.C. Sec. 2000(e) - 2(a)(1) and 2000e-2 (a)(2) of the Civil Rights Act of 1964, as amended:

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

The types of discrimination identified include: disparate impact and disparate treatment. Disparate impact is where a non-discriminatory employment practice acts to the detriment of a group who are protected by the statute and there is no business necessity for the practice in question. Disparate treatment is where the employee or applicant is similarly qualified to another employee or applicant but is denied employment because the employer considered the race, color, religion, national origin, sex, age, or disability of the employee or applicant as a basis for decision-making. The courts have adopted a mixed-motive analysis when considering an employment discrimination case. The key concept in mixed-motive analysis is the nexus between the person who acts in a discriminatory manner, his statements, and the final employment decision concerning the plaintiff.

significantly reduced the justification required for an employment practice shown to be a disparate impact. Writing for the Seventh Circuit in *Allen v. Seidman*, Judge Posner observed that *Wards Cove* permitted the use of any practice that excludes women or minorities so long as it is not unreasonable, and added that: *Wards Cove*...dilutes the 'necessity' in the 'business necessity' defense...[T]he 'business necessity' defense [is] now a misnomer, since the 'defense does not require a showing of necessity and is no longer an affirmative defense.¹⁰

Therefore, in the 1991 amendment to the Civil Rights Act, the Congress restored the law to its prior state under *Griggs*, in which the burden of proof in a disparate impact case is on the employer to justify its employment actions by a showing of "business necessity." Notwithstanding, the law as set forth under *Griggs* and its progeny (prior to *Wards Cove*), has its drawbacks. A mere showing of "business necessity" is a low standard for the employer to meet when sued under disparate impact, which requires a showing that an employment practice is disproportionately affecting a protected class. As a result, the employer will more often than not prevail when sued, and the "discrimination" will lawfully continue.

Disparate Treatment

The Supreme Court in *McDonnell Douglas Corporation v. Green*,¹¹, developed a prima facie case concept for maintaining an action on the basis of disparate treatment. In that case, Percy Green, an African-American, was employed by McDonnell Douglas Corp. as a mechanic and laboratory technician from 1956-1964. He was laid off during a period of corporate retrenchment.

Green, who was known as a civil rights activist protested his lay-off, charging that it was racially motivated. He organized and participated in a "stall-in" where the roads leading into McDonnell Douglas were blocked by stalled cars. In addition, there were allegations that he had knowledge of a "lock-in" wherein McDonnell Douglas employees were prevented from leaving the building.

Three weeks after the lock-in, McDonnell Douglas publicly advertised for mechanics. Green applied for the position to be re-hired and was denied employment. The decision not to rehire Green was predicated on his activism. Thereafter, Green filed suit against the company claiming racial discrimination under Title VII.

"Recognizing that direct proof of discriminatory intent, such as state-of-mind evidence, is often unavailable, the Court in *McDonnell Douglas Corp. v. Green* held that a plaintiff could raise an inference of such intent by establishing a prima facie case of discrimination."¹²

The requirements for a prima facie case of disparate treatment are:

1. The complainant belongs to a racial minority or protected class under Title VII;
2. The complainant applied for and was qualified for a job for which the employer was seeking applicants;
3. That, despite complainant's qualifications, he was rejected, and
4. After said rejection, the position remained open and the employer continued to seek applicants of complainant's qualifications.¹³

In the case at bar, the plaintiff's prima facie case was that 1) he was a member of a protected class-- he was an African-American; 2) he applied for and was qualified for a

In February 1973, the United States Department of Labor decided to terminate PSC because it was operating inefficiently. Officials at TDCA assisted by Burdine persuaded the Department of Labor not to terminate the program and agreed to correct its operating procedures. In keeping with this agreement, TDCA fired Burdine and two others and retaining a male employee. TDCA then hired a male from another division of the Agency as Project Director.

Burdine was rehired by TDCA and assigned to another division of the agency. In this new position, Burdine would achieve the same salary as a Project Director.

