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On May 22, the House passed the Americans with Disabilities Act by a vote of 403-20. A similar bill passed the Senate on September 7, 1989 by a 76-8 vote. The President is expected to sign the bill into law in June. This Summer LCEF will publish a SPECIAL REPORT on the ADA, the Emancipation Proclamation for persons with disabilities. The next *Monitor* will include articles on the GAO report on the implementation of the Immigration Reform and Control Act, and the Oklahoma City school desegregation case.

STATUS OF CIVIL RIGHTS LEGISLATION BEFORE CONGRESS

HOUSE PASSES FAMILY AND MEDICAL LEAVE ACT

On May 10, by a vote of 237-187, the House of Representatives passed the Family and Medical Leave Act. A coalition of women's, civil rights, and labor organizations has been pushing for passage of a leave bill for the past five years. The Senate bill was reported by the Labor and Human Resources Committee on April 19, 1989. The full Senate is expected to consider the bill sometime during the summer. Secretary of Labor Elizabeth H. Dole has said she will recommend that the President veto the legislation on grounds that the Federal Government should not mandate leave policies, but leave them to be negotiated by employers and employees.

The bill as passed by the House will allow an employee to take up to 12 weeks of unpaid leave a year in total to care for a newborn or adopted child, or for a seriously ill child or parent. The 12 weeks could include similar leave in the event of the worker's own illness. An individual must have worked for the employer at least 1,000 hours in the previous 12 months in order to qualify.

The employer must maintain the worker's health insurance coverage during the leave period if such insurance is provided by the company, and when the employee returns s/he must be given the same or an equivalent job. The bill applies only to companies that employ 50 or more employees. Thus it does not cover 90 percent of all employers and 56 percent of all employees.

The Senate bill would allow 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. It also provides for 13 weeks of leave per year for an employee suffering from a serious illness. This bill would apply to companies or worksites with 20 or more employees.

CIVIL RIGHTS ACT OF 1990 REPORTED OUT OF COMMITTEES

On May 8, by a vote of 23-10, the House Education and Labor Committee reported out of Committee the Civil Rights Act of 1990 (HR 4000). The mark-up took three days as Republican members of the Committee offered numerous weakening amendments that were defeated. Committee Chair Augustus Hawkins (D-CA) and Representative Peter Smith (R-VT) addressed the controversy that has arisen regarding the bill's definition of business necessity by offering an amendment redefining the standard an employer must meet in justifying an employment practice that has been shown to have a disparate impact on minorities or women. The amendment changed the bill's definition of business necessity from "essential" to effective job performance to the challenged practice or group of practices "bears a substantial and demonstrable relationship" to effective job performance. The amendment passed unanimously with one member voting present. The Committee also agreed to a number of clarifying amendments. Mark-up in the House Judiciary Committee is expected in June, with floor action not long thereafter. There are 181 cosponsors of the bill in the House.

On April 4, the Senate Labor and Human Resources Committee by a vote of 11-5 reported out the companion bill (S. 2104). Senator Orrin Hatch (R-UT) offered three amendments, two of which were defeated. Hatch's third amendment provided that an employer could refuse to employ an individual who uses or possesses any illegal drug. Senator Kennedy offered a substitute or "second degree" amendment to make clear that the amendment would apply only to current drug users, and to the use of illegal drugs, not to drugs administered under medical supervision such as methadone. Kennedy's second degree amendment was accepted. Hatch indicated that he had a number of other amendments he would offer for consideration on the floor of the Senate.

The bill is expected to be considered by the full Senate in June. There are 48 Senate cosponsors of the bill.

BACKGROUND

The Civil Rights Act of 1990 was introduced on February 7 by Senators Edward Kennedy (D-MA) and James Jeffords (R-VT), and Representatives Augustus Hawkins (D-CA) and Hamilton Fish (R-NY). Ten days of comprehensive hearings were held by the Senate Committee on Labor and Human Resources, and the House Committee on Education and Labor jointly with the Judiciary Subcommittee on Civil and Constitutional Rights.

The legislation will amend Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, sex, national origin, or religion, and the 1866 Civil Rights Law (Section 1981 of 42 U.S. Code) which prohibits intentional race discrimination in the making and enforcement of contracts. The bill addresses 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. The decisions narrow the coverage of civil rights statutes, make it harder for women and minorities to prove discrimination, make it easier for those opposed to civil rights consent decrees to challenge them, and limit the award of attorney's fees. The bill will also correct an 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 1981 for intentional racial discrimination. (For further discussion, see the *Civil Rights Monitor*, Summer/Fall 1989 and Winter 1990).

THE ADMINISTRATION'S POSITION

On February 22, Senators Robert Dole (R-KS) and Orrin Hatch (R-UT) and Representatives William Goodling (R-PA) and Steve Gunderson (R-WI) introduced companion bills for the Bush Administration. The Civil Rights Protections Act of 1990 (HR 4081, S 2166) would address only two of the Supreme Court decisions the Civil Rights Act of 1990 seeks to address. Supporters of the Civil Rights Act of 1990 argue that the Administration's bill is too limited, as it does not address the "systemic practices of businesses that foreclose minorities and women from the opportunity to be hired or promoted."

In a letter to Senator Edward Kennedy, Chair of the Senate Committee on Labor and Human Resources, the day before the Committee mark-up, Attorney General Dick Thornburgh said that "if S. 2104 were presented to the President in its current form, I and other senior advisors would recommend that it be vetoed." The letter further stated:

"The Administration supports overruling *Patterson* and *Lorance*, but urges the Committee to adopt the language of the Administration's proposal. The Department vigorously opposes those parts of S. 2104 that would overturn *Wards Cove Packing Co. v. Atonio*, *Martin v. Wilks*, and *Price Waterhouse v. Hopkins*, as well as the bill's damage remedy for Title VII violations."

