J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 3(2) 91-100, 1994-95

THE UNRESOLVED DILEMMA: THE SPECTER OF THE RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991

ROBERT K. ROBINSON, PH.D.

H. SHELTON MORRISETTE, M.A.

JOSEPH G. P. PAOLILLO, PH.D.

The University of Mississippi, University

ABSTRACT

Since the enactment of the Civil Rights Act of 1991 the question has arisen as to the statute's effective date. This is an extremely important question which is at the core of determining when actions prohibited by the new law can result in litigation. The dilemma now confronting federal courts is whether cases pending appeal, but initiated for workplace behavior occurring before the new statute's enactment, should be governed by the law that was in effect at the time these cases were filed, or under the provisions of the new act. A case involving this issue, *Landgraf v. USI Film Products,* has recently been granted a writ of certiorari and arguments will be heard by the Supreme Court during its October 1993 term. This article examines the *Landgraf* case, and related cases, as they relate to the retroactive application of the Civil Rights Act of 1991.

The Civil Rights Act of 1991 (hereafter referred to as the act) was signed into law by President George Bush on November 21, 1991. This civil rights act is the most comprehensive employment legislation enacted since the Civil Rights Act of 1964. Under this new statute, the culmination of Congress' dissatisfaction with several landmark decisions that emerged from the Supreme Court's 1989 term [1], United States employers are confronted with a wide range of new federal regulations governing employment practices. Particularly affected are the areas of: 1) disparate impact, 2) mixed motive terminations, 3) consent decrees, 4) seniority

doi: 10.2190/UXVC-KLJN-BDRU-W9PD
http://baywood.com

plans, 5) damages, 6) attorney's fees, 7) enforcement of contracts, 8) extra-territorial applications, and 9) adjustment of standardized test scores.

The enactment of any new law inevitably raises the question of the statute's effective data: that date on which the new provisions of the said statute are applicable to workplace behavior. This is essential for determining when prohibited actions can result in litigation being initiated for noncompliance. As a result of the act's wording, the problem of effective date has been exacerbated and confusion about its application has arisen. Currently, four federal circuit courts have addressed the application of the new act to cases pending at the time of the statute's enactment [2] and have generally arrived at the conclusion that the new legislation applies only in cases initiated after its effective date. However, there is sufficient precedence to argue that pending cases should be governed by the law in effect at the time they are concluded [3]. One of these cases, *Landgraf v. USI Film Products* [4], was granted a writ of certiorari, and arguments are scheduled to be heard by the Supreme Court during its October 1993 term [5].

This article examines the *Landgraf* case and related cases as they relate to the retroactive application of the Civil Rights Act of 1991 [6]. To enhance the reader's understanding of the issues involved, it is necessary to provide a discussion of the difficulty in making such determinations because of the Supreme Court's contradictory decisions in *Bradley v. Richmond School Board* [7] and *Bowen v. Georgetown University Hospital* [8]. At the core of the pending Supreme Court decision is the resolution of this dilemma: will the new civil rights act be applied to cases initiated *before* its enactment? Finally, this article concludes with a presentation of the resultant implication for employers should the Supreme Court decide that the new act will apply to those cases on appeal or remand at the time of the enactment of the Civil Rights Act of 1991. In short, what are the probable consequences of retroactive application of the act?

AMBIGUITY IN THE ACT

One of the principal employer concerns, beyond the act's new compliance requirements is under what circumstances may these new requirements be applied retroactively. Like all legislation, the Civil Rights Act of 1991 provides a section prescribing its effective date. Title IV of the act therefore states that "*[e]xcept as otherwise specifically provided,* this Act and the amendments made by this Act shall take effect upon enactment" [6, 1071, 1099]. That date was November 21, 1991. Taken prima facie, one would interpret this to mean that the amendments made by the act would not apply to most cases that arose before its enactment. But what about cases that arose before its enactment but are still pending appeal; would these cases be concluded under the civil rights laws that existed prior to November 21, 1991 or under new statute? The language of the statute provides no clear guidance on this matter.