As of February 1973, no action had been taken by TDCA with respect to Burdine's application for Project director nor had she withdrawn her application for that position. Burdine filed suit against TDCA under Title VII alleging that the failure to promote and the subsequent decision to terminate had been predicated on gender discrimination.

In the case at bar, the plaintiff's prima facie case was that 1) she was a member of a protected class— women; 2) she applied for and was qualified for a position for which the employer was seeking applicants; 3) she was denied such position; and 4) the employer continued seeking applicants of plaintiff's qualifications. Thus, she met the burden of proof for a prima facie case of discrimination.

Applying the standards enunciated in *McDonnell Douglas*, the Court ruled that the reorganization dictated by the Department of Labor constituted a legitimate business decision thereby proving TDCA had not discriminated against Burdine. The Court found that there was no need to entertain any comparative data about the relative merit of the man hired as Project Director, since that would be a burden of persuasion on the part of the defendant. As stated previously, the defendant has the burden of production of articulating a legitimate business reason.

A close reading of the above-mentioned facts begs inquiry. It is curious that Burdine, who obviously had the Project Director's qualifications and was able to do the Project Director's work when that person resigned, should not only be passed over for the that position, but be terminated as well. Yet, once again there is no direct evidence of discrimination. In the case of no direct evidence, the controlling law is the *McDonnell Douglas* analysis, and the plaintiff must bear the heavy burden of persuasion.

We know nothing about the qualifications of the man chosen to be the Project Director, because the court never looks into this. It is sufficient for the Court that Burdine's termination was part of a mandated, organizational shake-up. The Court does not require that the employer choose the best candidate, "the employer has the discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria."²¹

In keeping with the analysis requirements set forth in *McDonnell Douglas*, Burdine is denied an individual remedy for her grievance against TDCA because the employer was able to prove that its actions were legitimate.

Mixed-Motive Analysis

The doctrine of mixed-motive analysis is applied in situations in which there is some "direct evidence" of animus. This may take the form of abusive statements directed toward the employee or applicant and causally indicate the reason for the failure to hire or promote an employee or applicant. The key concept in mixed-motive analysis is how close is the nexus between the employer, his statements, and the employment decision

discrimination he would not have hired or promoted the applicant or employee, the plaintiff does not get individual relief.

In such instances, the employer is enjoined from further discrimination, and a declaratory statement is issued declaring him a Title VII discriminator. But this is a mere slap on the wrist when no job has to be offered, no re-instatement granted, and no back pay reimbursed.

Another example of a mixed-motive case is *Bibbs v. Block*.²⁷ In this case, Bibbs, an African-American male, was employed by Agricultural Stabilization and Conservation Service (ASCS), a division of the United States Department of Agriculture. In September 1976, Bibbs applied for and was denied a promotion to a supervisory position in the ASCS print shop.

Bibbs was one of seven who applied for the position. He was the only African-American applicant. All seven applications were forwarded to a selection committee composed of three Caucasians.

The District Court found that a Joseph Tresnak was the "key figure" in making the selection for promotion. Tresnak's key role is important since he was a known racist.²⁸ A witness testified that Tresnak had called Bibbs "a black militant,"²⁹ and another witness testified that Tresnak referred to another African-American employee as "boy" and "nigger".³⁰ A Caucasian was ultimately selected for the supervisory print shop position.

Although Bibbs succeeded in making a prima facie case of racial discrimination under *McDonnell Douglas*, the United States Department of Agriculture rebutted that by stating that Bibbs was "difficult to work with" and "had a history of disciplinary and interpersonal problems."³¹

The District Court made two factual findings. First, the court determined that race was a factor in the 'selection process'....later, it stated race was a 'discernible factor'...Second, the court found that Bibbs 'would not have been selected for the position even if his race had been disregarded.' [citations omitted] Thus, the court concluded race was not a 'determining' factor or a 'but for' factor, meaning a factor that ultimately made a difference in the decision and, that liability was therefore not established.³²

The Circuit Court of Appeals for the Eighth Circuit disagreed. After reviewing the evidentiary standard in *McDonnell Douglas*, it stated that, "the very showing that the defendant's asserted reason was pretext for race is also a demonstration that but for his race plaintiff would have gotten the job. That is what pretext means: a reason *for the employment decision* that is not the true reason."³³ The Court went on to say that in fact the District Court had found mixed-motives for the decision and therefore the burden is on the defendant to prove that Bibbs' race was not the motivating factor for its failure to promote him.