The Leadership Conference on Civil Rights issued a terse statement in response to the veto threat:

"Today the Bush Administration for the first time had to take a firm position on...civil rights issues. And rather than stand up in support of civil rights, the Bush Administration decided to bow to the right-wing of the Republican Party. We hope that President Bush will reject the recommendation of Attorney General Dick Thornburgh and other senior administration officials and refuse to join the ranks of Andrew Johnson and Ronald Reagan as the only presidents in American history to veto a civil rights bill."

HEARINGS

Hearings were held in the Senate on February 23, 27 and March 1 and 7. In the House, hearings were held on February 20, 27 and March 13, 20, and April 25, and a field hearing was held in Houston, Texas on May 21. Dozens of witnesses provided testimony on the need for the legislation and the impact of the Supreme Court decisions. Victims of discrimination who have had their lawsuits dismissed as a result of the Supreme Court decisions offered gripping testimony about their cases. Other witnesses argued, however, that the Supreme Court decisions had been merely technical adjustments to the law and that legislation was not needed. Opponents also suggested that the legislation would result in quotas, deprive citizens of their day in court, and provide a windfall for attorneys through monetary damages under Title VII and through the attorney's fees provisions of Title VII.

Senator Kennedy, Chair of the Senate Committee on Labor and Human Resources, in his statement opening the hearings said:

"Last year, a series of unfortunate rulings marked an abrupt and unwarranted departure from a generation of vigilance by the Supreme Court in protecting civil rights. These decisions have opened significant gaps in the laws that prohibit racism, sexism...and other types of ingrained bias in our society. Fortunately, none of those decisions is grounded in the Constitution. They each involve interpretations by the

Supreme Court of statutes enacted by the Congress. When the Court misinterprets the legislative intent of Congress, Congress can correct the mistake by enacting a new law. And that is what we intend to do."

Senator Orrin Hatch (R-UT) in contrast said:

"The Civil Rights Act of 1990 is designed to overturn several Supreme Court cases. In fact, it overhauls two Federal statutes, throws out years of Supreme Court and appellate court decisions, and conflicts directly with the several core concepts of American jurisprudence and justice....I don't believe that we have to overhaul the American legal system to assure equality. We don't have to award some groups more legal rights than others to guarantee the civil rights of all Americans. We don't have to make quotas the only legal employment policy in order to provide equal opportunity."

The first Senate panel

The hearings in the Senate began with a panel of former cabinet secretaries: William Coleman, Secretary of Transportation during the Ford Administration, and Shirley Hufstedler, Secretary of Education, and Ray Marshall, Secretary of Labor both during the Carter Administration. The three former secretaries provided compelling arguments for enactment of the legislation to provide equality of opportunity for all Americans, and to make the American workforce more productive and competitive in the world market.

William Coleman spoke eloquently of why the legislation should be enacted:

"This year, Mr. Chairman, will be a watershed in the history of civil rights laws. Whether for good or for ill, the Congress and the President will decide its future course. In February of 1989, no one in this room or indeed in the White House could have imagined that the Supreme Court could turn so dramatically away from the national consensus in favor of vigorous enforcement of Federal equal opportunity laws. The Court has forcefully reminded all of us how even the most clearly written of statutes can be drained of practical effectiveness by a crabbed, capricious interpretation. I do not appear before you out of sympathy or compassion or asking you about past wrongs. I ask that you change the law back to what it was because black Americans, after more than three centuries of contribution to this Nation, are entitled to no less."

Shirley Hufstedler, spoke of the role of women in the workplace:

"In the year 2000, over 60 percent of women will be in the labor force, and they will comprise 47 percent of the whole workforce. Today, 72 percent of all mothers of school age children are working outside their homes. Only 55 percent did so in 1975. More than half of all married women with very small children now are in the labor force. Almost 60 percent of married women live in families in which both the husband and the wife are employed outside the home. Women, like men, work for money. They have always worked, of course. The only real difference is that now they would like to get paid for it. Moreover, they need the money, just like men need the money, to support themselves and to sustain their families. Employment discrimination causes grievous harm to working women. No one can realistically remain unscathed when he or she is being subjected to discrimination, whether that discrimination is blatant or whether it is subtle."

Ray Marshall spoke of the connection between creating a discrimination free workplace and America's competitiveness in the world market:

"I think that it is absolutely the case that the elimination of discrimination has become a moral and an economic necessity, because those things have come together these days, and even those people who won't accept the moral imperative had better make a virtue of necessity because we are going to be, we are and will be even more in the future, a multicultural, multiracial society. Almost all of the growth for the rest of this century will be women and minorities -- mostly minorities. Women, white women, will be a little more than one-third of the growth of our workforce. Women and minorities together will be over 90 percent of the growth of our workforce.... We are not likely to

be able to develop our people, our women and minorities, as long as we permit discrimination and unless we make the most effective use of people who will be the largest, overwhelming proportion of the growth of our workforce. Now, while other things are important to reestablish our competitive position in the world, the elimination of discrimination is an absolute necessity."

Donald Ayer for the Administration

Donald Ayer, then Deputy Attorney General, testified for the Bush Administration at the House and Senate hearings. Ayer said that the Administration is strongly committed to opposing discrimination wherever it is found, and that the Administration was guided by the principle "that people should not be judged or dealt with according to the color of their skin or certain other irrelevant personal traits." Ayer expressed the Administration's opposition to provisions in the Civil Rights Act of 1990 that would address *Wards Cove*, *Martin v. Wilks*, and *Price Waterhouse*, as well as the damages provision in the bill. With regard to *Wards Cove*, Ayer said:

"In *Wards Cove*, the Court addressed three important issues concerning the burdens of proof in a lawsuit alleging that an employer's hiring practices have had the effect of discrimination in violation of Title VII. After reaffirming that statistics may form the basis for a prima facie case of disparate impact and that the statistics must compare the employer's workforce to the pool of qualified job candidates, the Court addressed the issue of causation. The Court held first that a plaintiff must identify the specific employment practices that have produced the challenged disparate impact. Thereafter, the Court addressed the burdens imposed on the parties once a plaintiff has established a prima facie case of discrimination. It held that the employer's burden is to produce evidence that the 'challenged practice pursues, in a significant way, the legitimate employment goals of the employer'... Finally, the Court held that the burden of persuasion always remains with the plaintiff, and that the plaintiff may defeat the employer's evidence by showing that reasonable alternatives would serve the employer's purpose equally well.

