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INSIDE

CIVIL RIGHTS LEGISLATION

An array of civil rights legislation is pending in Congress including the Americans with Disabilities Act and Family and Medical Leave Act1

A major priority of civil rights groups is passage of the Civil Rights Act of 1990, bipartisan legislation to address Supreme Court decisions on equal employment opportunity law. The legislation was introduced on February 74

PATTERSON DECISION

Almost 100 cases have been dismissed because of the Supreme Court's Patterson decision, in some instances leaving acts of discrimination unremedied6

SUPREME COURT CASES ADDRESS IMPORTANT QUESTIONS OF THE AUTHORITY OF LOWER COURTS

The Supreme Court will decide whether federal courts may set aside state laws that prohibit a school district from increasing its property tax to cover the costs of remedying past racial discrimination. In a second case the Court ruled that a district court judge went too far in imposing sanctions against council members who refused to implement a housing desegregation order.....9

SUPREME COURT ISSUES DECISION IN TENURE CASE

The Court ruled that universities accused of discrimination in tenure decisions must make available to the EEOC the relevant personnel files13

STATUS OF CIVIL RIGHTS LEGISLATION BEFORE CONGRESS

As reported in the February 1989 CIVIL RIGHTS MONITOR, bills dealing with an array of civil rights and human needs were introduced in the 101st Congress. While none of the major bills was enacted during the first session, several bills are proceeding through the legislative process and are expected to be enacted during the second session that began in January 1990. During 1989 the Congress did increase the minimum wage for the first time in almost a decade, and reauthorize the U.S. Commission on Civil Rights for 22 months. Brief summaries of these congressional actions follow.

Americans with Disabilities Act

After months of negotiations, the Senate on September 7 passed a bipartisan compromise by a 76-8 vote (S.

933). The House Education and Labor Committee on November 14 reported out a bill by a 35-0 vote (H.R. 2273). The House Committees on the Judiciary, Energy and Commerce, and Public Works and Transportation are expected to mark up the bill soon, with full House consideration expected in the Spring

The ADA legislation has been characterized by its proponents as the most comprehensive civil rights measure since the 1964 Civil Rights Act and will provide to Americans with disabilities protection similar to that provided racial, ethnic and religious minorities through the 1964 Civil Rights Act. The ADA prohibits discrimination against individuals with disabilities in employment, programs or activities of a State or a local government, public accommodations, transportation, and telecommunications. (For further discussion, see the Fall 1989 *CIVIL RIGHTS MONITOR*.)

Family and Medical Leave Act

The House leadership has committed itself to schedule a floor vote on the Family and Medical Leave Act early in the year. During the first session, the House Education and Labor (March 8), Post Office and Civil Service (April 12), and House Administration (April 18) Committees approved the measure (H.R. 770). A similar measure (S. 345) was approved by the Senate Labor and Human Resources Committee on April 19, 1989.

The Family and Medical Leave Act addresses the conflict many workers experience between work and family demands. Both House and Senate bills require employers to allow their employees to take up to ten weeks of unpaid leave over a two year period to care for a newborn child or a seriously ill child or parent. The Senate bill provides for 13 weeks of leave per year for an employee recovering from a serious illness. The House bill provides 15 weeks of such leave.

The Senate bill would apply to companies or worksites with 20 or more employees. The House bill covers companies with 50 or more employees, and after three years companies with 35 or more employees. The Senate bill would provide the same leave for federal workers. The House bill would provide federal workers with 18 weeks of parental leave and 26 weeks of medical leave.

Secretary of Labor Elizabeth H. Dole has said she will recommend that the President veto legislation that mandates such leave. In an April 17, 1989 letter to Senator Orrin Hatch (R-UT), the Secretary wrote that "the administration supports and encourages medical-leave policies designed to meet the specific needs of individual companies and their employees," and believes that "this can be best achieved voluntarily..."

Voter Registration Reform Legislation

During the first session of the 101st Congress, Voter Registration Reform bills were reported out of the House Administration Committee (HR 2190) on September 18, 1989 and the Senate Rules and Administration Committee (S 874) on September 26. The purpose of the bills is to establish uniform nondiscriminatory voter registration standards that will remove barriers that prevent full participation by all eligible citizens in the political process. The bills mandate a mail registration system for voters in federal elections in all States that require voter registration; a "motor-voter" system providing automatic registration for all applicants for driver's licenses except those who decline to register; and an "agency based" registration system requiring other state offices (public assistance, unemployment compensation) to offer assistance to people who wish to register.

On February, 6, 1990 the bill passed the House by a vote of 289 - 132. The House bill includes a provision that requires States either to rely on the post office for changes of address in cleaning voter registration lists or to institute a mandatory list cleaning procedure to verify voter addresses "at least once in each 4 year period." Member organizations in the Leadership Conference on Civil Rights will be working to improve the bill in the Senate to ensure that, among other things, the mandatory list cleaning procedures would not have a discriminatory impact.

