

# LEADERSHIP CONFERENCE EDUCATION FUND

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### SUPREME COURT CONTINUES TO RULE IN FAVOR OF AFFIRMATIVE ACTION

In two recent decisions the Supreme Court strengthened its support of affirmative action and again rejected the Department of Justice's central position on affirmative action, namely that affirmative action is permissible only for identifiable victims of discrimination. In the first ruling, the Court, by a 5-4 vote, upheld a one-black-for-one-white promotion plan imposed on a state agency by the federal district court after a finding of persistent discrimination by the State of Alabama in hiring and promoting state highway patrolmen. The Court reasoned that "the remedy imposed here is an effective, temporary and flexible measure. It applies only if qualified blacks are available, only if the Department has an objective need to make promotions, and only if the Department fails to implement a promotion procedure that does not have an adverse impact on blacks," (U.S. v. Paradise, 480 U.S. \_\_\_, 108 S.Ct. \_\_\_, 94 L Ed 203, (1987)).

In the second case, Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. \_\_\_, 108 S.Ct. \_\_\_, 55 LW 4379 (1987) the Court, by a 6-3 vote, rejected a challenge by a white male to a voluntary affirmative action plan implemented by a public agency to address underrepresentation of women and minorities in certain job classifications. The Court held "that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's

workforce. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace." Justice Antonin Scalia's dissenting opinion asserts that "...the plan's purpose was assuredly not to remedy prior sex discrimination by the Agency. It could not have been because there was no prior sex discrimination to remedy" as it was not part of the trial court record. This assertion is made despite the fact that a woman had never held one of the 238 skilled craft positions.

Civil rights activists hailed the decisions as great victories for affirmative action and asserted that most of the questions concerning affirmative action have now been answered by the Court. Supporters and opponents of the Court's decisions expressed the belief that the Johnson case will have broad implications as it addressed a situation that exists in many workplaces, i.e. underrepresentation of women and minorities in many job classifications although evidence of discrimination has not been established. Civil rights lawyers who have fought against the Department of Justice's attack on affirmative action over the past six years expressed the view that the Administration's positions had unwittingly helped firm up the Court's support for affirmative action. Barry Goldstein of the NAACP Legal Defense Fund stated that Assistant Attorney General William B. Reynolds "really helped us develop the law. I don't think it would be as strong today if it were not for the extreme actions taken by the Justice Department" (Wash Post, 3/26/87, A17).

#### Background: Paradise

In 1972 a federal district court found that the Alabama Department of Public Safety had "engaged in a blatant and continuous pattern and practice of discriminating against blacks in hiring." The district court found that "in the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment." The state was ordered to hire one black trooper for each white trooper hired until the force was approximately 25 percent black. The Fifth Circuit Court of Appeals upheld the order.

In 1975 and 1979 additional relief was granted, and the issue of promotions for minority state troopers arose. After the parties were unable to agree on a promotion procedure, the district court on December 15, 1983 ordered that at least 50 percent of all promotions to corporal and to higher ranks be filled by qualified black troopers.

On February 6, 1984 eight black and eight white troopers were promoted to the corporal position. The United States, the Alabama Department of Public Safety, and white state troopers appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit. That court affirmed the district court's one-for-one promotion plan on August 12, 1985. Review was granted by the Supreme Court on July 3, 1986, and oral argument was heard on November 12, 1986 (See CIVIL RIGHTS MONITOR, January 1987).

Background: Johnson

In 1978 the transportation agency voluntarily adopted an affirmative action plan "to attain a work force whose composition in all major job classifications approximated the distribution of women, minorities, and handicapped persons in the County labor market." The plan did not specifically discuss discrimination, but stated "that women had been traditionally underrepresented in the relevant job classifications" and recognized an "extreme difficulty in increasing 'significantly the representation' of women in certain of those technical and skilled-craft jobs."

At that time the agency had 238 skilled craft positions not one of which was held by a woman. In 1979, Paul Johnson and Diane D. Joyce applied for a road dispatcher position. Both applicants were long-time agency employees with relevant experience. Ms. Joyce, the only female applicant, placed fourth on an oral examination with a score of 73. Mr. Johnson tied for second with a score of 75. After a second oral interview, Mr. Johnson was recommended for the job by the examining board. However, the Affirmative Action Coordinator recommended to the agency Director that Ms. Joyce be appointed to the position pursuant to the affirmative action plan. Ms. Joyce was promoted to the position, and Mr. Johnson filed a complaint with the Equal Employment Opportunity Commission and received a right-to-sue letter. Johnson claimed the agency's promotion of Joyce over him violated Title VII's prohibition against sex discrimination. (He did not claim a violation of his right to equal protection of the laws under the Fourteenth Amendment.)