"...We believe strongly that the changes proposed in H.R. 4000 would have serious adverse consequences. By altering all three of the conclusions reached by the Supreme Court, and placing on the employer the ultimate burden of identifying his own practices leading to a statistical imbalance and proving them to be 'essential' to the conduct of his business, the proposal puts an employer in a nearly impossible position. It would be difficult for an employer not to adopt a silent practice of quota hiring and promotion in an effort to protect himself from the real probability of litigation and liability wherever a statistical imbalance is shown."

The victims

Brenda Patterson, the plaintiff in *Patterson v. McLean* testified about the discrimination she faced and being left without redress:

"My name is Brenda Patterson and I am from Winston-Salem, North Carolina. From 1972 to 1982 I worked at McLean Credit Union, and throughout that time I was treated much worse than white employees. I was humiliated and insulted by racist comments, I was never promoted and never paid what white employees were paid, and in the end I was laid off while white employees with less seniority kept their jobs.

"These things happened to me because I am black. I went to court because I thought this was wrong and my case went all the way to the Supreme Court. Last June the Supreme Court said I did not have a case and all my claims have now been dismissed. It has been 18 years since I started working for McLean and I have nothing for what I suffered...

"I am not a lawyer. I do not pretend to understand the technicalities of the Supreme Court decision in this case. But I always believed that if a black man or woman was mistreated because of race, we could go to the Federal courthouse, and justice would be done. I do not expect that you are going to decide my case, or make

the Credit Union pay me damages. All I want is a chance to tell my story to a jury, and to have it decided, fair and square, not on a bunch of technicalities, whether [my employer] discriminated against me. I do not think that is too much to ask."

Julius Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, in testimony before the House emphasized the harsh impact the *Patterson* decision has had on people's lives, with at least 158 claims dismissed since *Patterson*.

For example:

"Terrell McGinnis...was the only black employee in a company in Jefferson County, Alabama that sells and services garbage trucks in four southern states. McGinnis, a trained welder and auto mechanic, was subjected to extreme abuse, physical danger and humiliation, and eventually discharged, because of his race.

The following are just a few examples of the shocking treatment McGinnis received at the hands of the company's owner and manager:

(1) Despite his skills, McGinnis often served as the company's janitor and general flunky. He was required to clean the bathrooms and to keep black customers out of them. His boss said 'When the niggers come in, don't let them use the bathroom. Tell them it's out of order.'

(2) In front of white customers in a restaurant, the owner placed his lunch sandwich on the floor and told McGinnis, 'Here You go, my nigger.'

(3) On several occasions the owner wrongly accused McGinnis of misconduct and kicked him so hard that he required medical attention for the swelling and pain.

(4) He alone was required to wash the personal cars of other employees, sit at the rear of the room at social functions, and dispose of a truck load of fetid chickens.

(5) The owner called him a 'nigger' and 'black s-o-b' and then pointed a gun at his head and told him to do what he said, frightening McGinnis so much that he threw up his hands and said, 'Yes sir, yes sir.'

"Although the district court awarded McGinnis \$156,000 in damages, the court of appeals ruled after *Patterson* that such 'claims of harassment and discriminatory work conditions are no longer actionable under section 1981.' The only claim left in the case is the possible claim for denial of promotion. Because the company has fewer than 15 full-time employees, it is not covered by Title VII of the Civil Rights Act of 1964 and McGinnis has no other remedy."

The business community

James Paras testified in opposition to the legislation on behalf of the Chamber of Commerce:

"S. 2104 represents a multifaceted revision and expansion of the employment discrimination laws that have developed over the past 25 years. If enacted, it would dramatically alter the balance between the goal of eliminating discrimination in society and the goal of preserving a vital and efficient business environment capable of competing in an increasingly global economy. This is so because S. 2104 would substantially increase the burdens and risk of liability for *every* employer in this country, including the most exemplary."

In contrast, Sholom D. Comay, President of the American Jewish Committee which strongly supports the legislation, testified in support of the legislation from his position as a businessman.

"I come before you as a senior executive of a business which employs some 600 people. I know what running a business, meeting a payroll, supervising employees and being accountable to shareholders are all about. I am here to tell you that there is no reason why American business should not support this bill. In fact, it is in the interest of American business to strongly support this measure. The business community has and will benefit from equal employment opportunity because a society and government which supports such a goal will be the stronger for it. Future trends support this position. Studies indicate that by the year 2000, 50 percent of new job applicants will be women and racial or ethnic minorities. If the United States is to compete in an increasingly competitive and interdependent world, we need a strong, motivated and productive labor force, not one which is hobbled by the shackles of employment discrimination."

As the *Monitor* went to press, there were new developments that seemed to indicate a softening of the Administration's position.

During the week of May 14, the President held a series of meetings with civil and women's rights, labor, and religious leaders, and indicated a desire to work out a mutually acceptable bill. Bush asked that supporters of the Civil Rights Act of 1990 work with White House and Justice Department officials to fashion a compromise. He said he "wanted to sign a civil rights bill" but that he would not "sign a quota bill. I think we can work it out."

In a related development, on May 17 Senators Kennedy (D-MA) and Jack Danforth (R-MO) held a press conference to announce agreement on a change in the Senate bill's definition of business necessity to delete the word "essential" to effective job performance and substitute "a substantial and demonstrable relationship" to effective job performance. This action and similar action in the House Education and Labor Committee were designed to allay concerns that the original definition would induce quotas. While it appeared clear that the President did not want to be in the position of vetoing a civil rights bill, it was not clear to what extent the Administration's position had changed from that expressed by Deputy Attorney General Ayer in his congressional testimony (Donald Ayer abruptly resigned from his position as Deputy Attorney General on May 11). Attorney General Thornburgh on May 20 said that while the changes made in the bill were moving in the right direction, they had not eliminated the concern about quotas.

