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"THE FUTURE OF EMPLOYMENT DISCRIMINATION LAW AS THE UNITED STATES OF AMERICA ENTERS THE 21ST CENTURY"*

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ABSTRACT

This speech presents the author's personal views on the future development of U.S. employment law. It emphasizes that today employees and employers are confronted by a maze of laws and overburdened institutions that were established to enforce same. Meanwhile, a veritable war is going on in the workplace over employee rights and the American dilemma of a racial underclass remains unresolved. The author suggests a need for new approaches to persistent problems including alternative dispute resolution and a just cause standard for all terminations.

It is a great honor to have been asked by my friends and colleagues, Honorable William W. Schwarzer, Director of the Federal Judicial Center and Judge, U.S. Dist. Court of California and Lively Wilson of the Am. College of Trial Lawyers, to present for your consideration and discussion some musings on the development of employment discrimination law in the United States of America. Understand that, given my background as a civil rights lawyer, I feel somewhat like a parent who has watched his creation grow over four decades. Like all parents, I love my progeny, but can see the flaws and imperfections all too well. So with that caveat, please understand that this is a deeply personal exploration.

I cut my teeth as a young civil rights lawyer on the front lines in Mississippi in the battle for African-Americans in the United States. While in Mississippi, I had the great honor and privilege to serve as a legal assistant to the Rev. Dr. Martin

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Luther King. I was affiliated for the bulk of my time in Mississippi with the Lawyers Committee for Civil Rights Under Law, and filed some of the first Title VII employment discrimination cases under the 1964 Civil Rights Act. So, the effort to construct a viable system to prevent, punish, and hopefully eventually eradicate employment discrimination, especially racism, has been at the very core of my professional life.

Like any parent, I often ask myself and, as I get older, I ask it with increasing frequency: "What have we created and how can it be improved?" And, increasingly what resonates back to me is that, despite all its many warts, we can be justifiably proud of the great advances of the last thirty years. But, what does the future hold? Is my child to be forever the very imperfect offspring or is there a bright future of promise and hope. I believe there is.

Now that we have our sea legs, so to speak, we appear ready to engage in a great national dialogue on the fundamental issues surrounding the place of work in our society. With that backdrop, I would like to briefly review some history and current realities with you and share some ideas about the future.

Prior to the so-called civil rights era in the United States there were virtually no laws or executive orders prohibiting employment discrimination. Then in a great rush of activity over the past thirty years a labyrinthine maze of employment discrimination laws, regulations, ordinances, and what-have-you's have been promulgated at the federal, state, and local levels. Now, a single termination can arguably violate scores of such laws. In addition, so-called wrongful termination claims now commonly piggyback on the employment discrimination claims.

Many of these laws have varying statutes of limitations; some require action within as short of time period as thirty calendar days (the limitations period Anita Hill confronted) and some as long as a decade. Incredibly, now, almost thirty years after the passage of the Civil Rights Act of 1964, some members of the bar still debate what the correct limitations period should be in a so-called deferral case (where the federal government defers the complaint to the state enforcement mechanism).

The substantive law, e.g., the relative burdens of proof and the elements of a discrimination claim, varies depending on which of the plethora of claims is asserted. And, of course, there is a host of enforcement schemes that one can get caught up in at the federal, state, and local level.

The federal agency responsible for much of the enforcement effort in the areas of employment discrimination is the Equal Employment Opportunity Commission (EEOC). EEOC has long had a reputation as an overburdened and underfunded agency unable to deliver quality services to the constituencies it was supposed to serve. In short, EEOC is broke in the literal and figurative sense.

We have a despondent EEOC that has never been able to shoulder the immense burden the Congress over the years has imposed upon it. Many feel no amount of money can make EEOC produce the results so many interest groups want. The civil rights community wants more systemic investigations and pattern and practice law suits; the practicing bar wants more openness, more quality

mediation, thorough on-site investigations, and a place at the table in negotiations; feminists' organizations want emphasis on sex harassment cases; and organizations for the "elderly" want the emphasis to be on age discrimination cases. Meanwhile, employers and employees face the daunting task of maneuvering through the maze of administrative remedial schemes and eventually proceeding to court faced with multiple statutory and common-law claims.

One experiment with EEOC that has been suggested is to privatize its investigative function. If one accepts the premise that one cannot at least in the short term make the EEOC bureaucracy accountable, then why not experiment with privatization? Under a privatization scheme, those who are to deliver a service cannot hide behind immunity and can be held more accountable to the supposed beneficiaries of these services, individuals claiming discrimination and those so accused. To better assure accountability, I would recommend that some notion of a negligence standard be applied to such efforts. Such a partnership between EEOC and the private sector might free it to concentrate its scarce resources on law enforcement and guidelines.

In our country, there is virtually nothing to prevent someone who has been terminated from filing administrative charges of discrimination. Many of these charges deserve someone's attention. Correspondingly, many do not. Many are utterly meritless. We need to create better systems to separate the wheat from the chaff. We must have a better filtration system.