Racial Justice Act

On October 17, 1989 the Senate Judiciary Committee by a vote of 7-6 accepted the Racial Justice Act as an amendment to the Federal Death Penalty Act of 1989 (S 32). S 32 was subsequently reported out of Committee without a recommendation by a 7-6 vote.

The Federal Death Penalty Act would reinstate the federal death penalty for numerous federal crimes, and would make additional crimes punishable by death. The latter include murder by a federal prisoner serving a

life sentence, killing in the course of hostage-taking, and murder for hire.

The Racial Justice Act (S 1696, HR 2426) addresses the pattern of racial bias in the application of the death penalty. The bill would prohibit imposition of the death penalty if a criminal defendant could show, by using statistical evidence, racial disparities in the pattern of capital sentences based on the race of the defendant or the race of the victim. If the evidence showed a greater likelihood of death sentences where whites were the victims or disparities for black defendants and white defendants, no death sentence could be imposed on the defendant unless the State presented clear and convincing evidence that the apparent racial disparity is explained by non-racial factors.

Hate Crimes Statistics Act

The House on June 27, 1989 passed the bill by the overwhelming vote of 368-47 (HR 1048). A companion bill (S 419) was passed by the Senate on February 8, 1990 by the vote of 92-4. The bill was supported by the Bush Administration.

The bills establish a system to gather statistics on crimes based on the victim's race, religion, ethnicity or sexual orientation. The collection of statistics would provide a national data base and allow for the monitoring of hate crimes.

Minimum Wage Increase

On November 17, 1989 the President signed into law a minimum wage increase for the first time in almost a decade. The bill (HR 2710) increases the minimum wage from \$3.35 a hour to \$4.25 over a two year period (\$3.80 on April 1, 1990, and \$4.25 on April 1, 1991). The bill allows a subminimum training wage -- 85 percent of the minimum but no less than the current \$3.35 -- for 16 to 19 year old workers during their first three months of employment. The training wage could be paid the same workers for an additional three months by another employer if the employer certifies that the workers are still in training. The bill also includes an exemption from the increase for businesses with gross sales under \$500,000.

The bill passed the House on November 1 by a vote of 382-37, and the Senate on November 8 by a vote of 89-8. Final passage came after months of negotiations following President Bush's June 13 veto of an earlier version. The vetoed bill would have raised the minimum to \$4.55 over three years, and included a 60 day training wage for first jobs. The Administration's initial proposal included an increase to \$4.25 over three years and a six-month training wage for any new hire.

U.S. Commission on Civil Rights Extension

On November 17, 1989 the House by a 389-0 vote accepted a Senate compromise amendment to the U.S. Commission on Civil Rights reauthorization bill which provides a 22 month extension of the Commission to September 30, 1991. The Senate had approved the amendment on November 16 by voice vote.

The Commission's 1983 reauthorization was scheduled to expire on November 30, 1989. On November 15 the House passed a six-month extension, despite White House support of a six-year extension. Civil rights advocates supported the six-month extension. They were reluctant to support a longer extension before knowing who would be nominated to fill four Commission seats that were to become vacant in December. Under the Commission statute the President will fill two of the vacancies and the Senate and House Republican leadership will fill the other two.

The vacancies resulted from the expiration of the terms of Acting Chair Murray Friedman, and Commissioners Francis Guess, Robert Destro, and Sherwin T. S. Chan. The terms of Commissioners Mary Frances Berry, Blandina Cardenas Ramirez, William Allen and Esther Gonzalez-Arroyo Buckley run until December 1992.

At a press conference on February 8, 1990 Senate Minority Leader Robert Dole (R-KS) announced the appointment of Russell G. Redenbaugh of Philadelphia, Pennsylvania to the Commission, the first American with a disability appointed to the Commission. Mr. Redenbaugh, Partner and Director of the an investment banking firm, said that while he was new to the fields of civil and disability rights he had experienced discrimination first hand and that it was "good ethics and good business" to bring all Americans into the mainstream.

On February 9, House Minority Leader Robert H. Michel (R-IL) appointed Carl Anderson, Vice President for Public Policy for the Knights of Columbus. Anderson was legislative assistant to Senator Jessie Helms (R-NC) from 1976-1981. Two appointments by President Bush are imminent.

CIVIL RIGHTS ACT OF 1990 INTRODUCED TO ADDRESS SUPREME COURT DECISIONS ON EQUAL EMPLOYMENT OPPORTUNITY LAW

On February 7, 1990, Senators Edward Kennedy (D-MA) and James Jeffords (R-VT), and Representatives Augustus Hawkins (D-CA) and Hamilton Fish (R-NY) introduced bipartisan legislation to amend the 1866 Civil Rights Act and Title VII of the Civil Rights Act of 1964. The legislation will overturn several Supreme Court decisions on employment discrimination that add up to a major shift from equal employment opportunity law established over the past twenty-five years to protect the rights of minorities and women. There are 34 original Senate cosponsors and 123 original House cosponsors.