The district court found that Mr. Johnson was the better qualified applicant, and that but for the issue of gender he would have been promoted to the position. The agency was ordered to promote Mr. Johnson, award him back pay, and desist from further discrimination. The judge reasoned that the affirmative action plan did not meet the standards established by the Supreme Court in Weber, 443 U.S. 193 (1979). The Agency appealed and the U.S. Court of Appeals for the Ninth Circuit reversed the trial court's decision. Mr. Johnson appealed, the Supreme Court agreed to review the case on July 2, 1986, and on November 12, 1987 the Court heard oral arguments.

### THE CONTINUING IMPACT OF GROVE CITY

The continuing adverse impact of the Grove City decision on the protection of civil rights was made evident in testimony presented at a March 19, 1987 hearing on the Civil Rights Restoration Act of 1987 before the Senate Committee on Labor and Human Resources. In Grove City College v. Bell, 465 U.S. 555 (1984), the Supreme Court found that Title IX's prohibition against federal funding of sex discrimination extended only to the specific program or activity receiving the funds, and not to the entire recipient institution or entity. Further, since all the civil rights statutes relating to federal funds use the same language to describe coverage, the decision also narrows the scope of civil rights statutes prohibiting discrimination based on race, disability and age.

Introduced in the 98th Congress by then-Representative Paul Simon (D-IL) and

Senator Edward M. Kennedy (D-MA), the bill passed the House by an overwhelming majority, but was filibustered by Senate opponents and put aside in the closing days of the session. The bill was reintroduced in the 99th Congress by Representative Augustus Hawkins (D-CA) and Senator Kennedy but was stalled because of two amendments added by the House Committee on Education and Labor that would have changed substantive law. One amendment would have greatly expanded the number of institutions which could seek exemption for sexually discriminatory practices on grounds that such practices were required by their "religious tenets." A second amendment would have repealed long-standing regulations which require education institutions to include abortion services in their medical coverage for students and employees under certain circumstances and prohibit discrimination against students and employees who have had abortions. The bill has been introduced in the 100th Congress by Senators Kennedy and Lowell Weicker (R-CN) and Representatives Don Edwards (D-CA) and Hamilton Fish (R-NY). Supporters of the bill are pushing for quick passage of a clean bill in the Senate followed by similar action in the House.

At the Senate hearings, Benjamin L. Hooks, Chairperson of the Leadership Conference on Civil Rights, stated the case for undoing the Grove City decision:

The decision has created absurd results in many instances. Complaints are not investigated because the alleged discrimination took place in a building not constructed or renovated by federal loans to the institution. When complaints are investigated, the whole process takes longer because the federal government has to search for federal money connected with a specific program.

Except in cases where school districts receive impact aid, Title VI is being construed as applying only to specific classrooms or programs that receive federal funds. For example, since the Mecklenburg County, Virginia system desegregated, Black students have generally been assigned to the "lowest ability" classes. In the elementary grades, this segregation extends even to music, art and physical education classes. The Department of Education's Office for Civil Rights found the county in violation of Title VI but the case was dismissed by an administrative law judge because the ability grouping does not occur in a program receiving federal funds.

Similar problems have developed with respect to civil rights enforcement in the Department of Health and Human Services and in other federal agencies. Health facilities have raised the Grove City College decision as a defense in dozens of HHS administrative complaints that allege discrimination under Section 504. Similarly, court cases have been adversely affected by the Grove City College decision. In Foss v. City of Chicago, 640 F. Supp. 1088 (N.D. Ill. 1986) the court ruled that a handicapped firefighter could not sue under Section 504 because the alleged discrimination did not occur in the specific program receiving federal funds. A similar decision was rendered in Chaplin v. Consolidated Edison Co., 628 F. Supp 143 (S.D. N.Y. 1986) in which an "otherwise qualified" disabled applicant who was turned down for a job sued under Section 504.

A new report by the National Women's Law Center, released on the day of the

hearing, sets forth other graphic illustrations of the negative impact of the decision on enforcement at federal agencies responsible for enforcing the civil rights laws and on court cases. In one case a black high school student filed a complaint with the Department of Education alleging that her school's chapter of the National Honor Society had failed to induct her because of her race. In spite of being ranked fifth in her class and participating in a wide variety of extracurricular activities, she was not among the sixteen students invited to join the Society. OCR closed the case because it found the alleged discrimination did not occur in a program or activity which was a recipient of federal financial assistance from the Department of Education.

Two other examples from the report follow:

In University of California at Davis case, Medical School, the complainant was a first year medical student who alleged that she had been sexually harassed by a professor who made explicit sexual remarks to her, offered to give her better grades in exchange for sexual favors, and finally threatened to use his alliances with other professors to manipulate her grades. Although the medical school received federal funding through the Department of Education, no money was earmarked for the educational program for first year students or the Department of Surgery in which the professor taught. The Office for Civil Rights, Department of Education closed the case in January 1986 because it decided the Grove City "program or activity" requirement could not be satisfied.

