

GENERAL DISCUSSION

After the foregoing presentations and discussions, the participants entered into the following dialogue:

Professor Player:

I think Professor Blanpain, as well as some of the others, was a bit too apologetic about the lack of litigation in or lack of sophistication of the European countries compared to the United States concerning employment discrimination. One can call it sophistication, but perhaps a better word would be complexity. My observation, not scientifically supported, would be that much of American litigation is due to the lack, as you may or may not know, of a very sophisticated system for compensating employees who are terminated without cause. Most American states follow an employment-at-will doctrine which allows employers to discharge employees for any reason, or no reason, with no obligation to compensate the employee. The employee could just show up one morning and be told there was no work that afternoon, and the employer would be under no further obligation.

Employment discrimination does not always involve overt animus directed toward the employee based upon the employee's race, sex or religion; rather, the decision may be merely arbitrary, or based on any other non-legitimate reason. But, to provide the aggrieved employee with a remedy, persons involved in litigation often employ race, sex, national origin, or age as a vehicle to attack an otherwise unreasonable dismissal. So, plaintiffs often mold or try to use these very complex burden of proof obligations as an indirect vehicle for attacking unjust dismissals. Since the European systems have methods by which employees who are unjustly dismissed are almost administratively allowed compensation, as I understand it, you do not have the same need for this complex litigation that has evolved in the American system to provide a remedy.

My second observation relates to, from what I gather, the fears of employees who bring claims of racial and, primarily, sex based discrimination of being black-listed or denied future employment. American law handles these fears quite simply, although perhaps not very effectively, by so-called non-retaliation provisions in our statutes. Even where statutes do not have these provisions, the courts will imply their existence. For example, in on-the-job injury cases, many

courts will hold that even if the workers compensation statute itself does not expressly protect against retaliation for filing a charge, an employer cannot discharge an employee for invoking that right. Furthermore, if an employee is discharged or denied employment allegedly because of her sex and files a claim, even if the sex discrimination claim is unsuccessful, neither this employer nor any other employer can use the filing of that claim as grounds for refusal to hire or dismissal.

A good deal of litigation is produced by invoking the non-retaliation provisions of the statutes as opposed to the basic prohibitions against sex and race discrimination. So, an unsuccessful plaintiff in a sex discrimination case, who later loses her job, is often successful in filing a retaliation claim which will provide for the same basic remedies. Some of the problems in the European system could perhaps be solved by incorporating simple non-retaliation provisions within your statutory schemes.

Judge Groenen:

Article 136 of the Belgian law is in fact an enactment of the non-retaliation principle because the moment the victim of a discriminatory practice files a suit or a complaint, she is protected against termination by an allowance of six months indemnity. She could never, however, be protected from termination by reinstatement because that remedy is completely foreign to our legal system. Although it exists on paper in certain dismissal cases, Belgian judges seem to harbor a general aversion to reinstatement as a remedy. One reason for this opposition is the long period of time elapsing between the original dismissal and the hearing and the judgment. Reinstatement would have absolutely no effect because, in the meantime, the worker will have found work elsewhere. The terminated employee cannot be obligated to return to a former employer who has already replaced her. This poses a very difficult situation.

Mr. Jacqmain:

I think we have come to the point where we must criticize the European instruments for not being explicit enough in defining the means of redressing discrimination. For instance, the equal treatment directive does not give any precise directions for awarding damages or redressing discrimination. So, the Member States are left to solve these questions according to their own traditions which is precisely why these provisions are not working very well. Of course, we have a system of protection against retaliation; but, compensation equal

to six months salary is a bit ridiculous (although usually most special compensation provided by law is just as weak). I am not absolutely certain, however, whether a crushing level of indemnity would be a better solution. The answer is probably "yes" in certain cases. But in cases, for example, involving an employer's dismissing a worker's delegate to a factory council, the employer will proceed to do so even though this act will result in crushing indemnity of the employee. The employer, if the company involved is big enough, will gladly pay in order to get rid of a problem-causing delegate. So, I think the nearly philosophical, eternal debate on reinstatement continues.

