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Critique: A Plaintiff's View

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CRITIQUE: A PLAINTIFF'S VIEW

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No greater challenge confronts persons seeking to enjoy America's promise of "equality and justice for all" than that of enforcing the clear congressional mandate that all forms of discrimination based on race, religion, nationality and sex be eliminated. It follows then that the continued existence of such discrimination constitutes a great danger to the moral and economic well-being of our nation.

Title VII of the Civil Rights Act of 1964[1]—clearly the most potent weapon in the struggle for equal employment opportunity—was born in the civil rights revolution of the sixties and was expanded in 1972 to cover the public sector. Notwithstanding the broad[2] and pervasive[3] coverage of the Act and a decade of litigation,[4] compliance is still the exception rather than the rule. Discrimination in employment is widespread and such progress as has been made has been the result of litigation by a small segment of the private bar and to a lesser extent by the activities of the Equal Employment Opportunity Commission (EEOC).

Several explanations may be offered for the disappointing results under Title VII to date. In the first place, the resources provided by Congress were and continue to be insufficient for the task. Since the early months following the enactment of the statute, additional funding has been needed to secure a sufficient staff to eliminate the tremendous backlog of cases pending before the EEOC. Second, the

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1. 42 U.S.C.A. § 2000e *et seq.* (1974).

2. Sections 701(b) and 701(e) extend the sweep of Title VII to all employees and unions in an industry affecting commerce with 15 or more employees or members. *Id.* §§ 2000e-2(b), -2(e).

3. Section 703(a)(1) prohibits discrimination in hiring and discharging and sections 703(a)(2) and 703(c) prevent employers and unions from limiting, segregating or classifying employees or applicants in any way which would deprive or tend to deprive an individual of employment opportunities because of race, color, religion, sex or national origin. *Id.* § 2000e-4.

4. Much of the early litigation involved procedural problems and technical defenses raised by companies and unions.

failure of the EEOC to take more aggressive and forceful action has contributed immeasurably to the problem; this failure has placed additional pressure on the private bar to become the major force in Title VII developments. Third, because of the protracted nature of Title VII litigation, the contingency of the undertaking and the huge cash outlay necessary to carry the litigation to a conclusion, only a small number of attorneys[5] have been willing to handle such litigation on behalf of the victims of discrimination. Fourth, many companies, unions, and governmental units have failed to recognize their exposure to liability under Title VII and/or have been willing to gamble that they would not be successfully sued. Fifth, only a minute number of those persons victimized by unlawful discrimination have filed complaints. Many victims do not file because they are unaware of the discrimination, are afraid of retaliation (either overt or subtle), or believe that the filing of a complaint would be an exercise in futility. Finally, the congressional assumption that voluntary compliance would play a major role in eliminating forbidden discrimination proved to be wrong. The fact is that only slight progress has resulted from voluntary compliance.

The last several years have produced highly successful litigation which should result in a more effective enforcement of Title VII. Of particular importance are cases which expand the back pay awards for victims of discrimination,[6] and those which provide for the payment of interim attorneys' fees.[7] The problems in securing effective enforcement of Title VII, however, are of such magnitude that it will require outstanding leadership by the EEOC, increased participation by the private bar, additional funding to EEOC by the Congress and effective and imaginative judicial interpretation by the federal courts. Anything less will not make serious inroads against the cancer of employment discrimination which has become so firmly entrenched in the employment policies and practices of the industries of our nation.

5. Much of the successful litigation to date has been sponsored by the NAACP Legal Defense and Educational Fund.

6. *See, e.g.*, Albemarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975).

7. *See, e.g.*, Patterson v. American Tobacco Co., 8 F.E.P. Cases 778 (E.D. Va. 1974).