The legislation addresses the following Supreme Court decisions:

- *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), which limited the reach of the 1866 Civil Rights law by ruling that the law's guarantee of non-discrimination in the making and enforcement of contracts extends only to the formation of a contract, but not to problems such as racial harassment that may arise later on the job (see article below).
- *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), which revised the standards governing proof of discrimination in Title VII disparate impact cases, standards the Court established eighteen years ago in *Griggs v. Duke Power Co.*
- *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), which held that an employer can defeat liability for a challenged employment decision, in which intentional discrimination was a motivating factor, by showing that it would have made the same decision for nondiscriminatory reasons.
- *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989) which held that any challenge to a facially neutral seniority system must be timely filed soon after the system is first put in place and that persons who wait until they are adversely affected by the system to file a suit may be too late.
- *Martin v. Wilks*, 109 S. Ct. 2180 (1989), which held that court-approved consent decrees are open to challenge by other persons affected by the decree for apparently an indefinite period of time.
- *Independent Federation of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989), which held that successful plaintiffs who sue under Title VII may not be awarded attorneys fees against persons who intervene in the suit unless the intervenors' action was "frivolous, unreasonable, or without foundation."

(For further discussion, see the *CIVIL RIGHTS MONITOR*, Summer/Fall 1989).

Summary of the Legislation

The following borrows heavily from a document prepared by members of a Leadership Conference on Civil Rights steering committee.

1. Restoring sec. 1981 after the Patterson decision

The legislation amends sec. 1981 by reaffirming Congress' intent that this statute cover all aspects of and all benefits, terms and conditions of a contractual relationship. In an employment case, this would make sec. 1981 applicable to racial/ethnic discrimination in hiring, promotions, treatment on the job, demotions, discharges, retaliation and every other aspect of employment. An employer who is prohibited from discriminating against blacks at the time of hiring would also be prohibited from harassing black employees after they start working. By clarifying that all aspects of an employment contract are covered by sec. 1981, this amendment would also eliminate considerable confusion and conflict among the lower courts over the scope of the law since *Patterson*.

2. Preserving the discriminatory impact test revised by the Wards Cove decision (Title VII)

This section would restore the *Griggs* standard in disparate impact employment cases by placing the burden of proof on the employer to demonstrate the business necessity of a practice that has a disparate impact on the basis of race, color, religion, national origin or sex, and by removing the requirement established by *Wards Cove* that a complaining party demonstrate which specific practice or practices within a group of practices, or within an overall employment process, caused a disparate impact.

3. Prohibiting intentional discrimination allowed in the Price Waterhouse Decision (Title VII)

This provision specifies that an employer will be liable under Title VII when the plaintiff demonstrates that race, color, religion, national origin, or sex was a motivating factor for a decision, even though other factors also motivated the decision. A court could still decide not to order the employer to offer the plaintiff the job, promotion or other employment benefit if the employer demonstrates that because of legitimate factors the decision would have been the same. Other appropriate forms of relief, including costs, and attorneys' fees, would be available.

4. Providing a reasonable opportunity to challenge purposeful discrimination after Lorance (Title VII)

This provision deals with the problems created by this ruling by providing that when a collective bargaining agreement includes a seniority system or practice that is adopted with an intention to discriminate, the system or practice may be challenged when it is applied during the life of that collective bargaining agreement.

The time for filing an administrative charge with the Equal Employment Opportunity Commission would also be extended from 180 days to two years.

5. Preventing endless challenges to court-approved remedies permitted by the Wilks ruling (Title VII)

This section corrects the effect of the *Wilks* decision by establishing certain standards for providing interested nonparties with notice and an opportunity to be heard when a litigated or consent decree is proposed in an employment discrimination case, and then generally barring subsequent challenges by nonparties where these standards have been met. The legislation thus provides a means of achieving finality in a case, without requiring the parties and the court to relitigate continually the same challenges in separate actions, while at the same time protecting the due process rights of interested nonparties.

6. Allowing plaintiffs who sue under Title VII to be awarded attorneys fees for defending against intervenors' claims after the Zipes ruling (Title VII)

This provision would allow for a prevailing plaintiff in the original action to recover from the party against whom relief was granted (the original defendant) reasonable attorney's fees incurred in defending such judgment or order from the claims of intervenors.

The legislation also amends sec. 706(k) of the Civil Rights Act of 1964 to provide that the award of attorney's fees includes expert fees and other litigation expenses. This provision addresses the Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.* denying plaintiffs reimbursement for expert witness fees.

7. Granting all victims of discrimination the right to recover damages for intentional employment discrimination

The legislation also addresses an existing anomaly in Title VII, which prohibits gender, national origin and religious discrimination in addition to racial discrimination, but which does not provide a damages remedy similar to that available under sec. 1981 for intentional racial discrimination. Sec. 1981 allows for compensatory and punitive damages while Title VII monetary relief is limited to make-whole relief, i.e., hiring, reinstatement, back pay. As a result, Title VII does not provide many victims of employment discrimination with remedies for their proven injuries and allows many discriminatory employers to avoid any meaningful liability.

For example, victims of sex harassment who often suffer extensive psychological and/or other emotional harm, and those who ultimately quit their jobs or for whom the amount of lost wages is too speculative to support a back pay award.

