Employment Discrimination Cases in the 1989 Term: The Limited Impact Upon Civil Rights Litigation

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I was asked to speak about how plaintiffs' lawyers will counsel potential plaintiffs in employment discrimination cases since the 1989 Supreme Court term. Although we try cases much differently today than we did ten years ago, our methods do not differ significantly from last year. In short, with two significant exceptions, the Supreme Court decisions of the Spring 1989 term changed little in how plaintiffs' attorneys assess employment discrimination cases.

Determining whether or not a particular client ought to sue, and how to sue, requires a good deal of care. Good plaintiffs' lawyers considering taking on a large corporation about its employment practices have to anticipate what the courts are going to do. Before you invest thousands of hours and hundreds of thousands of dollars prosecuting a case against a large corporation or a similar institution, you must assess the chances of winning. Plaintiffs' employment litigators must make conservative assessments in this regard. For example, you ought to know what the various district and appeals courts have said before the 1989 Supreme Court cases were decided. There certainly were divisions among the districts as to what the law was, otherwise there would not have been Supreme Court decisions on the issues. What the Supreme Court did was resolve splits among the circuits. That is, the Supreme Court decides cases primarily when there is a division of authority. Therefore it is important to understand the split among the federal circuit courts and to base your case on a theory that is as unassailable as possible. That does not mean you cannot represent a potential plaintiff who has a less than perfect case, but you must be able to structure your case in a way such that the legal theory is backed by the authority in your circuit, or hopefully the majority

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of the courts. That is, and always has been, the central part of assessing a case and counseling your client at the beginning.

In the area of employment discrimination litigation this process has been affected by two 1989 cases: *Martin v. Wilks*,[1] and *Patterson v. McLean Credit Union*.[2] What the Supreme Court announced in *Patterson* surprised almost everyone, plaintiffs, defendants, law professors, and most district trial judges. In *Patterson*, the Supreme Court rejected the virtually unanimous position of the federal district trial courts that Blacks could recover in employment situations for humiliation, pain, and suffering. Basically, the court said that there is no longer any right under 42 U.S.C. § 1981,[3] part of a nineteenth century civil rights act, for Blacks to collect damages for pain and suffering.

To illustrate: I received a phone call two weeks after the *Patterson* decision from a black man in Texas who had been employed as a telemarketer for a large corporation. The corporation hires Blacks primarily because that helps it get into the black communities to sell its products. The man who called me found, after he was hired by the telemarketing company, that his boss was a white man who carried a bullwhip around. While the boss did not physically abuse the telemarketers, he intimidated them by snapping his bullwhip, calling them racist names, and by being verbally abusive. This was too much for my prospective client, and after several months of this abuse, he had a breakdown and ended up spending six weeks in the hospital. He asked me for advice. A year ago, that would have been perhaps a million dollar recovery and I would have taken the case. Today all I was able to tell him was that there may be some state law claims in Texas we could pursue, but the most that the federal law would offer him is a right to tell this bully to put his bullwhip away. That really exemplifies a tremendous change in assessing that individual's case, and to some extent, all class and race discrimination litigation. To me, it is the most radical and astounding effect that the Supreme Court had in this area.

The other Supreme Court decision that requires a different counseling approach to potential plaintiffs is the Birmingham firefighters case, *Martin v. Wilks*. This decision requires the plaintiff to join as defendants not only all of the unions that represent employees of a defendant employer but also all of their nonunion employees as well. The case rests on the premise that you

1. 109 S.Ct. 2180 (1989).
2. 109 S.Ct. 2363 (1989).
3. 42 U.S.C. § 1981 (1982).

cannot bind someone who is not a party to the litigation, and the only way to bind employees who are not members of the class is to join their unions as defendants in the case. This is obviously more troublesome if you want to get a binding judgment against non-class member employees who are not represented by a union. I think this is a procedural problem that can be cured, but I want to point out that it is important to anticipate the issue when you are assessing a case. I have made a practice of joining the unions since 1976, when the chief judge in the district of Minnesota ordered me to join the unions in the 3M sex discrimination litigation. The fact that the Supreme Court decided this term that you must join the unions is not really a surprise. Furthermore, it doesn't require any different approach. It is one of those things that most plaintiffs' lawyers should have anticipated. The prudent approach before *Martin v. Wilks* was to join the unions, so a conservative opinion from the Rehnquist court would not be a shock, and would not throw any of your cases out of court.

The *Martin v. Wilks* decision can be easily accomodated this way. Not so *Patterson*, which in my opinion is a disastrous result for a lot of Blacks in this country, in that they can no longer collect damages for pain and suffering. In fact, they cannot collect any such damages at all. If you believe, as I do, in the deterrent effect of damages, you can see why I consider *Patterson* such a serious setback for civil rights. What the Supreme Court did was to put Blacks in the same place that women are in under federal law.