To further confound matters, the act does provide one such *specific exception* in the instance of disparate impact cases. The act stipulates that "nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983" [6, 1071, 1099]. This very narrowly constructed exclusion of the aforementioned disparate impact cases could be interpreted, through "negative inference," to mean that other disparate impact cases, because they are not explicitly excluded, are permitted to apply the act's new rules governing disparate impact analysis.

Several courts have noted that this language in the act offers little help in resolving the retroactivity question [9]. One court even observed that as a result of the inability of contending parties in Congress to agree on the issue of retroactive or prospective application, "they [Congress] dumped the question into the judiciary's lap without guidance" [10]. In the absence of this critical guidance from Congress, the lower courts have now turned to the Supreme Court to provide precedence, thus resolving this dilemma.

The *Landgraf* Case

Landgraf v. USI Film Products is a case in which a female employee asserts that her employer constructively discharged her for filing a sexual harassment complaint against a coworker. The initial proceedings emerge from incidents that occurred in the workplace during January 1986. Without delving too deeply into the specifics of the case, let it suffice to say that in February 1991 a federal district court ruled that the complaining party had been sexually harassed, but had not been constructively discharged [4, at 427, 429]. Consequently, Landgraf was not entitled to any relief under Title VII of the Civil Rights Act of 1964.

Landgraf appealed her case to the United States Court of Appeals, Fifth Circuit, contending that the district court had clearly erred in its finding that she had not been constructively discharged. She also claimed that she was entitled to the punitive damage and jury trial provided for in the newly enacted Civil Rights Act of 1991, even though that statute was not passed until eight months after the initial district court ruling in her case.

In reviewing that appeal, the circuit court affirmed the lower court ruling that she could not demonstrate that she had been constructively discharged [4, at 431]. The court further ruled that "the Civil Rights Act of 1991 does not apply to conduct occurring before its effective date" [4, at 433]. In reading its decision, the circuit court recognized the dilemma posed by retroactive application of any federal statute, conflicting precedence—*Bradley v. Richmond School Board* [11] and *Bowen v. Georgetown University Hospital* [8]. Though the circuit court attempted to develop a ruling consistent with both of these apparently contradictory decisions, Landgraf has appealed this decision to the Supreme Court

and was granted a writ of certiorari on March 2, 1993 [5]. The question is currently under court review as to which of the two opposed doctrines will become the standard for retroactively applying the 1991 act.

CONTRADICTORY PRECEDENCE

The *Bradley* Doctrine

For nearly 200 years, federal courts followed a convention that had been deeply rooted in both Roman civil law and English common law—legislation must be applied prospectively unless the legislature specifically decrees a retroactive application [12]. In 1969 this changed. The Supreme Court, in *Thorpe v. Housing Authority* [13], held that "an appellate court must apply the law in effect at the time it renders its decision" [13, at 281]. This decision was reaffirmed four years later in *Bradley v. Richmond School Board* [11, at 696, 711] with some minor qualification. Under the *Bradley* doctrine, appellate courts would have to apply the existing law at the time of its decision unless such application would work at "manifest injustice," or there existed some legislative direction or history to the contrary [11, at 715-16]. Note that under this manifest injustice doctrine, a law would be retroactively applied unless it was explicitly stated in the legislation that it is to apply prospectively [11, at 715 n. 21]. In the instance of the Civil Rights Act of 1991, this clear legislative intent is absent.

Should the Supreme Court decide that *Bradley* is the appropriate legal formula to use, the new act's provisions would apply to all equal employment opportunity cases not concluded by November 21, 1991. The ramifications of this will be discussed in greater depth later in this article.

Bradley and Manifest Injustice

Since the Civil Rights Act of 1991 is clearly devoid of specific language expressing Congress' intent to apply its provisions retroactively, it is now incumbent upon the defendant to demonstrate that such an application creates a "manifest injustice." In making such a determination under the *Bradley* doctrine, federal courts must analyze the defendant's arguments under three criteria. The first consideration entails the nature and the identity of the parties involved in the litigation [11, at 718]. Here the courts must draw a distinction between "mere private cases between individuals" and cases involving matters of constitutional or national consequences [11, at 718]. The more the case is limited in scope (e.g., the fewer people who are affected by its outcome), the more likely the court will conclude manifest injustice. However, when the court's decision has public impact, as would decisions involving discrimination and harassment, the courts are less likely to find manifest injustice [14].