Despite the showing of discrimination, once again for liability purposes, there was no award to Bibbs of the individual relief of promotion.

The leading doctrinal case on mixed-motive is *Price Waterhouse v. Hopkins*.³⁴ Ann Hopkins, a high-level account executive and rainmaker, was informed by a partner directly involved in the decision-making process that she would have acceded to partnership had she "walked more femininely, talked more femininely, wore make-up, and jewelry."³⁵ Several other partners who determined which employee would accede to

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- 1 H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963), reprinted in [1964] U.S. Code Cong. &
Ad. News, 2391, 2393. The inclusion of sex as a prohibited basis under the Act was included at a later date.
See 110 Cong. Rec. 2577-84 (1964).
- 2 The Act does not address discrimination on the basis of sexual preference.
- 3 *Wards Cove Packing Co., Inc. v. Antonio* 493 U.S. 642 (1989), *Patterson v. McLean Credit*
Union 491 U.S. 164 (1989), and *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989),
- 4 Andrew J. Ruzicho and Louis A. Jacobs, *Employment Practices Manual*, Clark Boardman
Callaghan (1994), §2:02
- 5 401 U.S. 424 (1971)
- 6 *Id.* at 431
- 7 493 U.S. 642
- 8 *Id.* at 659
- 9 *Id.*
- 10 H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. (1991), reprinted in [1991] U.S. Code Cong. &
Ad. News, 549, 565.
- 11 411 U.S. 792 (1973)
- 12 Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social*
Policy Perspective, 82 Colum. L. Rev. 292, 299 (1982)
- 13 411 U.S. 792, 802
- 14 *Id.* at 804
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* at 805
- 18 528 F.2d 1102, 1105-6
- 19 *Id.*
- 20 450 U.S. 248 (1981)
- 21 *Id.* at 259
- 22 738 F.2d 255 (1984)
- 23 *Id.* at 260
- 24 *Id.* at 256
- 25 *Id.*
- 26 *Id.* at 259 (quoting *Ostroff v. Employment Exchange, Inc.* 683 F.2d 302, 304 (9th Cir. 1982), "the
burden is on [the employer] to prove that [appellant] would not have been...hired in the absence of
discrimination.")
- 27 778 F.2d 1318 (8th Cir. 1985)
- 28 *Id.* at 1320
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 *Id.*
- 33 *Id.* at 1321
- 34 490 U.S. 228
- 35 *Id.* at 235
- 36 *Id.* at 251



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June 11, 1996

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Dear President Pfeifer:

We are writing on behalf of the Franklin H. Williams Judicial Commission on Minorities. The Commission has reviewed the report from the Committee on Civil Rights from your association and has unanimously agreed to support the resolution in favor of affirmative action programs in New York State.

The Commission was appointed in 1991 by the Chief Judge of the Court of Appeals. One of the many goals of the Commission has been, and continues to be, to increase workforce diversity in the court system.

Previous reports by the Commission have focused on the serious underrepresentation of minorities on all levels in the courts. This underrepresentation includes appointed and elected judges, supervising judges, supervising personnel and court personnel. This has been particularly true in New York City Courts, where there is a large percentage of minority litigants when compared to the rest of the state.

While the courts have made some efforts to increase minority representation in all areas, much more needs to be done. Affirmative action programs will create a "level playing field" by creating equal opportunities for those individuals who have historically been, and continue to be discriminated against in employment, education, economic and social opportunity for all individuals. The American Bar Association and several state bar associations, as mentioned in the report, have formally endorsed the principles of affirmative action programs.