The bill would amend Title VII to provide compensatory and punitive damages for intentional discrimination, except that punitive damages would not be available in cases against a government agency. Jury trials would be available in any action where damages are sought.

8. Restoring strong civil rights enforcement

The legislation also provides that federal civil rights laws should be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies, and that the granting of remedies in one law should not be construed to limit other remedies provided in other laws.

House and Senate hearings will be held in February and March with floor consideration in the Spring.

NAACP LDF RELEASES REPORT ON THE IMPACT OF THE SUPREME COURT'S JUNE 1989 PATTERSON DECISION

One much discussed issue about the Court's fair employment decisions is whether they are technical in nature or will have an important impact on peoples' lives. A report by the NAACP Legal Defense and Educational Fund provides an assessment of the early impact in the lower federal courts of the Supreme Court's June 15, 1989 decision in *Patterson v. McLean Credit Union*. The report states that "between June 15, 1989 and November 1, 1989, at least 96 section 1981 claims were dismissed because of *Patterson*."

Background

The Supreme Court ruled 5-4 in *Patterson* that an 1866 civil rights law (sec. 1981 of the U.S. Code, Title 42) does not cover racial harassment. In so doing the Court stated that the 1866 law prohibits racial discrimination in the hiring actions of a private employer and may cover some promotion actions, but does not prohibit discriminatory treatment of employees.

"By its plain terms, the relevant provision in sec. 1981 protects two rights: 'the same right...to make ...a contract' and 'the same right...to...enforce contracts.' The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment...[It does not extend to] breach of the terms of the contract or imposition of discriminatory working conditions...The second of these guarantees,...embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract law claims without regard to race...The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal processes his or her established contract rights."

On the question whether a promotion claim is actionable under Sec. 1981 the Court stated: "only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under sec. 1981".

The Report

The findings of the NAACP LDF report include:

- Between June 15, 1989 and November 1, 1989, at least 96 race discrimination claims have been dismissed by federal judges because of *Patterson*. These dismissal orders were entered in a total of 50 different cases.
- The largest group of claims concerns allegations that a plaintiff was fired because of his or her race (31), 22 racial harassment claims have been dismissed, 16 claims alleging that promotions or transfers were denied on account of race, 8 retaliation claims, and six demotion claims.

- Among the section 1981 claims dismissed under *Patterson* have been allegations of "racial" discrimination against Hispanic, native Hawaiian, Chinese, Filipino, Cuban, and Jewish plaintiffs.

The report provides summaries of some of the cases illustrating "the egregious nature of the forms of harassment, and other discrimination, for which section 1981 no longer provides a remedy."

"*Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989), was brought by a 36 year-old black female who had been employed as an industrial nurse at Regal Tube Company for 16 months beginning in 1983. The district court found that during the course of her employment Brooms' supervisor, Charles Gustafson, subjected her to repeated explicit racial and sexual remarks, and in one instance directly propositioned her. On two occasions Gustafson displayed to Brooms illustrations of interracial sexual acts, and told her that she was hired to perform the kind of sexual acts depicted. On the second occasion, after Gustafson threatened to kill her, Brooms fled screaming and suffered a fall down a flight of stairs. She thereafter left Regal Tube and received two months of disability pay for severe depression brought on by the repeated harassment, which left her unable to work on a permanent basis for several years. The litigation was pending in the Seventh Circuit when *Patterson* was decided. The court of appeals summarily dismissed the complaint, reasoning that the alleged harassment was not unlawful under section 1981.

"In *Leong v. Hilton Hotels*, 50 FEP Cas. 738 (D. Hawaii 1989), the district court applied *Patterson* to dismiss the complaint of B. Kishaba, a Hawaiian woman of Asian extraction:.... 'It is undisputed that [Kishaba's supervisor] McDonough made many derogatory and discriminatory remarks about various ethnic groups....McDonough referred to a Japanese person as a 'Jap' and compared local people to 'the spics in New York,' stating that locals are 'not capable of being supervisors' and are 'incompetent'.... Kishaba witnessed racist behavior of a more subtle kind. When a Jewish group attempted to contact the executive office, McDonough told her to have D'Rovencourt take care of it because 'he's our resident.' She asserts that there was no doubt from his manner that he meant 'resident Jew' ... McDonough told her ... 'in a contemptuous way' that 'I have to have the only secretary who does the hula.' Additionally, McDonough frequently used the term 'you people' in such phrases as 'what's the matter with you people' or 'if you people don't shape up, I'll get rid of all of you.' Kishaba states that 'there was no doubt whatever that his references to 'people' were to local Asians and Hawaiians.... McDonough adopted a rude and aggressive behavior with Kishaba, yelling at her frequently and demeaning her in front of other employees.'

"The district court held that *Patterson* required dismissal of Kishaba's claim, reasoning that racial harassment, even racial harassment resulting in constructive discharge, was not illegal under section 1981."