SUPREME COURT CASES ADDRESS IMPORTANT CIVIL RIGHTS ISSUES

SUPREME COURT UPHOLDS JUDGE'S ORDER RE TAXES IN SCHOOL DESEGREGATION CASE

On April 19, 1990 the Supreme Court ruled 5-4 that federal judges may set aside laws that prohibit a school district from increasing its property tax rate in order to cover the cost of remedying constitutional violations, (*Missouri v. Jenkins*, 58 USLW 4480).

Background

On September 17, 1984 District Court Judge Russell G. Clark found the State and the Kansas City, Missouri School District (KCMSD) liable for discrimination against black children attending the KCMSD schools, both by operating the schools on a segregated basis and by providing a substandard educational program. The judge later approved specific programs and costs he found necessary to eliminate the substandard conditions present in the schools, and to provide the victims of unlawful segregation with the educational facilities that they had been unconstitutionally denied. The costs were apportioned between the State and the school district.

After finding that the school district had exhausted all available means to meet its share of the cost of the remedial plan, including numerous bond issues and property tax increases that the district voters had failed to approve (under state law which requires a two-thirds vote), the district judge ordered local authorities to impose tax measures sufficient to meet their constitutional obligation to remedy the school segregation. The Eighth Circuit affirmed the district court order but modified it to make clear that the court simply set aside State levy limitations on KCMSD's taxing authority, thereby relieving Judge Clark from any responsibility to

determine the particular property tax that should be imposed or to order imposition of that tax. (For further discussion, see the Winter 1990, *Civil Rights Monitor*.)

The question before the Court was "whether federal courts may set aside 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."

The Opinion

The decision, written by Justice White, and joined by Justices Brennan, Marshall, Blackmun and Stevens, rules that while federal judges do not have authority to raise local property tax, the modifications made by the appeals court -- setting aside the State levy limitations so that the school district could levy its own tax -- was "a judicial act within the power of a Federal court."

"It is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation....Here the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on KCMSD by the Fourteenth Amendment....However wide the discretion of local authorities in fashioning desegregation remedies may be, if a state imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

The Dissent

Major portions of the dissent, written by Justice Kennedy and joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, were read by Justice Kennedy from the bench, a practice Justices sometimes use to indicate particularly strong views about a case. The dissent states: "Today's casual embrace of taxation imposed by the unelected, life-tenured federal judiciary disregards fundamental precepts for the democratic control of public institutions." Justice Kennedy continues:

"I do not acknowledge the troubling departures in today's majority opinion as either necessary or appropriate to ensure full compliance with the Equal Protection Clause and its mandate to eliminate the cause and effects of racial discrimination in the schools. Indeed, while this case happens to arise in the compelling context of school desegregation, the principles involved are not limited to that context. There is no obvious limit to today's discussion that would prevent judicial taxation in cases involving prisons, hospitals, or other public institutions, or indeed to pay a large damages award levied against a municipality....This assertion of judicial power in one of the most sensitive of policy areas, that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies."

Response by Senators Danforth and Bond

On April 20, in response to the decision, Missouri Senators Jack Danforth (R) and Christopher Bond (R) introduced a Joint Resolution (S.J. Res. 295) "proposing an amendment to the Constitution to prohibit the Supreme Court or any inferior court of the United States from ordering the laying or increasing of taxes." Senator Danforth stated:

"The power to tax is the fundamental power of government. Until April 18, the people had to consent to be taxed. The power of taxation was held close to the people and under their control. No taxation without representation is basic civics. Our proposal addresses a core issue of constitutional government: Do federal judges who are elected by no one, and who serve for life, have the power of taxation? The Supreme Court ruling, in my view, basically gives the courts a green light to get into the area of taxation. I welcome the support and interest that is being shown in the principle of representative taxation, and look forward to hearings and to a great debate in Congress on a matter of profound importance."

A hearing on the amendment is set for June 19 in the Senate Judiciary Subcommittee on the Constitution.

FCC AFFIRMATIVE ACTION POLICIES BEFORE THE SUPREME COURT

On March 28 the Supreme Court heard oral arguments in two cases addressing the constitutionality of the Federal Communications Commission's affirmative action policies that give preference to minorities and women in the awarding of broadcast licenses in an effort to increase the number of minority broadcasters and thus provide "a diversity of expression over the airwaves".

The first case, *Metro Broadcasting v. FCC*, No. 89-453, involves a challenge to the FCC policy of granting preferences to women and minority applicants for television and radio licenses. Minority status is considered a "plus factor," that is weighed along with other relevant factors, in FCC's evaluation of applications for licenses. The second case, *Astroline Communications Co. v. Shurberg Broadcasting*, No. 89-700, involves a policy that allows station owners who are threatened with the loss of their licenses for failure to comply with regulatory standards to make a "distress sale" to a minority controlled company at 75 percent or less of the market value of the license.

Some civil rights lawyers have indicated that the Court's decisions in these cases could have an impact beyond the FCC's policies. In reviewing the cases, the Justices will be considering how far the Federal Government may go in fashioning programs that give minorities and women a preference.

