

SYSTEMIC DISCRIMINATION ISSUES: A Labor Lawyer's Perspective

Presentation by:

**Connie Y. Harper
Associate General Counsel
International Union, UAW
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216**

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Systemic Discrimination against members of the classes protected by Title VII has been a fact of life for most of the history of the labor movement.

In order to fully appreciate the impact of Title VII on the labor movement, one must roll back the clock to 1935 when both the National Labor Relations Act (Wagner Act), which gave industrial employees the right to organize, and the Fair Labor Standards Act, which established basic worker rights such as the 40-hour work week, were adopted by Congress. Neither Act protected agricultural and service workers, public employees nor anyone not involved in interstate commerce. Significantly, at that time most African-Americans, Latinos and women worked within either the agricultural or service sectors, therefore, they gained little if anything from these New Deal labor policies which established the parameters of modern worker rights. Consequently, at that time, the labor movement was highly segregated.

The few labor organizations that permitted African-Americans and Latinos to join maintained racially segregated facilities and/or local unions. And it was not uncommon for unions to negotiate contracts that limited African-American workers to the dirtiest and lowest paying jobs.

That is precisely the environment that gave rise to the court's decision in *Steele v. Louisville & N.R. Co.*, and *Brotherhood of Locomotive Firemen and Enginemen*, 323 US 192 (1944). There, plaintiff filed suit to enjoin enforcement of agreements between the defendants that discriminated against black firemen in favor of white firemen. Although the railroad employed African-Americans in the job classification of "fireman," the union's constitution excluded African-Americans from union membership. Then, the railroad and the union negotiated an amendment to the collective bargaining agreement

that excluded African-Americans from working as firemen. The CBA further reserved the right of the union to negotiate further restrictions on the employment of African-American firemen and limited their seniority rights. The African-American firemen were given neither notice nor the opportunity to be heard with respect to either of these agreements before they became effective.

In this landmark decision, the court construed the Railway Labor Act and ruled, for the first time, that labor organizations have a duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination. This ruling was later read into the duties of exclusive representatives established in §9(a) of the National Labor Relations Act.

Then Title VII was enacted which made labor organizations potentially liable for discrimination based on protected classifications. By the 1960's, African, Latino and Asian Americans accounted for only 25% of all union members. In 1968, only three (3) years after the effective date of Title VII, there were 170 civil rights cases pending against unions in federal courts. In response to the EEOC's scrutiny of labor organizations, many unions began to take proactive actions to eliminate invidious discrimination in their bargaining units.

During the 1980's, unions used Title VII to challenge wage differentials between men and women and to seek pay equity for its members in so-called "comparable worth" class actions. *International Union of Electrical, Radio and Machine Workers (I.U.E.) v. Westinghouse*, 631 F.2d 1094 (3rd Cir. 1980); "Wage Differentials as Violative of those Provisions of Title VII of the Civil Rights Act of 1964, as amended, which Prohibit Sex Discrimination in Employment," 62 ALR Fed 33; *American Federation of*

State, County, and Municipal Employees (AFSCME) v. State of Washington, et al, 770 F.2d 1401, (9th Cir. 1985); *International Union, UAW v. State of Michigan, et al*, 886 F.2d 766 (6th Cir. 1989).

As significantly, in the 1990's unions continued to invest their considerable resources to advancing the causes of women and minority members by prosecuting and winning litigation such as *UAW v. Johnson Controls, Inc.*, 499 US 187 (1991). This was a systemic discrimination case that challenged the employer's policy that barred all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the Occupational Safety and Health Administration (OSHA) standard. The court ruled that the policy was facially discriminatory because it required only female employees to produce proof that they were not capable of reproducing, despite evidence of the debilitating effect of lead exposure on the male reproductive system.

EEOC v. Mitsubishi Motor Manufacturing of America, et al, 990 F. Supp. 1059 (CD Ill. 1998) [held: Title VII authorizes a pattern or practice action for sexual harassment] involved claims of alleged pattern or practice of sexual harassment, sex-based harassment and retaliation on behalf of a class of current and former female employees from 1990 to 1998. It was resolved by entry of a Consent Decree in June 1998 that provided a \$34 million dollar settlement fund and specific non-monetary relief including revision of the company's sexual harassment policy and sexual harassment complaint procedure, as well as mandatory annual sexual harassment training for all supervisors and sexual harassment training for all new employees. A panel of three Consent Decree Monitors had authority to implement the terms of the Consent Decree

for the three-year duration of the Decree. The UAW was a Rule 19 party to the Consent Decree.

A similar claim is pending against Caterpillar, *EEOC v. Caterpillar, Inc.*, 336 F. Supp. 2d 858 (ND Ill. 2004), *affirmed*, _____ F.3d _____, 2005 WL 1274283 (7th Cir. May 27, 2005) where the EEOC has again alleged a pattern and practice of sexual harassment of salaried female employees. The UAW is not a party to this case, although it represents the hourly workers at the facility involved in the litigation.

Few, if any, lawsuits alleging intentional racial discrimination have been filed against unions in recent years. The handful of systemic cases that have been filed challenge selection procedures used by Joint Labor Management Apprenticeship programs. These have been resolved amicably without protracted litigation in those cases where the UAW has been a Rule 19 defendant.

A recent systemic discrimination claim that was decided after a bench trial is *Isabel v. City of Memphis*, 404 F.3d 404 (6th Cir. 2005). There, African-American police sergeants successfully challenged the city's written test used in promotions to lieutenant. The Sixth Circuit Court of Appeals affirmed the judgment for plaintiffs and the attorney fee award.

Another area of systemic discrimination that continues involves employer rules that require all workers to speak or read English at work. The EEOC has taken the position that fluency in English as a condition of employment is a "test" within the meaning of *Griggs v. Duke Power Co.*, 401 US 424 (1971); *EEOC Dec. YAU 9-048*, 2 FEP 78 (1969) (reasonable cause to believe that an employer violated Title VII when he discharged Spanish-surnamed American, allegedly for poor work due to his inability to

communicate well in English); *EEOC Dec. AL 68-1-155E*, 1 FEP 921 (1969) (reasonable cause to believe that employer violated Title VII by refusing to consider Spanish-surnamed American for employment as retail store manager on basis of his accent). *Cf. Luna v. Machinists Local 36*, 614 F.2d 529, 22 FEP 525 (5th Cir. 1980) (award of attorney's fees against plaintiff *pro se* in national origin suit reversed based in part on limited English fluency). *See also*, 29 CFR §1606.6(b)(1) (1980) (EEOC regulations: fluency in English requirement will be closely scrutinized but will not be considered an exception to the "bottom line" concept).

The question presented in these cases is whether the degree of fluency in English required by the employer is necessary to the performance of the employee's duties and thus constitutes business necessity. *Berke v. Ohio Dep't of Pub. Welfare*, 628 F.2d 980, 30 FEB 395 (6th Cir. 1980) (denial of position due to Polish accent was national origin discrimination in violation of Title VII); *Carino v. University of Oklahoma*, 25 FEB 1332 (WD Okla. 1981) (University unlawfully demoted plaintiff because of his accent; accent is immutable and not easily changed); *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375, 18 FEP 602 (SDNY 1978) (plaintiff's limited English language abilities justified failure to promote to a front office cashiering position).

A potential claim is festering in one of our UAW bargaining units where the employer requires Spanish-speaking employees who seek promotion to the welder classification to be able to read English on blueprints.

CONCLUSION

After over forty (40) years of Title VII implementation, members of the protected class continue to suffer the effects of systemic discrimination at work. Labor organizations have evolved from part of the problem to part of the solution.