This debate is heart-breaking because many situations exist, especially in cases of equal pay for instance, in which a woman is dismissed for nothing more than complaining about her pay. Even in the air hostess case, the management had never reproached the plaintiff. She was a good air hostess; she was not impolite with clients or anything of the sort. Her employer even went so far as to say that if compelled to take her back, it would do so. So, when our Supreme Court ruled that Article 133 of our law cannot be used to suppress a dismissal, it was a purely philosophical position concerning the impossibility of reinstatement as a remedy; but this conclusion did not arise from any necessity, not even from factual necessity.

Mr. Currall:

There are several points which might be interesting. The first is that Belgium is certainly not alone in precluding the possibility of ordering the hiring or the reinstatement of somebody who is not hired or who is dismissed in a discriminatory manner. This has always been the law in the United Kingdom, for example. It is said to be against public policy to force an employer to hire somebody against the employer's will; likewise, if the employer is the plaintiff, it is equally unfair, or indeed oppressive, to force an individual to perform a contract of employment if that individual prefers to breach the contract to go and work elsewhere. This has always been the position at common law, and it has not been changed by statute. The most that can happen under English law, or indeed the law of any part of the United Kingdom, is that industrial tribunals (i.e. labor courts) can recommend that a person be engaged or reinstated, but the tribunal's declaration is purely a recommendation.

My second point, which does not involve merely the passage of time since in fact industrial tribunals work reasonably fast, relates to the rights of third parties. Suppose an employer discriminates against a woman by refusing to hire her. Also imagine that a man

is hired instead. He probably had nothing whatsoever to do with the actual act of discrimination committed by the employer. This person is an innocent third party; so, why should he be thrown out of his job in order to instate somebody else, even if she is a victim of someone else's act of discrimination? Short of saying that the employer should in fact hire them both when there is only one job to be done, it is not easy to see that compulsory hiring or reinstatement is necessarily a suitable remedy in all cases.

My third point concerns sanctions. We have heard various criticisms of the situation in Belgium, and the situation in Germany was also pretty extraordinary until about five years ago. Formerly, the only damages one could recover under the ordinary civil law rule, which then applied in discrimination cases, for a discriminatory refusal to hire, were for the plaintiffs' expenses incurred during the interview process. Two famous cases which illustrate this point came before the European Court of Justice as preliminary questions: *Colson v. Land Nordrhein-Westfalen*¹ and *Harz v. Deutsche Tradax GmbH*,² in which the uselessly incurred expenses totaled about 1 mark 90 (about one dollar), which was the price of the bus fare to go to the interview. I do not know what the legal costs in the cases were. The interesting point about these cases is that the European Court of Justice held that where a national provision is simply ambiguous (the German law did not actually specify this as the only remedy, it simply was not clear that the court could give any real compensation as well), the existence of the directive and the precise nature of the obligations it imposes presupposes that it also be effective. Although none of the directives say anything about a specific sanction, whether it should be a criminal sanction or a civil remedy, there nevertheless must be a remedy, at the discretion of the Member State, and it must be effective. When those cases, after this interpretation, went back to the German judges, the judges found a means of awarding compensation. It is not for me to say whether the award was jurisprudentially correct according to German law. I think the award was for the six months' salary the applicants would have received had they been engaged. That appears to be the same measure of damages one can recover in Belgium.

In Britain, damages normally are available, but there is a maximum limit in discrimination cases. That limit was breached in *Marshall v.*

¹ [1984] E.C.R. 1891.

² [1984] E.C.R. 1921.

South Hampton and South-West Hampshire Area Health Authority in which the plaintiff was awarded two and half times what the tribunals were allowed to give.³ The award was to all appearances an unlawful act by the tribunal; the judgment, however, was not appealed, at least not on that point. While the average award is much lower, the normal contractual basis, subject to the maximum limit in discrimination cases, is what a plaintiff would have earned during the minimum notice period had he or she been hired and then been dismissed. So, if the period of notice would have been three months, the plaintiff could only get three months salary as compensation for discrimination. The employer would have had the right of dismissal at that stage anyhow.