In Lockport High School District, the complainant alleged that she was discriminated against on the basis of age when the district school board refused to let her speak at one of its meetings. Before this case was closed for lack of program-specific federal financial assistance, an internal memo regarding the case noted that no federal dollars went into the construction of the administration building in which the school board met.

Copies of the report, Federal Funding of Discrimination, The Impact of Grove City College v. Bell are available from the National Women's Law Center, Suite 100, 1616 P Street, NW, Washington, DC 20036. The cost for the report is \$2.00 prepaid.

#### **JUDGE FINDS EEOC "AT BEST SLOTHFUL, AT WORST DECEPTIVE" IN DEALING WITH AGE DISCRIMINATION**

On February 26, 1987, U.S. District Judge Harold H. Greene ordered the Equal Employment Opportunity Commission to require employers to make pension contributions for workers who remain in the workforce until age 70. The opinion reads:

Although it is among the Commission's duties under law to eradicate age discrimination in the workplace and to protect older workers against discrimination, that agency has at best been slothful, at worst deceptive to the public, in the discharge of these responsibilities. These Commission derelictions are estimated to affect hundreds of thousands of older

Americans, and to cost these individuals in lost pension benefits as much as \$450 million every year.

Judge Greene ordered EEOC to rescind a 1979 Interpretative Bulletin on benefits for post-normal retirement age workers which "takes the position that employers are free to cut off both their own contributions and the accrual of benefits for employees as of the time these workers reach a plan's "normal" retirement age --even if they continue to work past that age to age 70." Judge Greene also ordered EEOC to publish in the Federal Register a proposed pension rule "which would require pension contributions, credits, and accruals for employees working beyond "normal" retirement age to age 70," and to publish a final rule within eighty days of the Order.

### Background

In 1967, Congress passed the Age Discrimination in Employment Act "to promote employment of older persons based on their ability rather than age." In 1978 the Act was amended to extend coverage to workers between the ages of 65 and 70, and to prohibit "benefit plans from requiring the involuntary retirement of any individual because of his or her age." Pursuant to the amendments, in 1979 the Department of Labor issued an Interpretative Bulletin (the one referenced in the Order) which provides "that employers are free to cut off both their own contributions and the accrual of benefits for employees as of the time these workers reach a plan's "normal" retirement age -- even if they continue to work past that age to age 70."

One month after the DOL issued the bulletin, administration and enforcement of the Act were shifted to the EEOC. As EEOC undertook to review DOL's interpretations, it stated that "pending completion of the review, all Labor Department interpretations would remain in effect, and ...employers would be entitled to rely upon these interpretations as a good-faith defense to charges of age discrimination." Over the next eight years the Interpretative Bulletin remained in place despite the following actions:

In August 1979 the EEOC's General Counsel advised his Commission that the Interpretative Bulletin was "incorrect and that the Commission should therefore undertake a further amendment" to it.

Draft regulations were formally sent to other agencies for comment on April 22, 1980.

Proposed final regulations were submitted to the EEOC Commissioners on September 3, 1980 with a vote on their adoption set for October 22. The proposal was removed from the agenda on October 20.

On September 15, 1983 the Commission once again asked for public comment on proposed regulations. In June 1984 and March 1985, the EEOC voted for the proposed rules and rescission of the bulletin. The proposed rules would have required "post-normal retirement age contributions and credits."

On October 10, 1985, the American Association of Retired Persons filed a petition seeking issuance of the final regulations. EEOC rejected the

petition citing the need to publish the regulations for public comment and to go through the regulatory process.

On November 10, 1986, the Commission voted to terminate the rulemaking and not to rescind the Interpretative Bulletin.

#### The suit

On June 23, 1986 the American Association for Retired Persons filed suit in U.S. District Court charging that the EEOC "had been deliberately neglectful in the discharge of its duties under the Age Discrimination Act by failing for seven years and still refusing to require employers to make pension contributions for the benefit of those of their employees who continue to work after they reach what is called "normal" retirement age, generally age 65." The EEOC filed a motion to dismiss the suit arguing that "whether, and when, it should proceed with rulemaking under the ADEA is a matter committed by law to its discretion, and that because of that fact its decision with respect thereto is not reviewable in Court." EEOC further argued that the Commission had not been guilty of unreasonable delay.

The judge ruled in favor of the plaintiffs stating that EEOC's delay in this matter was indefensible as the issue affected the health and welfare of millions of older workers.