In 1980, the Supreme Court upheld a congressional program requiring that 10 percent of certain federal construction grants be awarded to minority contractors, *Fullilove v. Klutznick*, 448 U.S. 448. In January 1989, the current Court, in a 6-3 decision that declared Richmond, Virginia's set-aside program unconstitutional, held that state and local laws enacted to address discrimination against minorities must be judged by the same constitutional standards as laws enacted to favor whites over minorities, *Richmond v. Croson*. This standard, known as the *strict scrutiny* test and based on the equal protection clause of the 14th amendment, requires that official actions of a race conscious nature be narrowly tailored to address a compelling state interest. In the *Croson* opinion, the Court drew a distinction between that decision and *Fullilove* emphasizing that Congress has broader power to adopt such programs than do State and local governments. The FCC cases provide the Court an opportunity to reexamine the *Fullilove* ruling. However, some observers suggest that because the policies were based almost exclusively on the diversity rationale, rather than a finding of past discrimination (as in *Fullilove*), these cases will not necessarily test the question of whether Congress can give race or gender preference based on past discrimination.

Background

The Communication Act of 1934 gives the FCC authority to award television and radio broadcast licenses pursuant to the "public interest, convenience and necessity." The Commission's Policy Statement governing evaluation of applicants sets forth two primary objectives: (1) to provide the best practicable service to the public, and (2) to maximize diffusion of control of the media of mass communications, in order to maximize diversity of programming.

In conformity with the "best practicable service" objective, an applicant's integration of ownership and management is evaluated. In measuring the extent of the owner's active participation in the day-to-day management of the proposed station, the FCC considers the owner's residence in the community, participation in community activities, and prior broadcast experience.

The FCC did not initially consider an applicant's race or gender in the application process. In 1973, in a case challenging the FCC's process, the U.S. Court of Appeals for the District of Columbia reasoned that increased minority ownership and management of radio and television stations was in the public interest (*TV 9, Inc. v. FCC*, 495 F.2d 929 (1973), *cert. denied*, 419 U.S. 986 (1974)). The court found that it was reasonable to expect that minority ownership would increase diversity, and thus credit should be accorded for that factor in the applicant process.

In 1978, the FCC adopted a policy of granting "merit" (a plus factor) to an applicant's minority ownership. Subsequently, the FCC extended the Court's reasoning to licensing women as broadcasters, i.e., "if it were correct to assume that minority ownership promotes diversity, then the goal of diversification of programming would by the same logic likely be furthered by a policy that gives some comparative credit for female ownership of broadcast stations, given that women, like minorities, were infrequent owners of broadcast operations."

In 1986 the FCC sought to abandon its policy of granting preferences to women and minorities. In a case then pending before the full U.S. Court of Appeals for the District of Columbia (*Steele v. FCC*), that challenged the agency's grant of a license to a woman, the FCC filed a brief that did not defend its action. Instead, the agency's brief announced a policy reversal that placed it on the side of the plaintiff who was challenging the policy of preference for minorities and women. The FCC also filed a motion asking the court to send the case back "for further consideration" in light of its new view "that race, sex or national origin per se should not be a basis for licensing determinations" and its new conclusion that there were "constitutional and statutory deficiencies" in its decision granting the license. On October 9, 1986, the Court of Appeals issued an order returning the case to the FCC, and the case was subsequently settled.

Congress responded to the FCC action by including in the 1988, 1989, and 1990 appropriations acts prohibitions against the FCC spending any monies "to repeal, to retroactively apply changes in, or to begin or continue a re-examination" of its affirmative action policies. The FCC abandoned its reconsideration of the policies, and reinstated the policies.

Metro Broadcasting

This case involves three applications for a license to construct a new television station to serve the Orlando, Florida metropolitan area. The license was granted to the Rainbow Broadcasting Co., and Metro Broadcasting, one of the losing applicants, sought review of the decision in the court of appeals. The FCC's decision was based on the following factors:

- Rainbow owners with 90 percent interest would participate full time in the operation of the station; Metro Owners with 79 percent interest in the company would participate full time.
- Rainbow's ownership was 90 percent minority, and 5 percent female; Metro's ownership was 19.8 percent minority.
- Rainbow also received credit for past broadcast experience of one of its principal owners. The experience was considered slightly more significant than the experience of Metro owners.
- Metro was awarded a moderate preference for superior local residence and civic participation.

A panel of the U.S. Court of Appeals for the District of Columbia Circuit by a vote of 2-1 upheld the FCC's affirmative action policy, stressing that the policy was flexible and did not impose a quota.

Astroline Communications

In 1984, Faith Center, Inc., whose application for renewal of its Hartford, Conn. television station was under review because of questionable practices, sought FCC approval to sell the station to Astroline Communications Co., a minority business, in a so-called distress sale. The agreed on price was 50 percent of the market value. Shurberg Broadcasting, a non-minority firm, had an application before the FCC for a permit to build a television station in Hartford. Shurberg opposed the distress sale on a number of grounds including that the FCC's policy of preference for minority owned businesses was unconstitutional. The FCC approved the distress sale to Astroline in December 1984.

Shurberg sought review of the FCC decision by the U.S. Court of Appeals for the District of Columbia. By a vote of 2-1 a panel of the Court ruled that the policy was unconstitutional as it was not narrowly tailored to remedy past discrimination or to promote program diversity, and that the policy unduly burdened innocent parties.

The Arguments

In the Supreme Court, the FCC argues that the affirmative action policies reflect a deliberate and considered congressional choice, serve the compelling governmental interest of promoting diversity in broadcast programming, and have been narrowly tailored to achieve their intended goals.

"The minority enhancement policy is a race-conscious measure that has been ordered by Congress in each of the last three years as a part of the FCC's appropriations legislation. The Court should afford 'great weight' to Congress' judgment that an increase

in minority ownership of broadcast stations will enhance the diversity of broadcast programming to the benefit of both the minority and non-minority audiences.... The minority enhancement credit is narrowly tailored to serve its objectives.... The FCC, and subsequently Congress, turned to the minority enhancement credit and related race-conscious licensing measures only after seeking for many years to encourage diversity of ownership without consideration of race...In view of the failure of the FCC's various initiatives to improve significantly the level of minority participation, Congress properly exercised its broad discretion to select the methods for pursuing its objectives when it compelled the Commission to utilize the minority enhancement credit and other race-conscious licensing policies.... The burden imposed on innocent non-minorities...is permissible. The minority enhancement credit is only one of many factors considered by the Commission in granting broadcast licenses. No non-minority is deprived from having all of its comparative attributes weighed, and the minority enhancement credit does not insure that a minority applicant will prevail. Moreover, the policy involves no attempt to remove existing owners for the purpose of making room for new minority owners.