This discussion of sanctions is interesting because nothing specific exists in the directives. There are only the two basically identical decisions of the European Court of Justice of which I spoke earlier. These cases involve a kind of "rule of reason," saying: these directives have to be effective so there has to be a sanction, but the Member States can choose what it is to be. The time may have come for the Community to do something in the way of proposing a directive about sanctions. In fact, the Council of Ministers recently adopted its current work program, although this is a purely political decision, in which the question of sanctions is mentioned as something the Commission should make some proposals on in the future. This proposal would have to be a directive, and it would have to be adopted unanimously. We must remember, however, that many Member States have a long-standing tradition of not allowing compulsory reinstatement or instatement of individuals as a remedy in employment cases. Belgium has been cited; I have cited the United Kingdom, and I believe there are several others. In Germany, reinstatement is not possible as a right; it can be ordered in some cases, but there is no possibility of having it ordered systematically. I think it unlikely that such a directive will be adopted in the short term precisely because of long-standing traditions of not providing for this remedy.

That brings us back to the question: If you cannot have specific performance, what can you have? There is not much left except damages. The next question then is: How much is effective? That interesting question has something to do with tax law and whether compensation for discrimination is tax-deductible. If the corporate

³ [1988] I.R.L.R. 325.

tax level is 50%, the effective cost of compensation for the discrimination is only half of the amount paid. Case law in some European states shows that a fine imposed by the Commission in a competition case, for example, is nevertheless tax-deductible. Some people might say that allowing this deduction is against public policy, as being an incitement. So, these are some interesting questions to consider.

To summarize, the Commission is considering possible proposals. It will probably consult an expert working group before drafting any formal legislation. The problem has not escaped our notice, but I do not think we should be optimistic about any express sanctions, other than damages, being proposed, and, still less likely, being accepted. Thank you.

Professor Rohlik:

It seems to me that the only question is whether it pays to vindicate one's rights. What is the motivation to vindicate one's right, whether the ultimate remedy is a reinstatement or not? Very often in the United States, when the remedy is reinstatement, no reinstatement occurs in the end because the employee takes a certain amount of money. What is the motivation to vindicate one's right and what assistance is available in the vindicating of one's right? For instance, if contingency fee arrangements did not exist, lawyers would not take these cases and the employee would not get anywhere in some areas. In other areas, of course, the state or the federal government provides the assistance. Of course, if there is sufficient motivation for the employee to sue, for instance the prospect of a large recovery, then he or she will sue. Large recoveries are conduct regulating because the cost of discrimination becomes too high and, as a consequence, the employer has an incentive to pattern his or her conduct accordingly.

In ordinary discharge cases, not involving discrimination, experimental mediation procedures are now being substituted for arbitration in the United States. A mediator comes to a discharge case and tries to reach a compromise. Usually, three such cases are heard in a day. The mediator is paid a little bit more than the arbitrator for that day, but transcripts are not available and no study time and no lawyer is involved, etc. This is a touchy area as far as lawyers are concerned because usually the lawyers representing the companies do not participate in these cases. Very often the mediation compromise reached will be that the company offers the employee a certain amount of money which he or she will accept in lieu of the job. One large

employer with whom I am very familiar offers usually a three year salary for quitting.

If the mediation fails, ordinary arbitration follows. One of the features of mediation in this particular program is that all mediators are arbitrators and members of the National Academy of Arbitrators. If mediation does not seem to proceed well enough, the mediator will tell the parties what, in his or her view, will be the probable outcome before a different arbitrator in arbitration. The rate of settlement is about 80%.

Professor Player:

In European systems of enforcement, are class actions used?

Professor Vogel-Polsky:

Under French, Belgian, or Dutch legislation, a trade union may bring a case before the Court in the so-called "collective interest" of the union or its members, even when the plaintiff herself or himself refuses to litigate. The issues in the case remain of an individual nature, and the solution adopted by the Court will only apply to the individual case of discrimination, if any is found.

