CASE COMMENTS

Civil Rights—Fair Employment Practices — Recognition of Working Environment as a Protected Condition of Employment

Employee filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) alleging that her former employer discriminated against her by "segregating the patients."[1] The EEOC issued a demand for access to evidence,[2] including records and information relating to the treatment of the patients. Employer petitioned to have the demand limited[3] to exclude information regarding segregation of patients, arguing that the EEOC had no authority to investigate such a charge since segregation of patients could not amount to an unlawful employment practice under Title VII of the Civil Rights Act of 1964.[4] The district court granted the petition, denying the request for patient records.[5] On appeal to the Court of Appeals for the Fifth Circuit, *held*, reversed and remanded. "Segregating the patients" may be an unlawful employment practice since it could create a "discriminatory atmosphere" which would result in discrimination against employees with respect to "terms, conditions, or privileges of employment."[6] *Rogers v. Equal Employment Opportunities Commission*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3568 (1972).

The EEOC was created by Congress as the administrative agency responsible for seeking compliance with Title VII of the Civil Rights Act of 1964.[7] Any individual aggrieved by a practice made unlawful

1. The charge stated in part:
   The above company has discriminated against me because of my national origin Spanish surnamed American by:
   . . . .
   b. segregating the patients.
Rogers v. EEOC, 454 F.2d 234, 236 (5th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3568 (1972). How or why the patients (patrons of a firm of optometrists) were segregated or the employee's role, if any, therein are not clear.

2. The demand for access was issued pursuant to 42 U.S.C. § 2000e-8(a) (1970).

3. The petition was filed pursuant to 42 U.S.C. § 2000e-9(c) (1970).

4. 42 U.S.C. § 2000e (1970) (equal employment opportunities). The 1972 amendments to this Act make procedural changes, but do not affect the definition of unfair employment practices (§ 2000e-2(a)) which is the basis of this decision.

5. Rogers v. EEOC, 316 F. Supp. 422 (E.D. Tex. 1970), *rev'd*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3568 (1972).

6. This was the decision of Judge Goldberg. Of the other two Judges who heard the case, one concurred with Goldberg in result only, and the other dissented.

7. 42 U.S.C. § 2000e-4 (1970).

by that Act can initiate EEOC action by filing a charge with that agency.[8] The ageny will investigate the charge to determine whether there is reasonable cause to believe that it is true.[9] In several decisions the EEOC has found reasonable cause to believe that practices which affect the working environment are unlawful,[10] and has taken the position that the employer is required to "maintain an atmosphere free of racial and ethnic intimidation and insult."[11] A federal district court, recognizing this position by implication, held that it was unlawful to discharge an employee for inability to get along with coworkers where it appeared that the friction resulted from racial prejudice on their part.[12]

There is no mention of intent in the general definition of unfair employment practice.[13] In interpreting section 2000e-2(h) of 42 U.S.C. which specifies that a seniority system is not unlawful if it "is not designed, intended or used to discriminate," the Supreme Court has held that a practice which places an individual in a relatively less favorable position because of his race is unlawful, regardless of the employer's intent.[14] The Court stated: "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[15] The section authorizing the court to grant injunctive relief "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice,"[16] has been interpreted as requiring only that "the defendant meant to do what he did, that is, his employment practice was not accidental."[17]

In the instant case, Judge Goldberg found that the working environment was a term, condition or privilege of employment.[18] He stated that employee fringe benefits are becoming an increasingly important aspect of the employment relationship, and that psychological fringes should have the same protection afforded to economic fringes.[19] Petitioners' argument that patient discrimination could not

8. 42 U.S.C. § 2000e-5(a) (1970).
9. *Id.*
10. *See* Decision No. 71-909, 3 FEP Cases 269, (Dec. 24, 1970); Case No. CL 68-12-431 EU, 2 FEP Cases 295 (1969); Case No. YSF 9-108, 1 FEP Cases 922 (June 26, 1969).
11. Decision No. 72-1561, 4 FEP Cases 852 (May 12, 1972).
12. Anderson v. Methodist-Evangelical Hospital, 4 FEP Cases 33 (W.D. Ky. 1971), *aff'd*, ___ F.2d ___, 4 FEP Cases 987 (6th Cir. 1972).
13. 42 U.S.C. § 2000e-2(a) (1970).
14. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
15. *Id.* at 432.
16. 42 U.S.C. § 2000e-5(g) (1970).
17. Local 189 United Papermakers v. United States, 416 F.2d 980, 996 (5th Cir. 1969).
18. Rogers v. EEOC, 454 F.2d at 238.
19. *Id.*

be an unlawful employment practice because it was "directed toward petitioners' patients and not toward any employee"[20] was not material because there is no requirement of intent to discriminate against employees.[21]

Recognizing that it would be possible to discriminate against minority group employees indirectly through practices which affect the working environment, the writer said, "I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice."[22] Because charges filed with the EEOC are written by non-professionals, they are to be interpreted liberally.[23] A specific explanation of how the practice of "segregating the patients" had the effect of discriminating against employee because of her national origin was therefore not required.[24]

Interpreted liberally, the charge could also be construed as meaning that the employee, because of her national origin, "was not permitted to have contact with Anglo-Saxon patients."[25] The concurring opinion was based on this interpretation. Since discovery could be permitted on this basis, the concurring opinion stated that it would be neither necessary nor appropriate to consider the effect of the broader interpretation.[26]

The dissenting opinion pointed out that segregation of patients is discrimination in public accommodations and is prohibited by Title II of the Civil Rights Act of 1964.[27] It argued that permitting the EEOC to investigate this charge results in extending its authority to an entirely new field. The result is to make the Act "internally inconsistent"[28] since some establishments excluded from Title II are covered by Title VII[29] and since a different agency is responsible for seeking compliance with Title II.[30]

It may be argued that there is no real distinction between discrimination in employment and discrimination in public accommodations.