In *Patterson* the Court reasoned that a narrow interpretation of section 1981 was appropriate so as not to "undermine the detailed and well-crafted procedures for conciliation and resolution" of employment discrimination claims available under Title VII of the Civil Rights Act of 1964.

However, the report cites a number of dismissed cases that involve discriminatory practices not covered by Title VII. [Section 1981 covers smaller employees while Title VII exempts employers with fewer than 15 employees, and sec. 1981 reaches nonemployees such as partners in law or accounting firms or persons competing for partnership from outside the firm.]

"In *Gonzalez v. The Home Insurance Co.*, 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989), the complaint alleged that the defendant insurance companies had refused to be represented by the plaintiff insurance agency because the owners of the agency were Hispanic. In *Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co.*, 718 F.Supp. 721 (N.D. Ill. 1989), the plaintiffs claimed that Allstate had cancelled an agreement for insurance repair work to be done at a garage because its owners were black. The plaintiff in *Clark v. State Farm Insurance Co.*, 1989 U.S. Dist. LEXIS 10666 (E.D. Pa. 1989), asserted that State Farm had refused to pay her legitimate insurance claim because she was black....In all of these cases Title VII was plainly inapplicable."

The report also states the *Patterson* decision "leaves in an entirely confused state the application of section 1981 to...[many] discriminatory employment practices." The decision was clear on two issues: the refusal to hire someone for racial reasons violates section 1981, and racial harassment after a person is hired does not violate section 1981. The report concludes that the decision "has spawned a host of novel and unprecedented issues about the meaning of section 1981, issues which in the ordinary course of litigation could easily require a decade or more to resolve, and which will breed conflict and confusion among the lower courts."

"In Colorado, for example, District Judge Arraj concluded in *Padilla v. United Air Lines*, 716 F. Supp. 485 (D. Colo. July 5, 1989), that racially discriminatory dismissals still violate section 1981 because 'termination affects the existence of the contract, not merely the terms of its performance,' and that the plaintiff's sex discriminatory firing claim was therefore good after *Patterson*. Judge Babcock of the same District Court, on the other hand, expressly rejected Judge Arraj's interpretation of section 1981 and *Patterson*, dismissing a sec. 1981 termination case similar to that in *Padilla*. 'I respectfully disagree with my colleague's rationale...[d]iscriminatory discharge occurs after the commencement of the employment relationship and does not affect the employee's right to make or enforce contracts.' *Rivera v. AT&T Information Systems*, 719 F. Supp. 962 (D. Colo. 1989)."

On the basis of conversations with attorneys across the country, the report asserts that "in the wake of *Patterson* private practitioners are substantially and avowedly less willing to handle section 1981 cases, regardless of whether they may be convinced that they could prove that racial discrimination had indeed occurred."

"*Patterson* has had this impact, in part, because it is perceived as reflecting or presaging an unwillingness on the part of the federal courts to award relief in section 1981 cases, if not civil rights cases generally. In most of the possible section 1981 cases considered by private attorneys, the meaning of *Patterson* and section 1981 are far from clear. But that very turmoil is often sufficient, for inexorable economic reasons, to dissuade counsel from handling these cases. Private attorneys who handle many civil rights cases, of course, do not ordinarily get paid unless the claim is successful. Success need not be a certainty, but when the probability of success falls too low, it makes no financial sense for a lawyer to take or pursue the case. *Patterson* has not guaranteed the failure of section 1981 promotion, transfer, discharge, dismissal, retaliation, or salary claims, but the confusion wrought by *Patterson* has created a legal environment in which today, and for the foreseeable future, some meritorious section 1981 cases will not be brought simply because of that turmoil."

Reaction to the Report

In a December 11, 1989 issue of *Legal Times*, Former Reagan Justice Department attorney Bruce Fein, and Former Reagan Assistant Attorney General for Civil Rights William Bradford Reynolds in a review of the report, *Civil-Rights Activists Blowing Smoke*, assert that the *Patterson* decision has simply "preserved the *status quo ante*: maintaining sec. 1981 coverage for racially inspired conduct impeding the making or enforcing of a contract, while leaving to Title VII and various state laws civil rights enforcement in other contexts."

Fein and Reynolds further state:

"In the overwhelming majority of the dismissed sec. 1981 claims listed in the report (89 of the 96), the plaintiffs were not locked out of federal court without the ability to obtain relief. They remained free to pursue their employment discrimination charges -- whether based on wrongful discharge, promotion, retaliation, demotion, or some other transgression -- under other laws. If successful..., relief could be awarded in the form of back pay, reinstatement, an injunction against further racial misconduct, and in some instances, legal expenses and attorney fees."

Copies of the 28-page report are available from the NAACP LDF, 1275 K Street, NW, Suite 301, Washington, D.C., 20005.

SUPREME COURT CASES INVOLVING THE AUTHORITY OF FEDERAL COURTS TO EFFECTUATE REMEDIES

The Supreme Court has recently considered two cases that address how far federal courts can go to force compliance with court orders. In *Missouri v. Jenkins*, pending before the Court, the district court set aside a state law that limited the school district's ability to increase taxes to cover the costs of a court ordered school desegregation plan. In *Spallone v. U.S.* the Court in a 5-4 decision said that the district court went too far in imposing sanctions against individual councilmembers who refused to comply with the housing desegregation remedial orders.

