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Labor Law - Racial Discrimination in Employment - Reconciliation of the Policies of Title VII of the Civil Rights Act of 1964 with the Civil Rights Act of 1866

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LABOR LAW—RACIAL DISCRIMINATION IN EMPLOYMENT—RECONCILIATION OF THE POLICIES OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 WITH THE CIVIL RIGHTS ACT OF 1866—The Court of Appeals for the Third Circuit held that an action seeking relief from racial discrimination by a private employer based on the Civil Rights Act of 1866 is not impliedly barred by Title VII of the Civil Rights Act of 1964.

Young v. International Telephone and Telegraph Company, 438 F.2d 757 (3d Cir. 1971).

Young, a black union member, brought an action seeking damages and injunctive relief in a federal district court for alleged racial discrimination by his employer and union. The complaint asserted subject matter jurisdiction under section 1 of the Civil Rights Act of 1866,[1] now 42 U.S.C. §§ 1981 and 1982.[2] This section gives all persons regardless of race the same right to contract. The complaint did not allege that any action was initiated pursuant to Title VII of the Civil Rights Act of 1964[3] which proscribes discriminatory practices by employers and unions on the basis of race, color, sex, religion, or national origin. The district court dismissed the complaint, holding that 42 U.S.C. § 1981 does not apply to private acts of discrimination, and that the plaintiff's failure to have invoked the administrative processes outlined in Title VII before seeking judicial relief was fatal to his action.[4] The court of appeals reversed the district court's decision.

In *Jones v. Alfred H. Mayer Company*,[5] the Supreme Court held that 42 U.S.C. § 1982 was intended to bar all discrimination, public or private, in the sale or rental of property. The court of appeals in *Young* first traced the origin of 42 U.S.C. § 1981 to section 1 of the 1866 statute, and in view of *Jones* held that 442 U.S.C. § 1981 is applicable to private acts of discrimination in the making and enforcing of employment contracts.[6] Two other circuits had previously arrived at a

1. Act of 9 April, 1866, Ch. 31, 14 Stat. 27 (1866).
2. 42 U.S.C. §§ 1981, 1982 (1970). Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."
3. §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970) [hereinafter cited as Title VII].
4. 63 CCH Lab. Cas. ¶ 9536 (E.D. Pa. 1970).
5. 392 U.S. 409 (1968).
6. Young v. Int'l Tel. and Tel. Co., 438 F.2d 757, 760 (3d Cir. 1971). A further development in the area of applying post Civil War legislation to current problems occurred in *Griffin v. Breckinridge*, 403 U.S. 88 (1971). In that case, the Ku Klux Klan Act, 42 U.S.C. § 1985(3) (1970), which is based on section 2 of the Civil Rights Act of 1871 and affords a civil remedy for a conspiracy to deprive an individual of the equal protection of the laws, was held applicable to conspiracies among private individuals.

similar conclusion.[7] The court then investigated the possibility of Title VII impliedly repealing 42 U.S.C. § 1981.[8] Since Congress had no knowledge at the time of Title VII's enactment that private discrimination was prohibited under 42 U.S.C. § 1981, there could have been no intentional or express repealer. The court looked to the two categories of repeals by implication as set down in *Posadas v. National City Bank*[9] which are—(1) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute; and (2) where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one.[10]

The first category of repeals by implication was readily held inapplicable because with respect to employers and other contract rights, Title VII coverage was more limited than 42 U.S.C. § 1981.[11] The court then discussed possible conflicting provisions between the two statutes raised by the defendants which include the duty of the Equal Employment Opportunity Commission (EEOC) to temporarily defer to state agencies,[12] the thirty day statute of limitations contained in Title VII,[13] and the duty of the EEOC to attempt conciliation.[14]

The duty of the EEOC to temporarily defer to state and local agencies was found to be indicative of an intention by Congress to take advantage of existing state agencies having experience and expertise, thus shielding the EEOC from an overburdening case load, and not indicative of an intention to deprive any appropriate forums of their jurisdiction.[15] The difference in statutes of limitation was attributed to the different govern-

7. Sanders v. Dobbs Houses Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

8. The Court in *Jones* faced an analogous issue with respect to 42 U.S.C. § 1982, and Title VIII of the Civil Rights Act of 1968, §§ 801-831, 42 U.S.C. §§ 3601-3631 (1970), and held that the latter act does not pre-empt any remedy under the former act. In *Sanders* and *Waters*, the courts relied on the analogy and concluded that the same result should be reached in the Title VII context. The decision in *Jones*, however, was only dictum because the petitioners there could not have brought an action under Title VIII since their claims accrued prior to the effective date of Title VIII. 392 U.S. at 417, n.21. Furthermore, Title VIII was passed with a savings clause indicating it was not intended to affect any other state or federal remedy.