For the first time, in 1976, the European Court of Justice (E.C.J.) clearly and explicitly recognized the importance of Article 119.⁴ Member States, the Commission, and the Council of the E.E.C. shared the opinion that the principle of equal pay, enshrined in Article 119, must be implemented through Community law or national legislation. In the same ruling, the E.C.J. issued a strong limitation which had a reverse effect upon the self-executing nature of Article 119. The E.C.J. decided that, because neither the Member States nor the supra-national organs of the E.E.C. were aware of the self-executing nature of Article 119, its historical preliminary ruling would only apply to plaintiffs which had already brought an action before the tribunals. The E.C.J. decided to exclude from the ambit of Article 119 the hundred thousand cases in which women had been discriminated against in violation of Article 119 during the past twelve years. Artificially, the E.C.J. limited the consequences of the direct effect of Article 119 to the time of its decision.

The E.C.J. justified this denial of the essential nature of a self-executing provision by concluding that, in the name of public interest and juridical security, protection should be given to employers, en-

⁴ Defrenne v. Sabena, [1976] E.C.R. 455.

terprises, and governments against numerous claims seeking back-pay. This argument was completely anomalous, for its boomerang-effect was to deny legal protection, under Community law, to the category of people Community law intended precisely to protect. The discriminators were absolved because they pretended to have good reasons for misinterpreting Community law; women were effectively banished from the court due to their fear of retaliation.

The *Defrenne* case was a great victory from the perspective of legal science, in that Community law was enriched by a ban on sex-based determination of wages.⁵ This decision generated later on the core of E.E.C. law in the field of equal treatment and equal opportunity. But, for the thousands of women who were effectively discriminated against during the period from 1961 to 1971, the decision of the E.C.J. was an immense defeat precisely because our Community legal system ignores class action.

On different occasions, experts and lawyers have proposed that we augment our system by adopting class actions. Such an improvement of Community law could represent one of the remaining possibilities for effective implementation of equal treatment protection for men and women. In this respect, the interrelationship between international agreements like the U.N. Convention on the Elimination of All Forms of Discrimination Against Women and Community law should be stressed. The former treaty already provides for class actions, and Article 119 provides for equal treatment. Directives must be interpreted within the scope of Article 4 of the U.N. Convention, which I commented on earlier.

Ms. Walgrave:

We do not have class actions in Belgium. But conciliators involved in cases also act as the chairpersons of joint committees which negotiate collective agreements at the branch level. During the negotiations, we consider challenges to past collective agreements in order to avoid similar problems in agreements under consideration. So, while these cases do not compel a certain result, they do act as a guide.

Mr. Jacqmain:

Still, that is not the equivalent of a class action but is a systematic test case strategy. Women, more or less supported by unions, have

⁵ *Id.*

used this strategy. At the end of the 1960's, a number of unemployed women went to the courts to contest discrimination in the rates of unemployment benefits. The rulings of the courts were individual, of course, but that strategy served to pressure modification of the law. These days, a number of widows are contesting legal limitations to the possibility of collecting their own pensions as well as survival pensions. A spate of test cases, which are more or less coordinated, are now before the courts around the country.

Professor Vogel-Polsky:

Yes, but that is an accumulation of individual cases. Their effect on future judgments is only through the weight of case law.

Unfortunately, litigation remains strictly on an individual basis, along with the sanction or remedy decided by the tribunal. The situation will never arise where the employer has an obligation to provide a remedy for the entire class, for all workers subjected to the same unequal treatment. Never will a judge identify a discriminated group as such and order compensation for the group. That is a great failing of our Community system.

Mr. Currall:

I accept your point. But, in actions brought in the United Kingdom and Ireland, one often finds, in references to the European Court of Justice under Article 177 of the EEC Treaty (request for interpretation of Community rules which affect the outcome of a case before a national court), considerable coordination between the parties. The parties often agree to the facts; for example, the Order for Reference will frequently contain stipulations such as: It is agreed that Mrs. X would not have been dismissed if she had been a man of the same age in the same situation. The European Court of Justice, therefore, does not have to worry about hypotheticals, since the facts are agreed; it only has to worry about the interpretation of Community law, for in that the parties do not, of course, agree.