It is difficult to estimate how many American workers, who have contributed to the productivity of this nation past the age of 65, have already been deprived by the EEOC's inaction of the pension monies they earned through their post-age 65 labor. It is equally difficult to quantify how many of these older workers and their families are being or will be deprived of a decent standard of living -- even being pushed below the poverty line -- because the EEOC has seen fit for seven years so to manipulate its procedures as to leave standing an interpretation of the law that will not give them pension credit for post-age 65 work.

A spokesperson for the EEOC, as quoted in the Washington Post, stated that "EEOC ended rulemaking efforts last fall after Congress voted to require pension credits and contributions beginning next Jan. 1 for all workers past age 65." Congress included a section prohibiting discrimination against older workers in the provision of pension benefits as part of the fiscal year 1987 budget reconciliation bill. The provision amended the ADEA, the Employee Retirement Income Security Act, and the Internal Revenue Code on the pension accrual issue. However, the provision is not effective until January 1, 1988. Renee Devine, spokesperson for the EEOC stated that the Commissioners felt EEOC staff time was better spent developing regulations for this new provision rather than drafting regulations pursuant to the 1978 amendments to the ADEA. She speculated that EEOC would have final regulations in place when the law go into effect on January 1, 1988.

On March 13, 1987 EEOC entered a notice of appeal. On March 18, 1987, EEOC rescinded the interpretative bulletin, and on April 2 issued proposed regulations in compliance with the court order. Final regulations will be published by May 18 and comments are requested on when employers should begin

complying with the regulations. EEOC plans to proceed with an appeal of the ruling to challenge the court's intervention in the rulemaking process.

### CIVIL RIGHTS OFFICIAL RESIGNS

Ms. Betty Lou Dotson, Director of the Office for Civil Rights, Department of Health and Human Services, has resigned while the General Accounting Office is investigating her travel expenses and contracting practices. The GAO investigation was requested by Representative Ted Weiss (D-NY) following oversight hearings last summer. A review of OCR documents by subcommittee staff and of testimony provided by Ms. Dotson and her staff raised serious questions about her use of federal monies for travel and outside contracts. During the oversight hearings witnesses also asserted that OCR has been lax in its enforcement of the nation's civil rights laws, and "has failed over the past five years to minimally protect the rights of the populations entrusted to its care." (See the October 1986 CIVIL RIGHTS MONITOR for a discussion of lax enforcement at HHS).

#### The current investigation

At the conclusion of the oversight hearing in August 1986, Representative Weiss stated:

These hearings have convinced me that it is necessary to continue this investigation into the operation of your office, Ms. Dotson. The subcommittee, with the assistance of the General Accounting Office, will continue to review the management and financial operations of the Office for Civil Rights and the individuals who are operating that Office.

On March 12, 1987 the Washington Post reported that the GAO was nearing completion of its investigation and considering referring some allegations to the Justice Department for possible legal action. The hearing transcript, which was recently released, raises serious questions about Ms. Dotson's travel expenses and whether some of the expenses she charged the federal government were legitimate business expenses. Examples of questionable expenses and activities follow:

Between August 1981 and March 1986, Ms. Dotson made 126 trips to cities in the U.S., nine foreign countries, and two locations outside the continental U.S. for a total cost of \$86,868. During this period, 29 trips were made to Chicago where Ms. Dotson's mother resides. On 16 of these trips she rented a car for a total cost of \$1,324. During these same trips she charged the office for taxi fares from the hotel to the regional office. Ms. Dotson's total taxi fare charges for her 127 domestic trips was \$6,840.

Ms. Dotson's travel records indicated that the purpose of 63 regional office visits was "regional administration." However, when subcommittee staff inquired of all 10 regional managers as to the purposes of the meetings the regional managers had no record or were unable to recollect 45 of the 62 trips.



During the 126 domestic trips, Ms. Dotson was paid per diem for 75 Saturdays, Sundays and holidays, not including Saturdays or Sundays when either Ms. Dotson or a regional manager reported OCR meetings or conference activities. Twenty-one such days were during Ms. Dotson's trips to Chicago.

Ms. Dotson travelled on government expense to the Virgin Islands and to Paris twice, and once each to Nova Scotia, Jamaica, Montreal, Senegal, the Ivory Coast, Liberia, Rome, Italy, Nassau and to the People's Republic of China. Ms. Dotson stated at the hearing that on some of these trips she was representing the Administration and not on official business for the OCR/HHS.

On her trip to China she billed the government for \$666 in taxi fares. On most days she billed for three round trip taxi rides from her hotel to meetings, a morning, afternoon and evening session.