"Congress has repeatedly addressed the problem of minority ownership of radio and television stations. It has made findings that there is a need for increased minority ownership, endorsed policies initiated by the FCC including the distress sale policy, enacted policies of its own creation and ultimately enacted into law the distress sale and other programs to increase minority representation among radio and television station owners. The distress sale policy is within Congress' broad power under the commerce clause and the fourteenth amendment."

The briefs of Metro Broadcasting and Shurberg opposing the FCC policies argue that the policies violate the equal protection guarantees implied in the Fifth Amendment to the Constitution, that the standard of strict scrutiny should be applied to the policies, and that the policies cannot survive strict scrutiny as they are not sufficiently tailored to the accomplishment of program diversity:

"The Commission's race-, ethnic-, and gender-based preferences violate the equal protection component of the Due Process Clause for a number of reasons and in a number of ways.... The record as it currently exists bears no support for the preferences -- they are not the remedial product of any prior discrimination by the FCC, nor is their purpose to remedy any kind of past discrimination. They rest on the unproven assumption that Hispanics are likely to program for Hispanics, blacks for blacks and women for women -- all of which is absurd. The evidence that does exist is that licenses are driven by market forces.

"The only appropriate standard of review is that of 'strict scrutiny,' both for race/ethnicity and for gender. In addition to failing the compelling governmental interest test, the FCC's preferences fail the narrow tailoring test. They are open-ended as to time and application."

Decisions in the cases are expected by the first week in July.

SUPREME COURT ACCEPTS FETAL PROTECTION CASE

On March 26, the Supreme Court agreed to review a decision of the 7th Circuit Court of Appeals that let stand a battery manufacturing company's policy of excluding all fertile women from jobs where there is a risk of exposure to lead at a certain level, *United Auto Workers v. Johnson Controls, Inc.*, No. 89-1215. Under the policy women were also excluded from jobs in line of progression to jobs with a risk of lead exposure at a certain level. The company, Johnson Controls, contended that the policy of protecting fetuses from workplace hazards responded to a legitimate issue of industrial safety which justified the exclusion of fertile women from certain jobs. Ultimately the company is trying to shield itself from liability in potential lawsuits brought on behalf of children born with birth defects that may be attributed to their mothers' exposure to lead. The United Auto Workers and eight employees filed suit alleging the policy violated Title VII's prohibition against sex discrimination in employment.

The question before the Supreme Court is whether the policy of exclusion is unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964. Subsidiary questions include who bears the burden of proving that the employer's justification meets Title VII standards, and whether that justification is to be

tested by the bona fide occupational qualification (BFOQ) defense or may be upheld under the legitimate business justification defense.

Background

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, national origin, religion and sex. Section 703(e) provides that "notwithstanding any other provision of this title (1) it shall not be an unlawful employment practice for an employer to hire and employ people...on the basis of...religion, sex, or national origin in those certain circumstances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." This BFOQ defense provides a very narrow exemption from Title VII's discrimination prohibitions for facially discriminatory policies that are related to the "essence" or the "central mission" of the business.

Title VII forbids, in addition to intentional discrimination, those practices and policies, regardless of their intent, that have a discriminatory impact on protected classes and that cannot be justified as necessary to the conduct of the business. Statistical data are typically used to determine whether tests and other criteria for employment disproportionately exclude minorities and women. Under the 1971 Supreme Court decision in *Griggs v. Duke Power Co.* employers were required to show that practices that had been demonstrated to affect adversely the opportunities of women and minorities did fairly measure or predict actual performance on the job, that they were justified by business necessity. The Court last year changed course and ruled in *Wards Cove v. Atonio* that the burden of proving business necessity never shifts to the employer. Rather, the Court has now ruled, after demonstrating that an employment practice disproportionately excludes women or minorities from employment, the plaintiff must further show that the practice does not serve the employer's legitimate goals.

Some women's rights lawyers argue that lower courts have tended to merge and/or confuse the two defenses, thus broadening the BFOQ standard from the narrow exception Congress wanted, and applying inappropriately the business necessity defense to intent cases. In *Johnson Controls* they see the same negative effect on female plaintiffs from the opposite direction, a downgrading of the BFOQ defense to a level similar to the *Wards Cove* business necessity standard.

Facts

In 1977, Johnson Controls established a policy regarding the employment of fertile women in jobs with a risk of exposure to lead. The policy provided that protection of an "unborn child" was the primary responsibility of the prospective parents and accordingly the medical profession and the company could not take on the responsibility without infringing on the rights of the prospective parents as persons. The policy further stated that since pregnancy, and the bearing of a child is almost always voluntary and "since not all women who can become pregnant wish to become mothers...it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant." Accordingly, the company recommended but did not require that women wishing to become pregnant should work in non lead exposed jobs. The company did not however guarantee transfers or the salary level of women who transferred.

In 1978 the Occupational Safety and Health Administration issued its Final Standard for Occupational Exposure to Lead that concluded "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." OSHA established a series of mandatory steps for workers planning families to minimize the risk to the fetus and the newborn child:

- (1) periodic blood lead level tests to monitor lead levels
- (2) air monitoring of lead levels
- (3) fertility testing
- (4) educational and training provisions to fully inform workers
- (5) where appropriate, the possibility of temporary removal from lead-exposed jobs (wage protection and guaranteed return to the job within 18 months)

The agency recognized that male workers may be adversely affected by lead (infertile, impotent, and genetic damage) as well as women.