Women have never been able to collect damages under federal law for pain and suffering, humiliation, or for serious emotional injury due to sexual harrassment. In contrast, Blacks have been entitled to recover for such injuries. All harassment victims should have been put on the same footing long ago, but the Supreme Court went the wrong way. Every week I get five to ten requests from women who are being emotionally abused in the work place, and who have very strong claims of pain, suffering and humiliation. But, under federal law, they cannot collect for sexual harrassment. They may be able to stop it, by getting an order requiring the employer to to do various things in the work place to prevent sexual harrassment such as investigative and reporting procedures, but they cannot get damages. They cannot be "made whole." For example, I tried a sexual harrassment case against the General Electric Company last year in the eastern district of Virginia. My client had been harrassed, solicited, and assaulted by her supervisor. The workplace environment was permeated by sexual harassment. The supervisor had had coercive sexual relations with two other employees — often in the office itself. As a

result of this harassment, my client attempted suicide and spent six weeks in the hospital. The judge, who ruled in our favor on the harrassment issue, said yes indeed, GE was responsible and should have prevented the sexual harassment, and GE had to commit to a policy and a major training program to see that it did not happen again. Although the judge ruled that GE was responsible, my client collected only one dollar. Unfortunately, Virginia is one of the most conservative states in the country regarding employment matters, and has no state anti-discrimination law to protect women or minorities in the workplace. So our client ended up with little more than the gratification that she brought this problem to the public's attention, forced GE to change its practices, and hopefully protected other women. But she got no monetary compensation for what she endured. *Patterson* places Blacks and other minorities in the same boat.

Many people have said that *Wards Cove Packing Co. v. Atonio*,[4] is a far reaching decision that is going to change how we look at the world and how employment discrimination cases are tried. I disagree. I say that knowing that some very well respected academicians disagree. However, the truth is that *Wards Cove* is one of those decisions that a plaintiffs' trial lawyer should have anticipated a long time ago. You have to remember that *Wards Cove* was tried in Alaska fifteen years ago. As a matter of fact, I tried a class action case in 1986 with five months of daily in-court trial time, most of which was devoted to a statistical presentation. That statistical presentation in 1986 was very refined and it went far and beyond anything that could be required in *Wards Cove*. Each particular employment practice was isolated and statistical disparities were shown with respect to each of them. In fact, everyone in the courtroom got tired of it, and it does get to be very boring stuff, because of the necessary detail. To keep people awake you do things like intersperse anecdotal witnesses as you go along to bring the numbers to life a little. Anyway, given my experience, *Wards Cove* does not change anything in my approach to the statistical side of a discrimination case. I saw it coming years ago.

I tried employment cases in 1974, and in those days we did not have any direction from the Supreme Court like *Hazelwood School District v. United States*,[5] which came along in 1977, as to what the statistical standards of discriminatory impact were. It was a new approach then and attorneys were asking: "How do I do this?" Some attorneys in 1974 in Alaska simply looked at the

4. 109 S.Ct. 2115 (1989).
5. 433 U.S. 299 (1977).

workforce and decided that because the workforce was primarily Alaska Natives, then the pipefitters ought also to be primarily Alaska Natives. All Justice White did was point out what to me was perfectly obvious, and what the Supreme Court itself said in 1977, that you cannot compare pipefitters to the general population, you must compare pipefitters on the job with qualified pipefitters in the general population. That is, you must compare apples to apples, not apples to an undifferentiated mass of fruits and vegetables. My guess is that only a small fraction of qualified journeymen pipefitters in the state of Alaska are Alaska Natives. Anyone familiar with statistical presentations at the trial level could have looked at those factual records and said this case was a loser. For this reason, I don't think *Wards Cove* changes anything about the way I would handle a statistical case.

The other, more confounding problem, with *Wards Cove* was the "business necessity" language in it. The language is convoluted, and while some people may purport to explain to you what it means, I'm not sure its author could. The main reason I think that it is not that consequential, once future cases straighten out the meaning, is that in the several hundred employment discrimiation cases that I have dealt with, business necessity has been raised only on one occassion. It is difficult to find a legitimate business necessity to justify discrimination. For example, consider the 3M cases. These were brought in the early seventies and were among the first class actions in the district of Minnesota, and, as far as I know, in the Eighth Circuit. 3M tried to say that it hired women into the lower paying jobs because women were weak and could not lift things. If you presented that as a business necessity defense, to anybody, you would be laughed out of court. That is exactly how Judge Alsop, now the chief judge in this district, reacted to 3M's business necessity defense. He kicked out the defense on the plaintiffs' motion for summary judgment even under the more difficult standards of 1973.