The second criterion focuses on determining whether the intervening change to a pending law suit would deprive a party of a right that had matured or become unconditional [11, at 720]. In regard to equal employment opportunity cases, this would become an issue only if the respondent had a right to exclusion from any of the new act's provisions. For example, if the respondent enjoyed an exclusive right to only summary judgment, then the act's provision for jury trials would create a manifest injustice. This condition does not exist, nor do any of the other provisions of the act deprive any of the parties of preexisting unconditional rights.

The third and final criterion focuses on the impact that the change in the law has on existing rights. More specifically, the courts must determine whether the retroactive application of the act will impose new unanticipated obligations on a party without notice or without affording the party the opportunity to be heard [11, at 720]. Here, it could be argued that allowing a complaining party to change the initial complaint to include compensatory and punitive damages would constitute such an "unanticipated obligation." There are many, including the authors, who believe this is the case. However, it can also be argued that the new provisions for damages and jury trials have no impact on the legality of the conduct in question, only the level of damages [14]. Complaining parties have previously been free to seek compensatory and punitive damages under state tort statutes, the new act merely creates an alternative source for such liability. One court has already concluded that applying the new act retroactively imposes no new obligation for the defendant, as the defendant "cannot claim it was privileged to engage in illegal conduct merely because the conduct did not violate the second new statute" [15].

In the event that *Bradley* doctrine is applied by the court, this would not automatically apply the act retroactively. Under *Bradley* the retroactive application would still hinge on the defendant's ability to demonstrate that retroactivity would create a manifest injustice. The dilemma this poses is that questions of retroactive application could be subject to a case by case, court by court, analysis. There are even some courts that have already concluded that the manifest injustice provisions under *Bradley* can, and should, be overridden because "remedial legislation such as the Civil Rights Act has historically been construed broadly by the judiciaries" [16]. Such laws are enacted for the purpose of broadening the rights of victims of discrimination. In regard to this aim, some jurists feel that "it makes no sense to broaden those rights on one hand and then deny the wider effects of the law to people who have pending cases prior to November of 1991" [16].

It seems highly unlikely that many employers will be unable to establish manifest injustice, should the Supreme Court base its findings on the *Bradley* case. It can, therefore, be concluded that most pending equal employment cases would be judged under the new act.

The *Bowen* Doctrine

The second case providing precedence for retroactivity, *Bowen v. Georgetown University* [8], appears to be diametrically opposed to the views expressed in *Bradley.*

In this 1988 case, a unanimous Supreme Court apparently returned to a more traditional approach for retroactive application. In this decision the court concluded that "retroactively is not favored in the law" [8, at 208]. Consequently, congressional enactments or administrative rules are not to be construed as having a retroactive effect unless their language specifically states otherwise [8, at 208]. Following the precedence of numerous Supreme Court decisions [17], *Bowen* holds that unless a statute explicitly states that it is to apply at a date preceding its enactment, it applies only to actions that occur from the enactment forward. Absence of a retroactive application clause, therefore, implies prospective application. This is opposed to the *Thorpe* and *Bradley* guidance, which holds that in the absence of specific language limiting an act to prospective application, retroactive effect is to be construed.

The dilemma created by this blatant inconsistency is painfully apparent. When there is *no* specific wording addressing retroactive application of a statute, is it implied? According to *Bowen,* it is not. Under *Bradley* it is.

Bonjorno, Opportunity Lost

The Supreme Court was previously afforded the opportunity to resolve this quandary. Unfortunately, the court, by its own admission, chose not to "reconcile the apparent tension between the two lines of precedent governing retroactive application [*Bradley* and *Bowen*]" [18]. Under the very ambiguous language in *Kaiser Aluminum v. Bonjorno,* the court concluded that such reconciliation was unnecessary because both *Bradley* and *Bowen* involved situations in which the intervening statutes contained language that clearly conveyed Congress's intent to apply one law retroactively *(Bradley)* and the other prospectively *(Bowen)* [18]. Accordingly, the court ruled in *Bonjorno* that where congressional intent is clear it governs.