Today just about any kook who wants to can take up the time of the clerk of the court's office, one or more federal judges and their limited staff, and one or more members of the practicing Bar. Nearly unfettered access to federal justice has so burdened the system that it cannot produce satisfactory results with consistency. The system is supposed to deliver the highest quality of justice in the shortest possible time at an affordable price. Sadly, in part because of burgeoning case loads, including an onslaught of Equal Employment Opportunity (EEO) and wrongful termination cases, the federal bench cannot deliver on that commitment. As a consequence, EEO and wrongful termination cases have a bad name—and frankly, in many instances, for good reason. Too much garbage has been allowed into the system. As the old expression of the computer wonks goes: "Garbage in—garbage out." Or to paraphrase Jesse Jackson, "All boats will sink."

One answer we hear is that we need more federal judges. I disagree. Beyond being motivated by political pork-barrel rolling in some quarters, with scarce dollars we don't necessarily need more federal judges. Rather than concentrate on the top of the system, should we not focus on the court's bureaucracy? Judge Stanleys Harris' recent plea in the *Fairhead* case [1] should not go unheeded. In *Fairhead*, speaking of the overwhelming case loads that federal judges carry, he bemoaned the fact that federal trial judges cannot devote enough time to their civil dockets [1, at 158]. The judges need staff and resources to increase their efficiency. Adding more understaffed and outresourced federal judges is not the answer in my humble judgment.

I believe a beefed-up staff would go a long way toward restoring the federal judiciary to its historic role in society. The federal judiciary should have the time and opportunity, with thoughtfulness, to interpret and enforce the laws. For example, we have a great new federal statute, the Americans with Disabilities Act (ADA), for which my country can be justifiably proud. Just as history has judged Lyndon Johnson well for his role in the passage of the Magna Carta for African-Americans, the Civil Rights Act of 1964, history will also record the passage of the ADA as one of the foremost achievements of the Bush administration. The ADA's employment discrimination provisions have been in effect since 1992. The federal judiciary has embarked on a new journey to interpret and apply the ADA's provisions. We are the leader of the world at this point in history on the issue of disability rights. I mean that in no parochial or jingoistic sense. Rather, I wish to point out the awful burden Congress (the people) has placed on the shoulders of the federal judiciary. It is the federal judiciary's responsibility now to etch out the meaning of this new chapter of disability rights. The federal judiciary does so knowing its interpretations can affect the lives of an estimated forty-three million disabled citizens and quite possibly millions in other nations that eventually pass such laws. Witness the European experience, where *Griggs v. Duke Power* [2], the breakthrough disparate impact case, has been applied to interpret the anti-discrimination provisions in the European regional system.

Employment discrimination law is a hot practice field today, maybe one of the most lucrative for many and an attraction for scores of entrepreneurial lawyers. As many law school graduates cannot find work because of diminishing job opportunities, a flood of new attorneys has entered the field of employment discrimination law. Many are solo practitioners who have no mentor. Employment discrimination law from the very outset was viewed by the courts as a very complicated area of the law. One court referred to Title VII as byzantine. There certainly has been no diminution in the complexity of the employment discrimination field.

Thus, at great risk to themselves and at great risk to the image of our profession, these new lawyers operate in many instances with little or no supervision. Sometimes they do great harm to their clients by losing cases that should not have been lost and also do great harm to society, as such slipshod work can only foster disrespect for the law. Great harm can be done to the system, as it will be further bogged down with shotgun complaints that plead every imaginable claim that might somehow arise under a termination of employment. There is a need for mentoring.

One innovation that deserves attention is the "Inns of Court"[1] system. I am advised that an initial prototype has been created in New Jersey of an Inn of Court for employment law. The Inn of Court brings together, of course, the bench and

[1] Inns of Court are organizations, modeled on the British mentoring system, dedicated to the development and enhancement of professionalism amongst the bar. The American Inns of Court Foundation in Alexandria, Virginia assists groups establishing an Inn.

bar for open, candid interchange. Such a partnership would help the court and senior attorneys impress on the newly emerging bar practice pointers that would be beneficial to all.

Another innovation we hope would lessen the number of employment disputes would be for employers to provide true independence to fair employment officers (FEO) and open their function to the check-and-balance system of corporate democracy. Fair employment officers could serve as a check on abuses of corporate powers vis-a-vis employees. And, if shareholders had access to the records and reports of the FEOs, this would serve as a further authentication of an FEO's independence of the corporation. In short, we need to encourage business to experiment with more open self-examination and meaningful internal solutions.

One idea that is increasingly being advanced to simplify this system is a federal just-cause standard for employment terminations. The United States remains one of the few industrial nations that has not passed general protection laws against employment terminations for which there is no just cause. We need to open the dialogue to consider such options. We need to see what we can draw on and learn from the Canadian and European experiences. We need to debate and consider whether we need specialized courts like the industrial tribunals that exist in the European Economic Community (EEC). Many feel specialized employment courts would become political footballs between competing interests groups. Others envision courts run by a staff of civil servants with specialized training and education in the field of employment law and human resources. Localizing such courts is yet another idea to consider. The notion of "a community court" or even a localized worksite court at large employers should be considered.