The same approach is often used as to the result of an action. In a case in which I was involved, there was only one nominal plaintiff. The defendant (a public authority) agreed, however, that it would treat itself as bound by the result of that case in relation to several hundred other people, whose situation was said to be identical, save for dates and amounts. This practice, which certainly exists in the United Kingdom and Ireland, gives a result in fact quite similar to class actions. The result is a saving in administration and litigation costs. Although the case only involves one actual plaintiff, the parties

agree between themselves that the result will be binding in other similar cases, without litigating them too. I entirely agree, however, that this is not a formal class action.

Ms. Player:*

The cases that have been discussed that may function as class actions, that is, where the employer's policy is challenged, make up only one type of employment discrimination class action brought before United States' courts. The other type of class action is based on a plaintiff's contention that the employer has engaged in a "pattern or practice" of discrimination. In this type of class action, the plaintiff must show that this pattern of conduct was motivated by discriminatory animus.

"Pattern or practice" cases proceed in two stages. First, the judge hears evidence, including statistical evidence, to prove the pattern of discriminatory conduct. If the judge concludes at the end of this evidence that the employer engaged in a pattern of discrimination, the plaintiff usually will ask for a remedy for the class; for example, an order requiring the employer to hire, promote, or reinstate persons in the class discriminated against until persons of that class occupy a certain percentage of the work force. The plaintiff also might seek an order prohibiting future discrimination against the protected class of persons. These remedies would be available in addition to the back pay lost because of the employer's illegal conduct. In "stage two" of the "pattern or practice" case, after liability is found against the employer, the class members may come forward with their individual claims and seek equitable relief and/or back pay.

Some of the cases discussed this morning suggest that the United States Supreme Court is restricting the power of trial courts to order the types of equitable relief previously ordered in class actions. The case of *Martin v. Wilks*,⁶ suggests a new concern by the Supreme Court for the persons who are denied a job or a promotion because of preferences in hiring or promoting a member of the class discriminated against according to a quota or formula ordered by the trial court or agreed upon by the plaintiff class and the defendant employer. *Martin v. Wilks* demonstrates that a majority of the Justices are sensitive to arguments that Title VII of the 1964 Civil Rights

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⁶ 109 S. Ct. 2180 (1989).

Act,⁷ which has been in effect for 25 years, has eliminated much discrimination in the work place. Thus, the power that courts fashioning equitable relief under Title VII have exercised previously in class actions may be restricted in the future, and more attention may be paid to those persons whose rights may be affected by court-ordered or court-approved hiring or promotion orders.

Professor Vogel-Polsky:

Speaking for the European participants here, one of our main interests in American doctrine in this field is the decisive contribution it has made to developing an analysis of inequality in the context of systemic discrimination. The approach to systemic discrimination seems to benefit judges. It helps the courts to identify patterns of discriminatory conduct and provides for injunctive relief to end the practice.

We have advanced little in this respect. That is why a meeting like this one plays an important role; comparisons between legal theory and legal practice in various countries enlarge our understanding and interpretation of our domestic systems. Patterns of sex-discrimination in employment are very similar, but we do not use the same tools and we do not get the same results.

In Europe, cases of disparate treatment of men and women often result from collective agreements. The discrimination, derived from the collective agreement, is systemic. In practice, it is often impossible for an individual to contest a provision of a collective agreement. His or her trade union will not support the claim. Moreover, under Belgian law, no possibility exists for holding the trade union liable in the case of patent discrimination. But, that which is impossible under Belgian law could possibly be provided for in other Member States. Differences in legislation at national levels hinder the development of a common European anti-discrimination strategy. I believe that the systemic approach could provide strong impetus for better implementation of Community law.

⁷ 42 U.S.C. § 2000e.