In 1982, Johnson Controls announced a new policy that excluded women who are pregnant or capable of bearing children from lead exposed jobs. The policy also excluded jobs with a line of progression into lead exposed jobs. The jobs excluded were those where a single individual in that position, at anytime in the preced-

ing year, showed a blood level of lead above the determined "safe" level, or where the air-lead level was above that level. In instituting the new policy Johnson Controls indicated that it was responding to its "continuing interest in the protection of employees and their families from occupational health hazards and was responding to the increased understanding of the risk of lead exposure that had developed in the five years since it established its former voluntary policy."

The district court granted summary judgment (i.e., without a trial) upholding the company's policy. The UAW appealed.

The 7th Circuit Opinion

The 7th Circuit Court of Appeals in a 7-4 decision determined that a fetal protection policy could be defended under Title VII as a business necessity and that the business necessity defense was established in this case.

The 7th Circuit majority concluded that the fetal protection policy was "reasonably necessary to the industrial safety- based concern of protecting the unborn child from lead exposure." The court applied the *Wards Cove* rule and placed the burden on the plaintiffs to show that the fetal protection policy was not justified by business necessity, concluding that they failed to meet that burden. The court also ruled that UAW had failed to show that "less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates."

The majority additionally ruled that it was "convinced that Johnson Controls' fetal protection policy should also be upheld under the bona fide occupational qualification defense."

"In addressing the bona fide occupational qualification question, we have observed that: 'It is universally recognized that this exception to Title VII was meant to be an extremely narrow exception to the general prohibition of discrimination' ...Nonetheless, this formulation should not be treated as inviting a black letter conclusion that the employer automatically loses in a case in which it is required to demonstrate a bona fide occupational qualification...Indeed, the fact that Johnson's fetal protection policy applies exclusively to the high lead exposure areas of its battery division demonstrates why the policy is drafted with sufficiently definite terminology as to constitute a 'narrow exception to the general prohibition of discrimination...'"

The Appeals Court accordingly affirmed the district court's summary judgment for Johnson Controls.

The Dissents

The three dissenting opinions all conclude that the correct standard to be applied in this case is the more stringent bona fide occupational qualification, the "only one the statute allows in disparate treatment cases." Two separate dissenting opinions (Judges Cudahy and Posner) call for remand of the case to the district court for a full trial. Judge Easterbrook, joined by Judge Flaum would have ruled that "Johnson's policy is sex discrimination, forbidden unless sex is a 'bona fide occupational qualification' -- which it is not." The Easterbrook dissent explains:

"This is the most important sex-discrimination case this circuit has ever decided. It is likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII. If the majority is right, then by one estimate 20 million industrial jobs could be closed to women, for many substances in addition to lead pose fetal risks.... Whether that would happen is of course a separate question; legal entitlements need not translate to action. But the law would allow employers to consign more women to 'women's work' while reserving better-paying but more hazardous jobs for men. Title VII was designed to eliminate rather than perpetuate such matching of sexes to jobs.

"Title VII requires employers to evaluate applicants and employees as individuals rather than as members of a group defined by sex. The statute has its costs; prenatal injuries are among these. Appeals to the 'flexibility' with which the Supreme Court has allocated burdens of proof and persuasion get us nowhere. No amount of 'flexibility' justifies sex discrimination without a BFOQ, unless by 'flexibility' we mean a prerogative to disregard the statute when it requires decisions antithetical to our beliefs....

"Risk to the next generation is incident to all activity, starting with getting out of bed. (Staying in bed all day has its own hazards.) To insist on *zero* risk, which the court says Johnson may do, is to exclude women from the industrial jobs that have been a male preserve. By all means let society bend its energies to improving the prospects of those who come after us. Demanding zero risk produces not progress but paralysis. Defining tolerable risk, and seeking to reduce that limit, is more useful -- but it is a job for Congress or OSHA in conjunction with medical and other sciences. Laudable though its objective be, Johnson may not reach its goal at the expense of women."

EEOC Response

In response to the circuit court decision, the Equal Employment Opportunity Commission issued guidelines in late January that take issue with the decision. The EEOC policy guidelines provide that the correct standard for a defense in fetal protection policy cases is the bona fide occupational standard and not business necessity. In issuing the guidelines EEOC was instructing its enforcement officers who operate outside the three states covered by the Seventh Circuit (Wisconsin, Illinois, and Indiana) not to rely on the *Johnson* decision in processing 'fetal hazard' charges.

"Fetal protection policies...are not neutral rules to which adverse impact analysis applies. Instead, as stated in the Commission's Policy Guidance, policies which exclude only women constitute *per se* violations of Title VII. For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law.

"In evaluating these cases, the field must weigh the extent of the risk against the breadth of the exclusion. Thus, where the risk is slight, in terms of numbers and nature of the harm, any exclusion will be hard to justify; conversely, severe harm to a high percentage of those exposed may warrant a broader exclusion....Even if the risk of harm were mediated only through one sex, the Commission thinks that an exclusion as broad as the one in *Johnson Controls* could seldom be justified.... *Johnson Controls* excluded all presumptively fertile women even from non-hazardous jobs from which they might be promoted into high-lead jobs.... This aspect of the 'fetal protection' policy is not necessary to protect the offspring; rather it is a matter of convenience.... Finally, where safe blood levels can be ascertained there can be little reason to exclude women whose blood levels are within the safe range."

California Supreme Court Ruling

In a case in California involving the same company, the California Supreme Court on May 17, 1990 refused to review an appeal from a judgment of the Court of Appeal, Fourth Circuit, State of California that upheld the California Fair Employment and Housing Commission's finding that the Fetal Protection Program of Johnson Controls, Inc. at its Globe automotive battery plant in Fullerton, California constituted unlawful sex discrimination. The California Fair Employment and Housing Commission had appealed the trial court's order vacating the decision of the Commission. The Court of Appeal's opinion states:

"The Company's policy is predicated upon the presumption that the employer is better suited to safeguard the interests of a woman's future offspring, should there be an unexpected pregnancy, than is the woman herself -- i.e., that society's interest in fetal safety is best served, not by fully informing women of the risks involved and allowing them to make informed choices, not by fixing the workplace, but rather by removing from women the opportunity to make any choices in the matter at all.