School Desegregation in Kansas City, Missouri

On October 30, 1989 the Supreme Court heard oral arguments in *Missouri v. Jenkins* No. 88-1150. The question before the Court is "whether federal courts may set aside state laws that prohibit a school district from increasing its property tax, where the school district would otherwise be unable to meet its constitutional obligation to remedy its past racial discrimination and had exhausted all other alternatives for meeting that obligation". There is also a question of whether the State's appeal of the Eighth Circuit's decision was timely filed and thus whether the Supreme Court has jurisdiction to consider the merits of the case. If the Court answers the question of jurisdiction in the negative, it will not address the substantive question.

The Supreme Court previously had refused to review a major educational improvements component of the school desegregation order (compensatory education, reduced pupil-teacher ratios, capital improvements, etc.) that involved millions of dollars. Thus, the question before the Court is not whether the program will be funded but whether the district court could order a tax increase as the method for funding it.

Background

As described in the Respondents' Brief filed on August 28, 1989, the facts in the case are as follows:

In 1977 the Kansas City, Missouri School District (KCMSD) and a group of KCMSD school children filed suit in federal district court alleging that the State of Missouri maintained unconstitutionally segregated and inferior schools for black children in the District and failed to eradicate the effects of that discriminatory conduct.

On September 17, 1984 District Court Judge Russell G. Clark found both the State and KCMSD liable for unconstitutionally discriminating against black children attending KCMSD schools, both by operating the schools on a segregated basis and by providing a substandard educational program...[and] found also that the State and KCMSD had failed in their affirmative duty to undo the continuing harm caused by that conduct within KCMSD.

On June 14, 1985, Judge Clark approved the key components of the desegregation plan: magnet schools, capital improvements, and encouraging voluntary transfers of students to desegregate KCMSD schools. On appeal the en banc Eighth Circuit held that the particular programs approved by Judge Clark are necessary for successful desegregation.

The district court then proceeded to address the precise methods to be used to implement the remedial plan.

Judge Clark heard the testimony of representatives of the plaintiff school children, State and District officials, as well as parents, teachers, and experts. On the basis of this evidence, he found that "as a result of the constitutional violations KCMSD's physical facilities have literally rotted and that the overall condition of the schools remained generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD".

The judge approved specific programs and costs he found necessary to eliminate the substandard conditions present in KCMSD schools, to provide the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied. The judge ordered the State to pay 75 percent of the remedial costs, and the school district 25 percent, except for the cost of capital improvements which was to be equally divided.

Judge Clark found that the school district had exhausted all available means of producing the revenues necessary to meet even its 25 percent share of the remedial plan, including its Board's proposal of numerous bond issues and property tax increases, all of which the District's voters had failed to approve (state law requires a two-thirds vote, and in the last election 63 percent of school district voters had cast their ballots for an increase). He then concluded that he had no choice but to require local authorities to impose tax measures suffi-

cient to meet their constitutional obligations -- even though such measures would be in excess of the limits set by state law.

The Eighth Circuit affirmed Judge Clark's authorization of an increased property tax levy on two alternative grounds. First, the court determined that when all other alternatives had been exhausted the court could order local authorities to exercise their taxing power if absolutely necessary to remedy a constitutional violation.

Second, the Eighth Circuit determined that state laws had effectively prohibited KCMSD from imposing a property tax sufficient to meet its desegregation obligations and that Judge Clark's order therefore be modified simply to enjoin application of those state laws, thus authorizing, but not ordering, KCMSD to impose an increase.

The Eighth Circuit thus affirmed the district court order as one that simply set aside levy limitations on KCMSD's taxing authority, thereby relieving Judge Clark from any responsibility either to determine the particular property tax that should be imposed or to order imposition of that tax. The State of Missouri petitioned the Supreme Court for review of the scope of the remedial plan and the funding orders. The Supreme Court granted review of only the funding orders.

The Arguments

In the briefs before the Court, and in the oral arguments, the positions of the two sides are as follows:

The State argues that federal courts do not have the power to override taxing laws in fashioning a remedy for a constitutional violation. The State contends such an action is "inconsistent with the proper role of federal courts," as established in Article III of the Constitution, and is an intrusion upon the powers reserved to the executive and legislative branches. Further, the State takes the position that "in *choosing* among remedies, a federal court should be obliged to take account of the resources reasonably available to finance them."

"At no time did the [lower] court question whether a less-costly approach, in keeping with plans in other districts, would be advisable; rather, it pursued its flagship plan until a tax increase became a foregone conclusion."

The State's brief asserts:

"While no one doubts the power of the federal courts to safeguard individual constitutional rights,...this fact does not mean that, in doing so, they may take on whatever powers seem expedient, however much they might displace other departments of federal or state government".