Subcommittee staff estimated that the GAO report would not be completed for another two months. Copies of the Hearing transcript, Oversight of the Office for Civil Rights at the Department of Health and Human Services, are available from the Subcommittee on Intergovernmental Relations and Human Resources, B372 Rayburn Office Building, Washington, DC, 20515. After reviewing the transcript, you should feel free to share your comments with Representative Ted Weiss, Chair of the Subcommittee or Representative Jack Brooks, Chair of the Committee on Government Operations.

#### DEPARTMENT OF EDUCATION SEEKS TO REORGANIZE DESEGREGATION CENTERS

On February 17, 1987 the Department of Education published amendments to regulations promulgated under Title IV of the Civil Rights Act of 1964 which authorizes the award of grants to assist school districts in addressing problems relevant to race, sex and national origin. The proposed regulations would reduce the number of Desegregation Assistance Centers funded under the Act from 40 to 10 and require DACs' applications for grants to address all three areas funded under the program - race, sex, and national origin. Since 1978 DACs have specialized in one area. Additional grants are available for State Education Agencies, and the SEAs could elect to address one area, or any combination of areas.

Some opponents of the proposed changes argue that the Administration is trying to do through the regulations what it could not do through the budget, i.e. destroy the program. Since 1981 the Administration has proposed zero funding for the program. While Congress reduced the budget in 1981, from \$45.7 million to \$37.1, and again in 1982 to \$24 million, the funding level has remained at \$24 million since 1982. The Administration's budget request for FY 1988 once again proposes zero funds for the program. Opponents also fear that the expertise the separate centers have developed over the years in addressing the unique problems of race, national origin, and sex discrimination will be lost through the reorganization. Accordingly, the St. Paul, Minn. School Superintendent in a letter to Secretary of Education William Bennett recommended that three separate DACs should remain in each of the 10 regions to address the equity issues. This arrangement would reduce the number of

centers from 40 to 30, but the reduction would be less severe than that proposed by the Department of Education.

Some supporters of the DACs, however, have expressed the opinion that consolidation makes sense because of the current funding level. They assert that the current funding level severely limits the services the DACs are able to provide, and that dividing the available funds among 10 centers rather than 40 will allow the remaining centers to provide comprehensive assistance.

### Background

Title IV of the Civil Rights Act of 1964, authorized grants "to provide technical assistance, training, and advisory services to school districts in the process of desegregating." Following the Supreme Court's decision in Lau v. Nichols, 414 U.S. 563 (1974) which required school districts to provide services to students with limited English proficiency, DACs were established to assist schools in this area. Similarly, after the adoption of regulations pursuant to Title IX of the Education Amendments of 1972 the race centers began providing assistance in the area of sex equity. Since 1978, however, separate centers have provided assistance on race and sex issues. Sixty percent of DACs are operated by institutions of higher education, and the other 40 percent are operated by other non-profit organizations. In fiscal year 1987, all but 5 states participated in the program along with 40 DACs.

Examples of "current desegregation assistance needs include dealing with in-school segregation due to tracking, the lack of minorities and girls in gifted and talented and other special programs, unequal access by minorities and girls to computers and computer courses, and the low enrollment of minorities and girls in math, science, and technical curricula" (U.S. Department of Education, Descriptive Overview of Title IV Desegregation Assistance Centers, July 1985).

### Department Response

Mr. Curtis Coates, Section Chief, Equity Training and Technical Assistance Section, Department of Education, in a telephone interview told MONITOR staff that the proposed regulations seek to provide more services to the school districts with fewer staff employed in the centers. "The Department of Education is not an employment agency. With consolidation and better management they should be able to provide better services." Asked if any evaluations had indicated the Centers were "overstaffed," he stated there had not been any such evaluations.

He also said that DACs in a region could form a consortium, but he would not say whether they could remain in their present sites or would have to operate under one roof. If Congress does not approve the President's request to eliminate funding for the program and funds it at its current level, \$10 million will be available for DAC awards and \$14 million for SEAs.

Representative Don Edwards (D-CA) in a March 30, 1987 letter to Secretary of Education William Bennett urged his reconsideration of the restructuring of the DACs. Representative Edwards stated that he shared the Secretary's concern

"about the most effective use of limited resources," but believes "the proposed change in the structure will greatly sacrifice the ability of DACs to provide school districts with effective technical assistance."

Staff of the House Education and Labor Committee told MONITOR staff that members of the committee have received numerous letters from school districts around the country opposing the reorganization. The members are considering the possibility of holding a hearing on the issue.

### **SUPREME COURT UPHOLDS PREGNANCY LAWS**

The Supreme Court in a 6-3 decision on January 13, 1987 upheld state laws which mandate unpaid pregnancy leave, finding that such laws do not violate Title VII of the Civil Rights Act of 1964. Title VII, as amended by the Pregnancy Discrimination Act (PDA), provides that sex discrimination includes discrimination on the basis of pregnancy. The opinion of the Court stated that:

Title VII, as amended by the PDA, and California's pregnancy disability leave statute share a common goal. The purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of ... employees over other employees."... "The entire thrust ... behind this legislation [PDA] is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."... By "taking pregnancy into account," California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs.