This, unfortunately, is not the case in the Civil Rights Act of 1991 or in the majority of federal statutes. As stated previously, there is nothing in the new civil rights act that openly declares that Congress intended it to be applied prospectively *or* retroactively. The great fault of the *Bonjorno* decision is that it provides no direction to the courts in such an event—the absence of congressional intent. It is hoped that the pending *Landgraf* ruling will, once and for all, resolve this question.

What the Supreme Court must now decide is which law is to be applied to all civil rights cases pending appeal: The law in effect at the time the decision is rendered (*Bradley* doctrine), or the law in effect at the time the complaint arose

(*Bowen* doctrine). The outcome will have profound effects throughout the business and legal communities.

CONSEQUENCES FOR EMPLOYERS

Retroactive Application and Disparate Impact Cases

Clearly there exists a potential for many cases falling outside of the March 1975 to October 1983 time frame which may be argued under the new policies. Fortunately, most of these cases have already been analyzed under the pre-*Wards Cove* standards and would hardly be affected by the act. However, those pending cases falling between the *Wards Cove* decision and the enactment of the Civil Rights Act of 1991 (June 5, 1989 to November 21, 1991) could be substantially affected by the act's new burdens of proof. Those cases initially decided in the lower courts under *Wards Cove* guidance could now, conceivably, be heard on appeal under *Griggs*. Additionally, the application of punitive and compensatory damages could be arguably imposed as well.

The subsequent district court cases that have been appealed since enactment demonstrate some degree of disagreement among various districts as to whether retroactive application of the act is permitted or not. In instances of the lower court favoring prospective application, such decisions would most likely be reversed because of the more onerous burdens of proof required of employers under the new act.

Increased Litigation and Exposure to Damages

Additionally, the retroactive application of the Civil Rights Act of 1991 would result in massive dislocations in the ongoing litigation currently awaiting adjudication in the appellate system [10, at 229]. Every case that is still pending appeal would now be decided under the new law, thus placing many employers at a substantial disadvantage. Imagine the predicament of an employer who predicated employment policies on the decision.

The greatest incentive for complaining parties and their attorneys to petition the court for retroactive application would be to recover punitive and compensatory damages under the new act. In instances where the complaining party can show that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federal protected rights of an aggrieved individual," the employer may be liable for damages [1, at 1071, 1073]. One particular Title VII complaint particularly suited to this situation is sexual harassment. Hostile environment claims in which the employer, or its agents, have failed to immediately conduct and investigate and take remedial action designed to preclude the harassment's recurrence are likely to substantiate the "malice or

reckless indifference" requirements of the act [19]. Invariable, any racial harassment complaint could meet the standard.

The courts are very likely to become inundated by cases in which the lower court has already found sexual harassment to have been substantiated, but the case is pending appeal on another legal issue. This is precisely the case in *Landgraf.* The district court had concluded that the harassment Landgraf experienced was sufficiently severe to support her hostile environment claim under Title VII [4, at 427, 429]. The issue that initially predicated her appeal was whether or not she had substantiated her constructive discharge [4, at 427, 429]. It was only after the passage of the Civil Rights Act of 1991 that Landgraf requested the addition of compensatory damages and punitive damages and the availability of a jury trial in her case [4, at 432]. It seems reasonable to expect that other complaining parties under similar circumstances would elect to follow this course of action if it were available to them. The retroactive application of the act will afford them such an opportunity. For defendants this retroactivity would impose a new obligation in regard to liability.

CONCLUSION

It would appear that the *Bowen* doctrine would be the more appropriate doctrine to follow because its presumption against retroactive application appears to be more consistent with commonly held legal procedure on the matter. This concept is not only consistent with our English common law tradition [20], but adheres to the constitutional proscription of ex post facto laws [10, at 229]. A ruling that a new law is applicable only to conduct engaged in after its effective date would be compatible with this tradition.