During oral arguments the State's attorney was asked what the State would do to assure compliance with the funding order if the tax measure were struck down, and the State said it would be prepared to raise its own contribution beyond 75 percent if need be.

The respondents counter that "the lower federal courts were not only authorized, but were obliged to devise a method that would enable [the school district] to meet the duty," and that "the State's contention that the lower courts were obliged to reduce the constitutionally necessary remedy rather than interfere with State revenue mechanisms reflects an erroneous and completely inverted view of the Constitution: federal courts do not scale back constitutionally mandated remedies to match the constitutional violators' cash on hand; rather, the courts require the violators to produce whatever funds are necessary to cure their violations."

"After careful consideration of all available alternatives, those courts fashioned the least intrusive means for achieving that end -- setting aside the State laws which prevented KCMSD from selecting and imposing an increase in its local property tax."

The respondents further assert:

"The State's position -- that the federal courts should have left the constitutional violations *unremedied* rather than override State tax laws -- is completely without merit, and without precedential authority. This Court has repeatedly held that where State and local officers violate the Constitution, and default in their own duty to remedy that

violation, and after ample opportunity provide no realistic plan for ultimately remedying the violation, it is the duty of federal courts to devise the necessary plan, even if State laws must be overridden."

A decision in the case is expected before the end of the Court's term in early July 1990.

Housing Discrimination in Yonkers, New York

In *Spallone v. U.S.*, decided on January 10, 1990, the Court in a 5-4 decision ruled that District Court Judge Sand's sanctions against individual members of the city council for refusing to enact an ordinance to provide public housing throughout Yonkers should not have been imposed until it was clear that sanctions against the city alone would not result in compliance with the housing desegregation remedial orders. This ruling has no impact on the content of the remedial order.

Background

In 1985 the U.S. District Court found that the city of Yonkers and the Yonkers Community Development Agency "had intentionally engaged in a pattern and practice of housing discrimination in violation of Title VIII of the Civil Rights Act of 1968...and the Equal Protection Clause of the Fourteenth Amendment." The court found that over a period of thirty years the city had selected sites for public housing that perpetuated housing segregation. City officials in effect equated public housing with minority housing and located 96.6 percent of such housing in or adjacent to the southwest section of Yonkers. In 1980 Blacks and Hispanics were 19 percent of the Yonkers population and in 1989 more than 80 percent resided in the southwest section of the city.

The District Court enjoined "the City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with them from...intentionally promoting racial residential segregation in Yonkers, taking any action intended to deny or make unavailable housing to any person on account of race or national origin and from blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin". The city was ordered to take affirmative steps to locate public housing throughout the city.

In December 1987 the Court of Appeals affirmed the judgment and the Supreme Court subsequently denied certiorari.

Subsequently the city council approved a settlement that provided a long range plan for addressing the problem of housing segregation in the city, including the construction of 1000 units of low income housing (as part of mixed-income developments), and identification of sites for 200 units of public housing. The settlement was then entered as a consent decree on January 28, 1988.

However, on August 1, 1988 the City Council defeated by a vote of 4-3 a "resolution of intent to adopt the legislative package known as the Affordable Housing Ordinance". The legislative package included a provision "conditioning the construction of all multifamily housing on the inclusion of at least 20 percent assisted units..."

On August 2, 1988 the District Court held the city and city council members who had voted in the negative in contempt and imposed sanctions on the city of \$100 for the first day, with a doubling for each consecutive day of noncompliance, and \$500 per day for council members.

The Court of Appeals affirmed the District Court's decision but set the city's fine at a maximum of \$1 million per day. The council members had argued "that the District Court abused its discretion in selecting its method of enforcing the consent judgment."

The city and council members petitioned the Supreme Court for stay of the fines pending their request for certiorari. The Court granted a stay of the fines imposed on the council members but not the city.

On September 9, 1988 the city council by a vote of 5-2 approved the Affordable Housing Ordinance. In 1989 the Supreme Court granted certiorari and on January 10, 1990 reversed.

The Opinion

The opinion, written by Chief Justice Rehnquist and joined by Justices White, O'Connor, Scalia, and Kennedy states: "that the portion of the District Court's order of July 26 imposing contempt sanctions against the

petitioners if they failed to vote in favor of the court-proposed ordinance was an abuse of discretion under traditional equitable principles." The majority explained:

"The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests. Even though an individual legislator took the extreme position -- or felt that his constituents took the extreme position -- that even a huge fine against the city was preferable to enacting the Affordable Housing Ordinance, monetary sanctions against him individually would motivate him to vote to enact the ordinance simply because he did not want to be out of pocket financially. Such fines thus encourage legislators, in effect, to declare that they favor an ordinance not in order to avoid bankrupting the city for which they legislate, but in order to avoid bankrupting themselves....

"We hold that the District Court, in view of the 'extraordinary' nature of the imposition of sanctions against the individual councilmen, should have proceeded with such contempt sanctions first against the city alone in order to secure compliance with the remedial orders. Only if that approach failed to produce compliance within a reasonable time should the question of imposing contempt sanctions against petitioners even have been considered."