#### Background

The case, California Savings and Loan Association v. Guerra, U.S. \_\_\_, 107 S.Ct. 683 (1987), was brought by California Savings and Loan after one of its employees filed a complaint with a California state agency alleging that the bank had not allowed her an unpaid pregnancy leave as required by California state law. The bank attempted to avoid complying with the state law by asserting in federal court that the California statute mandating job reinstatement after a four month unpaid pregnancy leave conflicted with the federal Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e (k) (the PDA). The federal law, which was enacted to put an end to rampant job discrimination against pregnant women, provides that women disabled by pregnancy shall be treated the same for employment purposes as all other employees similar in their ability or inability to work.

Employer organizations including the U.S. Chamber of Commerce sided with the bank, arguing that special treatment for pregnant women is not lawful under the federal law requiring equal treatment. Feminist groups were divided on the issue, with some, mostly on the west coast, supporting the California law. These groups argued that, because only women become pregnant, inadequate disability leave disproportionately affects women and is therefore discriminatory. Other groups, including the National Organization for Women,

the Women's Legal Defense Fund, the National Women's Law Center and the American Civil Liberties Union, contended that there is no conflict between the state and federal laws because an employer can comply with both, but, if the Court found a conflict, the proper remedy would be for the Court to extend the statute to cover all temporarily disabled workers. The Justice Department sided with the employer, taking a position contrary to one it espoused in a 1976 case involving state-required benefits for female workers. See Memorandum for United States as Amicus Curiae, Homemakers Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974) cert. denied, 423 U.S. 1063 (1976). The Justice Department's opposition to extension of benefits was expressed in a brief it filed in a Montana case involving a statute similar to the California pregnancy leave statute. See Brief for the United States as Amicus Curiae, Miller-Wohl Co. v. Commissioners of Labor and Industry, 692 P.2d 1243 (Mont. 1984), jurisdictional statement filed, 53 U.S.L.W. 2367 (U.S. Mar. 27, 1985) (No. 84-1545).

The Cal. Fed. case is part of a larger debate over treatment of pregnancy, the needs of new parents, child care and other family needs in the workplace. The federal Pregnancy Discrimination Act overturned an earlier ruling by the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), that pregnancy discrimination is not sex discrimination within the meaning of Title VII. But the Pregnancy Discrimination Act requires only that pregnant workers be treated the same as other employees. In the absence of state laws requiring benefits, employers, like the bank in the Cal. Fed. case, who choose to provide inadequate benefits for all workers, may do so without violating the PDA. A bill currently in Congress, The Family and Medical Leave Act of 1993 (S249/HR925) would remedy this problem by requiring all employers to provide up to twenty-six weeks of unpaid job-guaranteed leave for all employees who are temporarily unable to work due to a serious health condition, and eighteen weeks for employees to attend to a newborn, newly adopted or seriously-ill child or dependent parent.

#### Supreme Court ruling

The Supreme Court ruling agreed "with the Court of Appeals' conclusion that Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop -- not a ceiling above which they may not rise.'" The Court found that Congressional statements that PDA doesn't require giving pregnant women any benefits not already provided other disabled employees doesn't support the argument that PDA prohibits special treatment because if Congress had meant to bar preference it would have been "the height of understatement to say only that the legislation wouldn't require it." The Court did emphasize the limited nature of the California law as it provides benefits only for the period of actual physical disability, finding it different from the protective legislation of an earlier day which reflected archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. Such a statute would be inconsistent with Title VII's goal of equal employment opportunity.

The Court further said that even if it agreed that PDA bars differential treatment of men and women it would not find the California statute invalid. The California statute does not bar employers from complying with the federal

law as well as its own, and there is no physical impossibility nor an inevitable collision between the two regulatory schemes. Nor does California law require employers to treat pregnant workers better than others disabled; it just establishes benefits "that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees, thereby treating "women affected by pregnancy" no better than "other persons not so affected but similar in their ability or inability to work."

#### **SUPREME COURT REBUKES JUSTICE DEPARTMENT POSITION ON SECTION 504**

On March 3, 1987 the Supreme Court issued a decision in School Board of Nassau County, Florida v. Arline, 480 U.S. \_\_\_, 94 L Ed 2d 307, 108 S. Ct. \_\_\_ (1987), which rejected the Department of Justice's position that employers can discriminate against persons with contagious diseases because of fear alone and even if irrational, of transmission of the disease. The DOJ had argued that discrimination on the basis of fear of contagion is not discrimination on the basis of a handicap and therefore is not covered by Section 504 of the Rehabilitation Act of 1973 which prohibits recipients of federal funds from discriminating against "otherwise qualified" disabled persons.