"Distilled to its essence, this is not discrimination based on 'objective differences' between men and women, it is discrimination based on categorical, long ago discarded assumptions about the ability of women to govern their sexuality and about the comparative ability of women to make reasoned, informed choices.

"However laudable the concern by businesses such as the Company for the safety of the unborn, they may not effectuate their goals in that regard at the expense of a woman's ability to obtain work for which she is otherwise qualified."

In the Johnson Controls case where the Supreme Court is reviewing the Seventh Circuit decision, the petitioner UAW's brief is due June 1, 1990, and respondent Johnson Controls has 30 days after that to respond. Oral argument in the case will be heard in the Fall.

BOEING AND EEOC SETTLE AGE DISCRIMINATION CASE

The Equal Employment Opportunity Commission and The Boeing Co. have entered into a tentative consent decree to settle a six-year old lawsuit in which the EEOC alleged that the company's policy of removing test pilots from flight status at age 60 violated the Age Discrimination in Employment Act (which prohibits discrimination in employment against persons 40 years of age or older). In 1986, the federal district court ruled in favor of the company, finding that the policy could be justified by the ADEA's bona fide occupational qualification exemption. The Ninth Circuit Court of Appeals in 1988 ruled that the validity of the policy should be determined by a jury and remanded the case to the district court.

The consent decree provides for a medical review program that will evaluate the fitness of pilots over the age of 60. Initially, statistical data will be collected on the physical and mental status of all pilots, and then annually for five years on pilots 57 years and older. The consent decree also raises the age of pilot termination to 63 for five years, and provides for the award of \$4.4 million to 29 former pilots who were forced off the job at age 60. After the five year study, Boeing will reassess its policy and decide whether to lift the age 60 ban permanently.

In announcing the agreement, EEOC Chair Evan Kemp, Jr. said:

"With this agreement, EEOC is breaking new ground in dealing with age discrimination, specifically age ceilings for pilots. The agreement calls for a totally new testing procedure that may provide us with better tools to fight employment discrimination."

General Counsel Charles A. Shanor said:

"I am confident that these tests will conclusively demonstrate that modern medical examinations and pilot proficiency evaluations are a far more accurate means of determining pilot competency and safety than the use of chronological age. The older, well-evaluated, medically cleared pilot brings to the job experience and judgement vital to the safety of our airways."

The district court judge held a fairness hearing on May 11.

FEDERAL GOVERNMENT ISSUES FINAL RULES TO IMPLEMENT THE AIR CARRIER ACCESS ACT OF 1986

On March 6, 1990 the Department of Transportation (DOT), and the Federal Aviation Administration (FAA), issued final rules under the Air Carrier Access Act of 1986, governing nondiscrimination on the basis of handicap in air travel. The Act provides that "no air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation."

The DOT regulations require airlines to provide services for persons with disabilities including narrow wheelchairs to allow access to lavatories, assistance as requested in boarding and leaving the plane, in preparing to eat -- opening packages and identifying food, and in loading and retrieving carry-on items. The regulations also provide that the airline may not limit the number of persons with disabilities on a plane, or require that persons with disabilities be accompanied by an attendant except where actually necessary, or require advance notice except when special accommodations are needed. The regulations also require that new aircraft, ordered by the carrier after the effective date of the provision, or delivered to the carrier more than two years after the effective date, meet certain structural requirements:

- o Aircraft with 30 or more passenger seats shall have movable aisle armrests on at least one-half of the passenger seats.
- o Aircraft with 100 or more passenger seats shall have a space in the aircraft designated for the storage of at least one folding wheelchair.
- o Wide-body aircraft would have to have at least one accessible lavatory, allowing for a person in a wheelchair to maneuver.
- o Aircraft with more than 60 passenger seats, and with an accessible lavatory, shall be equipped with an operable on-board wheelchair.

Maureen McCloskey of the Paralyzed Veterans Association said, in a telephone interview with MONITOR staff, that the New Mexico Chapter of PVA has petitioned for review of the regulations in the U.S. Court of Appeals for the 10th Circuit Court. McCloskey said PVA is concerned about the attendant rules and advance notice requirements as they give too much discretion to the air carriers. Readers wanting additional information should contact Ms. McCloskey at (202) 872-1300.

The Federal Aviation Administration's rule regulates exit row seating in aircraft and requires that only persons who are determined by airline personnel "to be able without assistance to activate an emergency exit and to take the additional actions needed to ensure safe use of that exit in an emergency may be seated in exit rows." Thus, the airline would be allowed by FAA to refuse exit row seating to persons who are blind, persons less than 15 years of age, or persons with severe hearing or speaking difficulties.

A spokesperson for the Air Transport Association which represents major airlines said the regulations would compromise safety and that the ATA was considering court action (Wash. Post, 3/3/90). Nancy Van Duyne, an attorney with the ATA, said in a telephone interview that the organization requested a stay of the effective date for six months, but was turned down by the U.S. Court of Appeals for the District of Columbia. ATA has not challenged the DOT regulation on substantive grounds, but on May 4, 1990 ATA petitioned the court for review of the FAA exit row seating rule.

The National Federation of the Blind considers the FAA exit row seating rule discriminatory. Marc Maurer, president of the NFB has said that in emergencies involving thick smoke or at night blind persons would be superior to sighted persons in dealing with the emergency (Wash. Post 3/3/90). The NFB is working with Senator Hollings (D-SC) and Representative Traficant (D-OH) to pass legislation to allow blind persons to sit wherever they choose, (the Air Travel for Blind Individuals Act, S 341, HR 563). The bill was introduced in response to the FAA's proposed rule. On June 12, 1989, the bill was reported out of the Senate Committee on Commerce, Science and Transportation. No action has been taken in the House.