So, as a practical matter, I do not think that *Wards Cove* means much. I know, of course, that whenever you get an opinion like this from the Supreme Court, a lot of people immediately write articles, largely funded by the business round table or the folks to whom this decision matters, which will support the proposition that the decision ought to be presented to the courts as a very significant defeat for civil rights plaintiffs. It is a question to debate, perhaps, but it is not in any way as important to plaintiffs' attorneys as what the Court did in *Patterson*.

Contrary to popular wisdom, there actually were some good

developments arising out of recent Supreme Court decisions. For instance, in *Texas State Teachers Association v. Garland Independent School District*,[6] the Court held that a plaintiff's lawyer need only prevail on some meaningful part of the litigation in order to collect a reasonable fee for the entire litigation. Since fees are a relevant part of case assessment to any civil rights advocate who wants to stay in business, this was a significant development. Before *Texas State Teachers*, employers argued, sometimes successfully, that plaintiff's counsel could only get paid piecemeal for the issues or motions they won. If the plaintiff lost on some other motion it sometimes had to subtract that time from its fee petition.

The Supreme Court recognized, however, that in order to be an effective plaintiff's advocate, an attorney must argue some positions which may be at the cutting edge. Consequently, it held that successful plaintiffs are entitled to a reasonable fee in cases stemming from claims arising from a common core of facts and involving related legal theories. *Texas State Teachers* is therefore a very significant decision and one that is played down by defense counsel and is much ignored by writers in the area, because fees are not really that important to people writing law review articles. As a practical matter, however, it is an important decision. It will encourage civil rights plaintiffs' attorneys to take on cases they otherwise could not.

The most important, positive development for civil rights plaintiffs from the Supreme Court last term was *Price Waterhouse v. Hopkins*.[7] Justice Brennan wrote his opinion very well, and he knew exactly what he was doing. In my view, he significantly changed the burden of proof in employment discrimination cases. This is very significant, because in the courtroom success often depends upon the burden you have to carry. Price Waterhouse, an accounting firm, had rejected a woman for partnership. Some of the partners who voted against her did so because they did not think she acted like a woman. They believed she was too aggressive and masculine, and that she did not dress right. In other words, they had sex-stereotyped her. In addition, her job performance was questioned, not an unusual issue when someone is being admitted to partnership in an accounting firm. So there were apparently two motives involved in voting her down. The Supreme Court said two new and important things in the *Price Waterhouse* case. First, it said sex-stereotyping of that nature violates Title VII. Second, and more importantly, it said that the employer has

6. 109 S.Ct. 1486 (1989).
7. 109 S.Ct. 1775 (1989).

the burden of proving a negative. That is, the employer in this kind of a situation has to prove that, in the absence of the discriminating motives or factors, it would have reached the same result.

This decision represents a return to where we were when trying these cases back before *Texas Department of Community Affairs v. Burdine*.[8] *Burdine* established the principle that all an employer had to do to shift the burden back to the plaintiff was to articulate a legitimate, nondiscriminatary reason for its conduct. Justice Brennan brought the law right back to where it was before *Burdine*. Some people may assert that *Price Waterhouse* only applies in a mixed motive case, that is in cases where both job performance, a legitimate reason, and sex stereotyping, an illegitimate reason, are factors. However, virtually all employment discrimination cases are mixed motive cases. In every case that I have tried, the employer said it fired the person or did not promote them because there was someone else better qualified, usually a white male. I say it was because of discrimination or reprisal. So you always have a mixed motive. If the burdens of proof are applied properly now and in the future, these cases will be easier for plaintiffs to win.

Despite those positive developments, cases such as *Patterson* give a clear message to people who advocate for civil rights that the Rehnquist Supreme Court is not hospitable to civil rights cases. That is what Justice Blackmun meant when he spoke of an "ill-wind blowing" on the Supreme Court. As long as this trend is recognized, it can produce some positive results. For one thing, I think that Congress is going to react and, hopefully in 1990, we will see remedial legislation. Senator Kennedy is the primary leader of the cause to restore Title VII to what it was intended to be before the Rehnquist Court started chipping away at employees' rights. The most important thing Congress can do is undo *Patterson*. It should enact legislation to treat racial and sexual harrassment on equal terms. But, apart from *Patterson*, there is no good reason to be discouraged as a plaintiff's lawyer.

As always, plaintiff's counsel needs to know the rules and anticipate developments in them. If you are not doing this, then you are not doing as good a job as you ought to be doing as a plaintiffs' employment trial lawyer. That is not to say that laws could not be made more favorable to the plaintiff's side. But, until such changes come about, I can live with those that we have been dealt, and encourage you to do the same.

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8. 450 U.S. 248 (1981).