The Court reasoned that:

Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

#### Background

Gene Arline was hospitalized for tuberculosis in 1957. For the next 20 years, the disease was in remission. She taught school in Nassau County from 1966 to 1979. In the Spring and Fall of 1978, she suffered recurrences of the disease and was placed on leave with pay. At the end of the 1978-79 school year, the School Board voted to terminate her contract with the school system "not because she had done anything wrong," but because of the "continued recurrence of tuberculosis." Ms. Arline filed suit in U.S. District Court. The District Court held that she was not "a handicapped person under the terms of the statute." The Court of Appeals reversed and the School Board appealed to the Supreme Court.

The questions before the Court were "whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of 504 of the Act, and, if so, whether such an individual is "otherwise qualified" to teach elementary school. On the first

question the Court found "that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of 504... and that respondent Arline is such a person." On the second question the Court remanded the case to the District Court "to determine whether Arline is otherwise qualified for her position.

#### The implications for AIDS Sufferers

Although the plaintiff in this case suffered from tuberculosis, lawyers on both sides have stated that the case will have a greater impact on persons with AIDS. The DOJ's position in this case was initially crafted around the issue of discrimination against persons with AIDS. In a memorandum prepared in response to a request from the Department of Health and Human Services which has received complaints from health workers alleging discrimination because they have AIDS or AIDS related complex or they test positive for AIDS antibodies, the DOJ stated:

[W]e have concluded that Section 504 prohibits discrimination based on the disabling effects that AIDS and related conditions may have on their victims. By contrast, we have concluded that an individual's (real or perceived) ability to transmit the disease to others is not a handicap within the meaning of the statute and, therefore, that discrimination on this basis does not fall within Section 504...

Assistant Attorney General Charles J. Cooper, head of the office of Legal Counsel which developed the Department's position in the area, expressed the opinion that the high court improperly stretched the 1973 law banning discrimination against the handicapped. "They begged the real question. What they have done is declare contagiousness a handicap. It wasn't reasoning; it was raw judicial force" (Wash Post, 3/21/87).

Legislation has been introduced by Senator William Armstrong (R-CO) and Representative William Dannemeyer (R-CA) to amend Section 504 of the Rehabilitation Act of 1973 to exclude individuals with contagious diseases from the definition of handicapped individuals (S673/H1396).

#### **HOUSE SUBCOMMITTEE TURNS DOWN PRESIDENT'S REQUEST FOR ADDITIONAL FUNDS FOR THE U.S. COMMISSION ON CIVIL RIGHTS**

On March 12, 1987 the House Appropriations Subcommittee on Commerce, Justice, State, The Judiciary and Related Agencies turned down the President's request for a supplemental appropriation of \$350,000 for this year and the rescission of restrictions placed on the expenditure of funds by the Congress last year. Chair Clarence M. Pendleton, Jr. in testimony before the Subcommittee on March 3, 1987 expressed support for the President's proposal. Further, the Chair stated that "If Congress cannot support the Administration's request for a Commission with adequate funding and independence, it should shut down the agency."

Commissioner Mary Frances Berry in testimony before the Subcommittee recommended that the supplemental not be approved, that the Commission's

budget be frozen at its current level, and that the restrictions be maintained. She further objected to the manner in which the Commission developed the budget request for presentation to the Subcommittee.

I am here to ask you to reject the budget request you have received for the U.S. Commission on Civil Rights. Continued problems in the management of the Commission exist, despite the action the Congress took last year in reducing the Commission's budget and instituting restrictions and earmarks. In short, the Chairman of the Commission and the Acting Staff Director continue to play fast and loose with the procedures and processes governing the Commission's functions... The best example of the disdain for procedure that has inhibited our efforts to perform our functions is the budget request now before you, concocted by Chairman Pendleton and the White House without Commission knowledge, discussion, or approval in advance. I know it is difficult to remember that we should be a Commission independent of the Reagan Administration, but having the White House submit a budget for us is ridiculous.

#### Background

Before adjournment, the 99th Congress worked out a compromise on FY 1987 funding for the U. S. Civil Rights Commission which substantially reduced the Commission's budget and restricted use of the monies.

The Senate had reduced the Commission's appropriation by 50 percent --from \$11.8 to \$6 million -- and placed restrictions on the expenditure of the monies, while the House eliminated future funding for the Commission, with \$11.8 million provided to close down the agency by the end of 1986.