Regardless of the rationale and doctrine, the Supreme Court must resolve the retroactively issue and eliminate the inconsistency among the lower courts. It can only be hoped that the court seizes this opportunity to ensure that the dilemma is once and for all resolved, and that *Landgraf* does not result in another *Bonjorno.*

* * *

Dr. Robert K. Robinson is an Assistant Professor of Management at The University of Mississippi. His research interests involve federal regulation of the work place, sexual harassment, business ethics, and employee recruiting and selection. Professor Robinson's articles have appeared in numerous professional journals.

H. Shelton Morrisette is a Ph.D. student at The University of Mississippi. Prior to starting his graduate studies, he was a manager in industry for 15 years working for several large and small organizations. His research interests include impression

management, employee selection, Group Decision Support Systems, and federal regulation of the work place.

Dr. Joseph G. P. Paolillo is a Professor of Management and Chair of the Department of Management and Marketing in the School of Business Administration at The University of Mississippi. Dr. Paolillo teaches in the area of Strategic Management and Business Policy. His research has been published in numerous journals and he has also co-authored a text, *Organizational Theory: a Macro Perspective for Management,* 3rd Edition, Prentice-Hall: Englewood Cliffs, New Jersey, 1986.

END NOTES

1. *Wards Cove v. Atonio,* 109 S.Ct. 2115 (1989); *Price Waterhouse v. Hopkins,* 109 S.Ct. 1775 (1989); *Martin v. Wilks,* 109 S.Ct. 2180 (1989); *Patterson v. McLean Credit Union,* 109 S.Ct. 2363 (1989); *Independent Federation of Flight Attendants v. Zipes,* 109 S.Ct. 2732 (1989); and *Lorance v. AT&T Technologies,* 109 S.Ct. 2261 (1989).
2. *Johnson v. Uncle Ben's Inc.,* 965 F.2d 1363 (5th Cir. 1992); *Vogel v. City of Cincinnati,* 959 F.2d 594 (6th Cir. 1992); *Luddington v. Indiana Bell Telephone Co.,* 966 F.2d 225 (7th Cir. 1992); and *Fray v. Omaha World Herald Co.,* 960 F.2d 1370 (8th Cir. 1992).
3. *Thorpe v. Housing Authority,* 393 U.S. 268 (1969).
4. 968 F.2d 427 (5th Cir. 1992).
5. 61 U.S.L.W. 3596 (March 2, 1993).
6. 105 STAT. 1071 (1991).
7. 416 U.S. 699 (1973).
8. 488 U.S. 204 (1988).
9. *Johnson v. Uncle Ben's Inc.,* 965 F.2d 1365, 1372; *Harvis v. Roadway Express, Inc.,* 973 F.2d 490, 496 (6th cir. 1992); and *Stevens v. Mann,* 57 FEP Cases 1290 (S.D. Tex. 1992).
10. *Luddington v. Indiana Bell Telephone,* 966 F.2d 225, 227 (6th Cir. 1992).
11. 416 U.S. 696 (1974).
12. 973 F.2d at 496.
13. 268 U.S. 393 (1969).
14. F. Douglas, *The Civil Rights Act of 1991: Continuing Violation and the Retroactivity Controversy,* Lab. L. J., Mar. 1993, p. 161.
15. *Sample v. Keystone Carbon Co.,* 786 F.Supp. 527, 530 (W. D. Pa. 1992).
16. Douglas 14 quoting *Sultarikos v. Charger Manufacturing Co., Inc.,* 782 F.Supp. 420 (E. D. Wis. 1992).
17. *See Miller v. U.S.,* 294 U.S. 435 (1935); *Shwab v. Dayle,* 258 U.S. 529 (1922); *United States Fidelity & Guaranty Co. v. United States ex. rel. Struthers Well Co.,* 209 U.S. 306 (1908); and *White v. U.S.,* 191 U.S. 545 (1903).
18. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 828 (1990).

19. R. Robinson, B. Allen, D. Terpstra, and E. Nasif, *Equal Employment Requirements for Employers: A Closer Review of the Effects of the Civil Rights Act of 1991,* Lab. L. J., Nov. 1992, pp. 733-734.
20. *Harvis v. Roadway Express, Inc.,* 973 F.2d 496 (6th Cir. 1992).

Direct reprint requests to:

Dr. R. K. Robinson
University of Mississippi
Department of Management
University, MS 38677