Rather than tinkering with the countless statutes already on the books and passing yet another raft of such laws, there is a need for a zone of relative stability for those affected by these laws. The passage of a federal just-cause statute would simplify the entire process and would reduce the debate to one issue—was there just case for termination. Obviously, race is not just cause. Nor is sex. But, the focus would no longer be necessarily race or sex; the focus would be on the employer demonstrating whether or not there was just cause.

Another peripheral and positive by-product of a change to a simple just-cause standard would be an effect on job references. If employers had to provide at the time of termination reasons for termination in writing and just cause were the standard, all prospective employers would know not to hire candidates before receiving a certified copy of the prior employer's termination notice. Wouldn't this possibly take us beyond the current absurd situation that exists in the United States where many good employees cannot obtain a positive job reference and most frighteningly, many socially dysfunctional individuals get hired by yet another employer because it cannot obtain any useful information that might have forewarned it? Those who belittle concern about the latter must explain to us what they would have done differently in the instance of the Bank of Bethesda Maryland. That bank hired an individual who, unbeknownst to it, had been

committed to a Maryland state institution for the criminally insane on multiple occasions. That individual entered the bank one morning, removed a revolver from a gym bag and assassinated five young, female coworkers. Obviously such senseless violence might have been prevented had there been a job reference system in place.

No thoughtful person wants fighting each other in the courts to be the chief business of society [3]. The war in the workplace must end. We must make expeditious resolution of workplace disputes a national priority. So-called alternate dispute resolution (ADR) can play a major role in the process. But, the effort to compel a certain form of ADR is wrongheaded; ADR can and maybe should be mandatory. But, under that sizable umbrella freedom of choice must be a *sine qua non.* There must be a "soup to nuts" menu available to both the employee and employer that provides affordable choices of a meaningful ADR.

Nonbinding mediation with a trained mediator should be encouraged and *must be* on every such menu. In my experience, once all sides understand and appreciate that nonbinding mediation before a *trained* mediator actually resolves disputes relatively inexpensively and expeditiously, the parties are more than delighted to use it. One critical key to its success is the mediator. The mediator must be trained in the art form. The practicing bar must play catch-up and learn the advocacy skills necessary to adequately represent clients in mediation.

While we should be and are justifiably proud of the great advances of the last three decades—who would have ever dreamed of some of the changes we have seen in just a brief period of time?—we must not forget the stark reality of what still needs to be done. A terrific reality check is to merely look at occupations by race in the United States' 1990 civilian labor force as reported by the federal government. The top ten occupations for African-Americans are: 1) private household cleaners and servants, 2) garbage collectors, 3) housekeepers and butlers, 4) unemployed (no civilian work experience since 1985), 5) cooks (private household), 6) stevedores, 7) nursing aides, orderlies, and attendants, 8) winding- and twisting-machine operators, 9) maids and housemen, and 10) longshore equipment operators. Nationally, black men in inner city neighborhoods are less likely to reach the age of sixty-five than men in Bangladesh, one of the poorest nations in the world. Approximately one in every four young black American males between the ages of twenty and twenty-nine is behind bars, on parole, or on probation. By far, the predominant cause of death for young black men was homicide. Seventy-two percent of black males drop out of school before completion of high school. Nationally, 45 percent of black males are unemployed, and in some cities, 70 percent of black males, sixteen to twenty-four years old, are unemployed.

Mentoring by the business community is a very realistic possibility. Employers could reach out to communities, the schools, and other institutions to identify individuals who at an early age could enter into contracts with the employer, promising to stay in school and obtain good grades in exchange for a job

commitment years down the road. The employer, in exchange for the commitment, would provide appropriate scholarship incentives.

We have come far and we have far to go. I hope I am at least right that respectable minds will address the need for developments that lessen the divisiveness in and polarization of our society while better addressing some of the root causes of the reality I just described. Many feel there has been and continues to be a virtual legal war on in the workplace in the United States. This war has snapped our productivity, diverted legal talent to minuscule disputes, generated divisiveness and suspicion, and created and fostered lack of mutual respect for one another and loss of pride in work. There is a crying need many feel for a sense of community—a sense of national purpose, that we are all in this together. Partnerships may be part of the answer: partnerships between government and the private sector; partnerships between employers and the potential new workforce; partnerships between the judiciary and the bar; partnerships between employers and the aggrieved community.

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Mr. Fitzpatrick has been described by the National Law Journal as being among the top employment lawyers in the country and by Washingtonian Magazine as "tops in employment law for plaintiffs or defendants." He is included in the 1993-94 edition of *The Best Lawyers in America* published by Woodward/White, Inc.

ENDNOTES

1. *Fairhead v. Deleuw, Cathex,* 817 F. Supp. *153, 158* (D.D.C. 1993).
2. *Griggs v. Duke Power Co., 401 U.S. 424 (1971).*
3. *Timms v. Rosenblum,* 713 F. Supp. 948, 956 (E.D. Va. 1989).

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