The Dissent

Justice Brennan, with whom Justices Marshall, Blackmun and Stevens joined, said that while he "under[stood] and appreciate[d] the Court's concern about the District Court's decision to impose contempt sanctions against local officials acting in a legislative capacity," he viewed "its availability for such use, in extreme circumstances...essential."

Justice Brennan also chided the majority for second guessing District Court Judge Sands' ruling given the judge's intimate knowledge of the case.

"Judge Sand's intimate contact for many years with the recalcitrant council members and his familiarity with the city's political climate gave him special insight into the best way to coerce compliance when all cooperative efforts had failed. From our detached vantage point, we can hardly judge as well as he which coercive sanctions or combination thereof were most likely to work quickly and least disruptively. Because the Court's *ex post* rationalization of what Judge Sand should have done fails to do justice either to the facts of this case or the art of judging, I must dissent."

Judge Brennan says further that the opinion will send a message to district judges to be cautious in their efforts to seek compliance with their remedial orders:

"It directs a message to district judges that, despite their repeated and close contact with the various parties and issues, even the most delicate remedial choices by the most conscientious and deliberate judges are subject to be second-guessed by this Court. I hope such a message will not daunt the courage of district courts who, if ever again faced with such protracted defiance, must carefully yet firmly secure compliance with their remedial orders. But I worry that the Court's message will have the unintended effect of emboldening recalcitrant officials continually to test the ultimate reach of the remedial authority of the federal courts, thereby postponing the day when all public officers finally accept that 'the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding."

Justice Brennan's concern appears to be prophetic as the councilmen who fought the fines expressed jubilation and suggested that the housing might indeed not be built despite the fact that the decision in no way altered the substance of the remedial order.

SUPREME COURT ISSUES DECISION IN TENURE CASE

On January 9, 1990 the Supreme Court in *University of Pennsylvania v. Equal Employment Opportunity Commission* ruled unanimously that colleges and universities accused of discrimination in tenure decisions must

make available to the EEOC the relevant personnel files. The university had argued that "policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the Commission to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials."

The EEOC had argued that the adoption of such a requirement would place a substantial obstacle in the way of EEOC's "efforts to investigate and to remedy alleged discrimination."

Background

In 1985 Rosalie Tung, an associate professor at the University of Pennsylvania Wharton School of Business, was denied tenure. She filed a complaint with the EEOC alleging that she was denied tenure because of her race, sex and national origin in violation of Title VII of the Civil Rights Act of 1964. Tung alleged that the chairman of her department had sexually harassed her and that when she rebuffed him he wrote a negative letter to the committee considering her tenure. Tung also said that her qualifications were "equal to or better than" five male faculty members "who had received more favorable treatment."

The EEOC sought to investigate the complaint and requested a number of relevant documents from the university, including Tong's tenure review file and the files of the five male faculty members mentioned in the complaint. The university refused to provide the documents even after they were subpoenaed, and asserted that a letter setting forth the reasons for the denial of tenure "was sufficient for disposition of the charge." EEOC rejected the university's contention, asserting that "the Commission would fall short of its obligation if it stopped its investigation once [the employer] has...provided the reasons for its employment decisions without verifying whether that reason is a pretext for discrimination."

EEOC applied to the U.S. District Court for the Eastern District of Pennsylvania for enforcement of its subpoena. The court entered an enforcement order and the Court of Appeals for the Third Circuit affirmed the decision.

Because of an apparent conflict with the Seventh Circuit's decision in *EEOC v. University of Notre Dame*, 715 F.2d 331 (1988) the Supreme Court granted certiorari.

The Opinion

Justice Blackmun wrote the unanimous opinion for the Court: "we cannot accept the University's invitation to create a new privilege against the disclosure of peer review materials. We begin by noting that Congress, in extending Title VII to educational institutions and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents."

"We readily agree with petitioner that universities and colleges play significant roles in American society. Nor need we question, at this point, petitioner's assertion that confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate. The costs that ensue from disclosure, however, constitute only one side of the balance. As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great if not compelling governmental interest. Often, as even petitioner seems to admit...disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files..."

The opinion further asserts:

"In essence, petitioner asks us to recognize an 'expanded' right of academic freedom to protect confidential peer review materials from disclosure. Although we are sensitive to the effects that content-neutral government action may have on speech...we think the First Amendment cannot be extended to embrace petitioner's claim....if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment. In effect, petitioner says no more than that disclosure of peer review materials makes it more difficult to acquire information regarding the 'academic grounds' on which petitioner wishes to base its tenure

decisions. But many laws make the exercise of First Amendment rights more difficult. For example, a university cannot claim a First Amendment violation simply because it may be subject to taxation or other government regulation, even though such regulation might deprive the university of revenue it needs to bid for professors who are contemplating working for other academic institutions or in industry.

"In addition to being remote and attenuated, the injury to academic freedom claimed by petitioner is also speculative...we are not so ready as petitioner seems to be to assume the worst about those in the academic community...Not all academics will hesitate to stand up and be counted when they evaluate their peers."

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