9. 296 U.S. 497 (1936).

10. *Id.* at 503.

11. Title VII § 706(b), 42 U.S.C. § 2000e(b) (1970) limits Title VII's application to employers in interstate commerce having over twenty-five employees. Also, 42 U.S.C. § 1981 is applicable to contracts other than employment contracts.

12. Title VII § 706(b), (c), 42 U.S.C. § 2000e-5(b), (c) (1970).

13. Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (1970). The complainant has thirty days after being notified of the EEOC's inability to conciliate his claim to file suit in a federal district court.

14. Title VII § 706(a), 42 U.S.C. § 2000e-5(a) (1970).

15. 438 F.2d at 762.

mental and judicial interests involved in a suit under Title VII, and was held not to be evidence of irreconcilable conflict.[16]

The statutory duty of the EEOC to attempt conciliation presented a more complex issue, and was the strongest argument facing the court in favor of implied repeal. Upon reviewing the available legislative history, the court found no reference to any limitation on the jurisdiction of other agencies due to the enactment of Title VII.[17] The court further stated that case law exists which recognizes a concurrent jurisdiction between the EEOC and the National Labor Relations Board,[18] and concluded that nothing in the language of Title VII casts doubt on the validity of these holdings or indicates an intention to deprive a district court of any pre-existing jurisdiction, known or unknown.[19]

The legislative history of Title VII reveals that the procedural mechanisms initially advanced for attacking discrimination in employment were modified to a great extent as the bill proceeded through Congress.[20] The statute emerged with the primary responsibility of initiating and prosecuting a claim upon the aggrieved individual since the EEOC lacked investigative or enforcement powers. Conciliation by the EEOC was the statutory method enacted to resolve disputes, with the employee retaining the right to sue in a federal court if the EEOC efforts were unsuccessful.[21] Ideally, conciliation in the field of labor-management relations has many advantages which include: settling disputes while minimizing friction between the employer and employee, giving the employer a chance to explain his conduct before widespread public attention, and allowing broad relief to the employee without the expenses of litigation.[22] The conciliation efforts by the EEOC, however, have been unsuccessful in approximately half the cases during the last

16. *Id.* at 763. Different governmental interests include the broader coverage of Title VII with respect to employers, and the possibility of participation in the lawsuit by the United States Attorney General. Different judicial interests include the possibility of waiver of fees and costs, the imposition of counsel fees, and the appointment of counsel for the complainant. *Id.*

17. *Id.* at 762. It was pointed out that Senator Tower introduced an amendment which would have excluded any federal agency but the EEOC from dealing with practices covered by Title VII. That amendment was defeated by more than a 2-1 margin. *See* 110 CONG. REC. 13650-52 (1964).

18. United Packinghouse Food and Allied Workers Int'l Union v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969); Local Union No. 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

19. 438 F.2d at 762.

20. *See* Vass, *Legislative History of Title VII*, 7 B.C. IND. AND COM. L. REV. 431 (1966).

21. Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (1970).

22. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1200 (1971).

four years.[23] The Commission's lack of enforcement power eases the pressure to conciliate on the employer.[24] Recent case law has recognized this weakness and has favored judicial redressing of employee grievances over strict adherence to a statutory policy of conciliation. For example, the federal courts have allowed actions to proceed under Title VII in which the EEOC had not attempted conciliation,[25] had found that no "reasonable cause" for complaint existed,[26] and had proposed reasonable conciliatory solutions which the charging party refused to accept.[27] From these cases, it is apparent that a complainant proceeding under Title VII will not be barred from the federal courts regardless of the outcome of the EEOC's conciliatory efforts. The courts, however, have been unwilling to allow suit directly in a federal court under Title VII without affording the EEOC at least the opportunity to conciliate. It has been held repeatedly that completely bypassing the EEOC would fly in the face of clear congressional intent and nullify the statute's conciliation policy.[28]

Prior to *Young*, two actions seeking relief from racial discrimination based solely on 42 U.S.C. § 1981 had reached federal appellate courts. In *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*,[29] the Court of Appeals for the Seventh Circuit held that exhaustion of Title VII procedures prior to the initiation of a suit under 42 U.S.C. § 1981 was not required if the plaintiff pleads a reasonable excuse for bypassing these procedures. In *Sanders v. Dobbs*,[30] the plaintiff had failed to commence a suit within Title VII's statutory time limit of thirty days after notification that the EEOC could not conciliate her claims,[31]

23. *Id.*

24. *See* Comment, *Enforcement of Equal Employment Opportunity Under the Civil Rights Act: How About Cease and Desist Powers?* 9 DUQ. L. REV. 75 (1970).

25. Dent v. St. Louis—S.F. Ry., 406 F.2d 399 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).

26. Flowers v. Laborers Local 6, 431 F.2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970).

27. Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969).

28. Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir. 1967), *cert denied*, 390 U.S. 910 (1968); *See also Developments in the Law, supra* note 22 at 1202, n.46.

29. 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). The defendants in *Young* urged the court to accept *Waters* as holding that either exhaustion of Title VII remedies or some justification for non-exhaustion is a jurisdictional pre-requisite in a racial discrimination suit. This contention was summarily rejected by the court. 438 F.2d at 762.

30. 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). This case overruled *Harrison v. American Can Co.* 61 CCH Lab. Cas. ¶ 9353 (S.D. Ala. 1969) which was relied on by the district court. *Harrison* held that the comprehensive scheme for handling employment discrimination contained in Title VII evidenced a clear intent of Congress that Title VII processes must first be utilized before seeking judicial relief.

31. Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (1970).

and brought an action based on 42 U.S.C. § 1981. The Court of Appeals for the Fifth Circuit sustained the action, rejecting the defendant's contention that Title VII impliedly repealed 42 U.S.C. § 1981.

It is significant, however, that none of the courts in actions based on Title VII or 42 U.S.C. § 1981 have permitted an unexcused bypass of Title VII's elaborate procedural scheme. Even in *Sanders*, the plaintiff had initially proceeded through the EEOC but inadvertently failed to bring suit within the statutory time limit and was forced to base her action on 42 U.S.C. § 1981.[32] In this respect, *Young* differs from the previous line of cases, and raises a question concerning the viability of Title VII's procedural scheme in racial discrimination cases now that a plaintiff has an independent basis of relief.[33]

It is submitted that the *Young* decision is unlikely to have the practical effect of rendering the procedural scheme of Title VII a nullity. Few bona fide cases seeking other than temporary injunctive relief will be initiated in a federal court under 42 U.S.C. § 1981. This is due to various factors including: the relative ease of filing a complaint with the EEOC, the expense associated with initiating a federal law suit, and the likelihood of obtaining at least partial satisfaction of a claim under conciliation initiated by a local agency or the EEOC.[34] This is not to say that the decision will have little beneficial effect. As pointed out by the court, an employer may be more willing to settle with an employee while a preliminary injunction has preserved the status quo.[35] Furthermore, in many situations, such as the discriminatory firing of an employee, temporary relief in the nature of a preliminary injunction is essential for providing a meaningful remedy to the aggrieved employee. A considerable time delay will diminish the value of any award to the employee, and may even discourage his seeking any relief under Title VII. The decision of the court, in this respect, has eliminated a major weakness in the procedural scheme for eliminating racial discrimination in employment promulgated by Title VII.

Notwithstanding this desirable effect, it is submitted that the court's

32. Furthermore, in *Sanders*, the defendant had not pointed out specific conflicting provisions in the two statutes, but had argued generally concerning 42 U.S.C. § 1981's implied repeal. The court, therefore, never decided the specific issue of whether the EEOC's duty to conciliate was in conflict with an independent remedy under 42 U.S.C. § 1981.