The bipartisan conference compromise provided \$7.5 million for FY 1987, with \$2 million to be used for the Regional Offices, and \$700,000 for the Office of Federal Civil Rights Evaluation. The Staff Director had planned to close the Regional Offices, and to merge the Evaluation Office with the Office of General Counsel. Senator Warren B. Rudman (R-NH) and Representative Neal Smith (D-IA) in a letter to the Commission Chair reiterated the intent of the Conference Committee concerning the Commission's appropriations.

The conference agreement... earmarks \$2,000,000 for regional offices to be operated by the Office of Regional Programs and \$700,000 for Federal civil rights monitoring to be performed by the Office of Federal Civil Rights Evaluation. In earmarking funding for civil rights monitoring activities, the conferees intend that the Office of Federal Civil Rights Evaluation increase its monitoring of Federal civil rights enforcement activities.

Additional restrictions provided that the agency may not spend more than \$20,000 on consultants, \$40,000 on mission-related contracts, or \$185,000 on temporary or special needs employees. Additionally, the agency may not employ more than 4 Schedule C employees (political appointees), and Special Assistants to the Commissioners are limited to 150 billable days at a GS 11 level. Similarly, the Chair may not bill the agency for more than 125 days, and the other Commissioners are limited to 75 days.

The Congressional action responded to a General Accounting Office audit that found serious mismanagement at the agency and detailed abuses in personnel practices, travel payments, and financial records. Specifically, GAO found that the Commission had hired consultants and temporary and political employees in place of career staff, and that while Commissioners are appointed as part time employees of the Federal Government, Chairman Clarence Pendleton and his assistant had billed the government at an almost full-time rate.

#### The hearing

Despite the restrictions and the instructions from the Appropriation Subcommittee Chairs, the Commission proceeded with its reorganization and closed seven of the ten regional offices as well as the administrative Office of Regional Programs. The Office of Federal Civil Rights Evaluation was merged with the Office of the General Counsel. Rep. Bob Carr indicated at the hearing that he saw these actions as in conflict with the intent of Congress. Rep. Carr also questioned the Commission's accounting practice of attributing severance pay for former employees to the appropriation for monitoring of civil rights evaluation, as these funds were intended for monitoring and not for severance pay. The Commission's budget officer stated that the earmarks could not be met without including the severance pay. She in effect was saying that because the Commission's monitoring efforts are so minimal, the agency would not expend \$700,000 on this activity in fiscal year 1987. Therefore, the decision was made to include the severance pay of former employees in order to meet the monitoring earmark.

#### **FOR YOUR INFORMATION**

COMMON CAUSE has released a PROFILE OF JUDICIAL APPOINTMENTS IN THE REAGAN ADMINISTRATION. The report shows that "[a]t the district court level the Reagan administration ... appointed 18 women (9% of his district court appointments), 4 blacks (2%), and 11 hispanics (5%)." Of his 59 appointments to federal courts of appeal the Reagan Administration has appointed four women (7%), one black (2%), and one hispanic (2%). For additional information and a copy of the profile, contact Virginia Sassaman at Common Cause, 2030 M Street, NW, Washington, DC 20036

The NOW LEGAL DEFENSE AND EDUCATION FUND and Dr. Renee Cherow O'Leary have released a STATE-BY-STATE GUIDE TO WOMEN'S LEGAL RIGHTS. The book covers such issues as Parental and Medical Leave, Pregnancy Discrimination, Grandparent's Rights, Divorce Mediation, Sex Harrassment, Retirement Equity, Relationship Contracts, Unisex Insurance Rates and dozens more. Roxanne Conlin, president of NOW LDEF said "We're launching a major effort for women in the United States to understand their legal rights and join in the debate over the whole question of women and the law." Copies of the STATE-BY-STATE GUIDE are available in bookstores or by sending \$12.95 plus \$2.00 postage and handling to the NOW LDEF, 99 Hudson Street, New York, NY 10013.

The CHILDREN'S DEFENSE FUND has published a report, THE HEALTH OF AMERICA'S



CHILDREN: THE MATERNAL AND CHILD HEALTH DATA BOOK which reports that the United States' progress in reducing overall infant mortality slowed for the fourth consecutive year. The country's ranking among 20 industrialized nations continued its 35-year decline from sixth to a tie for last place. The book describes the current status of maternal and infant health; analyzes national, state, and large-city infant mortality rates; compares U.S. infant mortality rates over time to those of 19 other industrialized nations; and assesses American women's access to prenatal care, patterns of childbearing among teenagers and unmarried women, and the nation's and the states' rates of progress in achieving the Surgeon General's 1990 objectives on five key maternal and infant health indicators. The book is available for \$9.95 from the Children's Defense Fund, 122 C Street, NW, Washington, DC 20001.

APRIL 1987

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LC EDUCATION FUND, INC.  
2027 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 667-6243

Ralph G. Neas, Executive Director  
Karen McGill Arrington, Deputy Director

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