---

20. *Id.*

21. *Id.* at 238-39 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

22. Rogers v. EEOC, 454 F.2d at 238. Actually the question could have been avoided if the interpretation favored in the concurring opinion had been adopted. See text accompanying note 25 *infra*.

23. *Id.* at 240. *See* Sanchez v. Standard Brands, Inc., 431&F.2d 455 (5th Cir. 1970); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968).

24. Rogers v. EEOC, 454 F.2d at 240-41.

25. *Id.* at 241.

26. *Id.* at 243.

27. *Id.* at 246, citing 42 U.S.C. § 2000a(e) (1970).

28. *Id.*

29. *Id. Compare* 42 U.S.C. § 2000a(a) to (e) (1970) *with* 42 U.S.C. § 2000e(a) to (i) (1970).

30. *Id.* 42 U.S.C. § 2000a-3(d) (1970).

If an individual or firm practices discrimination in one area it might also be expected to do so in other areas. The procedure set up by Congress requires that each of these areas be investigated by a separate agency. Possibly it would be more efficient to permit a single agency with broad powers to examine all of a firm's practices at one time, but the statute does not provide for this.

Recognition of the working environment as a condition of employment entitled to full protection under the Civil Rights Act of 1964 might have the effect of allowing the EEOC to investigate almost any aspect of the operations of an employer covered by the Act. If the challenged practice involves overt discrimination, as in the instant case, it does not appear to be required that the charging party be a member of the group against whom the discrimination is directed.[31] Also, there seems to be no logical reason for restricting application of the principle to cases in which overt discrimination against non-employees is charged. Even a practice as superficially neutral as choosing a particular color for the walls of the workroom could theoretically be challenged by an employee by charging that the color chosen has a detrimental effect on working conditions.

However, an employment practice is not unlawful unless it has the effect of placing one or more employees (or potential employees) in a relatively less favorable position "*because of* such individual's race, color, religion, sex, or national origin."[32] A practice which affects the working environment would therefore not be unlawful unless its impact on a protected group was greater than that on employees in general. Thus, one element of a case challenging such a practice would be proof that the individual allegedly discriminated against was affected, not because of individual sensitivity, but because the protected group to which he or she belonged was *generally* more sensitive to the practice than other groups.[33] This requirement should answer the objection in the dissenting opinion that the Act was not concerned with "whether a particular individual might be uncomfortable or have feelings of unhappiness in his employment."[34] It

31. In the principal case, the charging party was a Spanish surnamed American, but the patient segregation may have been directed against blacks. Rogers v. EEOC, 454 F.2d at 243. In Decision No. 71-909, cited *supra* at note 10, the EEOC permitted a white employee to challenge discriminatory practices directed against his Negro co-workers.

32. 42 U.S.C. § 2000e-2(a) (1970) (emphasis added).

33. For example, if it could be shown that a high degree of sensitivity to religious discrimination was a characteristic of the white race, then an employer who discriminates against customers on the basis of religion could be guilty of discriminating against white employees on the basis of race. But if such sensitivity is a purely individual characteristic, then there would be no unfair *employment* practice.

34. Rogers v. EEOC, 454 F.2d at 246.

should also make employment discrimination based on working conditions extremely difficult to establish, thus eliminating unreasonable claims.

S.K.

Constitutional Law—Self-Incrimination—Use and Derivative Use Immunity Is Coextensive With the Privilege Against Self-Incrimination and May Be Used To Compel Testimony

Petitioners were subpoenaed to appear before a United States grand jury. An order was obtained from the district court directing petitioners to answer questions and produce evidence before the grand jury in exchange for a grant of immunity conferred pursuant to 18 U.S.C. section 6002.[1] Petitioners refused to answer the questions, contending that the immunity granted was insufficient to supplant the privilege against self-incrimination and compel their testimony. The district court found them in contempt.[2] On appeal the court of appeals affirmed.[3] On writ of certiorari[4] to the Supreme Court of the United States, *held*, affirmed. The United States can constitutionally compel testimony from an unwilling witness who invokes the fifth amendment privilege against compulsory self-incrimination by conferring immunity (as provided by 18 U.S.C. section 6002) from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings.[5] *Kastigar v. United States*, 92 S.Ct. 1653 (1972).

---

1. Section 6002 was added to Title 18 of the United States Code by the Organized Crime Control Act of 1970. It provides immunity from compelled testimony and information derived therefrom in any subsequent criminal prosecution.

2. The petitioners were committed to the custody of the Attorney General until either they answered the questions or the term of the Grand Jury expired.

3. Steward v. United States, 440 F.2d 954 (9th Cir. 1971).

4. Steward v. United States, 440 F.2d 954 (9th Cir. 1971), *cert. granted, sub nom.* Kastigar v. United States, 402 U.S. 971 (1971).

5. Two views exist as to the necessary degree of immunity needed to adequately supplant the fifth amendment privilege against self-incrimination. Transactional immunity is an absolute immunity from any offenses or transactions disclosed in the compelled testimony. Use and derivative use immunity prohibits only the use of the compelled testimony and any fruits flowing therefrom, but allows the government to use evidence obtained from an independent source to prosecute the witness.