33. For discrimination on any basis other than race, Title VII remains the only remedy.

34. Comment, *Racial Discrimination in Employment under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 640 (1968-69).

35. 438 F.2d at 764.

decision that a plaintiff can intentionally bypass the EEOC and proceed under 42 U.S.C. § 1981 was neither intended by Congress in light of the detailed procedural scheme of Title VII, nor warranted by the application of subsequent case law. It is further submitted that an alternative to the holding in *Young*, which retains substantially all of its beneficial effects, is to limit the relief available under 42 U.S.C. § 1981 to a preliminary injunction. The granting of this relief could be withheld until a complaint is filed with the EEOC, and thus a sharp break with previous case law which emphasized the requirement of initially proceeding within the procedural scheme of Title VII would be avoided.

Preliminary injunctive relief should not be precluded by Title VII, since the language of the statute does not explicitly deny the granting of this relief, and the legislative history is silent on the matter.[36] Also, since a preliminary injunction should render the conciliation efforts more successful, this type of relief under 42 U.S.C. § 1981 would not be irreconcilable with the procedural scheme of Title VII, but on the contrary in harmony with the statute's policies. Furthermore, the possibility of harassment of employers by groundless suits would be eliminated. The plaintiff could not gain affirmative relief before filing a charge with the EEOC, but only preserve the status quo of the parties.

Precedent abounds which recognizes the importance of allowing a federal court to assume jurisdiction in a course of action without explicit statutory authority, in order to preserve the status quo pending an administrative determination of the merits of the complaint.[37] Among the more significant cases in this category is *West India Fruit and Steamship Company v. Seatrain Lines*.[38] The second circuit affirmed a district court's decision to grant an injunction restraining certain shipping rate reductions pending a final decision by the United States Maritime Commission. The Commission had exclusive jurisdiction in the controversy, and express statutory authority allowing the court to interfere did not exist. This precedent would especially apply to the present case since the final determination of the rights of the parties lies in the federal courts rather than in the EEOC, and explicit statutory authority for the court's jurisdiction exists.

36. *Developments in the Law, supra* note 22, at 1257.
37. *See* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 677-86 (1965) and cases cited therein.
38. 170 F.2d 775 (2d Cir. 1948), *petition for cert. dismissed on petitioner's motion*, 336 U.S. 908 (1949).

A situation in which relief of this nature is especially valuable would be the discriminatory firing of an employee. The court could bar firing or allow the complainant to receive his salary during the injunctive period.[39] In other situations, such as discriminatory hiring practices in a new construction project, the court may enjoin the start of the project.[40] It is unlikely that a court would properly order the hiring of a new employee not chosen by the employer, however, if the employer is a repeated violator of Title VII, this remedy may be appropriate.[41]

The *Young* case marks the limit to which the federal courts can assure more meaningful remedies for discriminatory employment practices under the present statutory scheme. The remaining obstacles to a more effective anti-discrimination policy including the EEOC's lack of enforcement and investigative powers can only be changed by further legislation. Congress has refused on many occasions to act upon bills incorporating these changes,[42] and the judiciary has assumed the initiative of liberalizing the procedural scheme of Title VII. Now it is time that Congress once more assume the responsibility for further alleviating discriminatory practices in employment by passing legislation correcting the inherent weaknesses of Title VII's procedural scheme.

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CONFLICT OF LAWS—CHOICE OF LAW IN INTERSPOUSAL SUITS—The United States Third Circuit Court of Appeals has held that in an action by a woman against her former husband for injuries arising out of an automobile accident, the law of the state of the accident rather than the law of the state of domicile would be controlling on the issue of interspousal immunity.

Purcell v. Kapelski, 444 F.2d 380 (3d Cir. 1971).

Elizabeth Kapelski, a passenger in a car driven by her husband, sustained injuries in a two-car collision at a New Jersey intersection near the Pennsylvania border. At the time of the accident, they were both Pennsylvania domiciliaries. Subsequently, the couple was divorced and

39. *Developments in the Law, supra* note 22, at 1259.
40. *Id.* at 1259.
41. *Id.*
42. *See* Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 DUQ. L. REV. 1, 30 (1969-70).