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HINDSIGHT AND FORESIGHT ABOUT FEPC

JOHN G. FEILD*

PEOPLE are asking better questions these days. They used to ask: "Do we need fair employment laws?" Today they are asking: "Are our FEP laws adequate?"

Hopefully, this new question will be answered somewhat more affirmatively with the passage of the Federal Civil Rights Act which includes provisions extending equal employment opportunity on a national basis for the first time in our history. The answer may at best be only partial, however, not only because it is questionable whether the provisions of the new federal law will in fact be adequate to the need, but equally because the continued operation of existing state and local fair employment laws on their present basis is increasingly being challenged.

This challenge, of course, is coming not from those who oppose fair employment laws but primarily from those they are designed to benefit. Ironically, this comes at a time when the operation of these laws has reached unprecedented coverage. Today there are 22 states and more than 50 cities with enforceable fair employment codes. In addition, at the federal level, the strongest executive order ever issued on the subject, signed by President Kennedy in 1961, already embraces that huge portion of the economy that is now involved in federal contracting. It may not be too much to say that fully 75 per cent of all employment is currently subject to some antidiscrimination regulation. Why have these doubts been raised at this time and what validity do they have?

In part, the doubts as well as frustrations expressed in recent direct action demonstrations over job discrimination in the north as well as the south seem verified by recent economic data released by the Census Bureau and the Department of Labor. Dr. Herman Miller, Assistant to the Director of the United States Census Bureau, in his testimony before the Senate Subcommittee on Employment and Manpower last summer testified that his analysis of Department of Labor reports and United States census data indicated that the "economic status [of Negroes] relative to whites has not improved for nearly 20 years."¹ He goes on to say that: "Although the relative occupational status of nonwhites has not changed appreciably in most States since 1940, the income gap between whites and nonwhites did narrow during the Second World War. During the past decade, however, there has been no change in income differentials between the two groups."² He testified further: "This conclusion is reinforced by details of the 1960 census which show that in the 26 States (including the District of Columbia) which have 100,000 or more Negroes, the ratio of

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1. *Senate Hearings on S. 773, S. 1210, S. 1211 and S. 1937 Before the Subcommittee on Employment and Manpower of the Committee on Labor and Public Welfare, 88th Cong., 1st Sess. 321 (1963).*

2. *Id.* at 323.

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Negro to white income for males increased between 1949 and 1959 in [only] two States (District of Columbia and Florida) and it was unchanged in two others (New Jersey and Oklahoma). *In every other State there was a widening of the gap* between the incomes of whites and Negroes, and in some cases it was fairly substantial.”³ (Emphasis added.)

To underscore further the economic basis for current doubts and dissatisfaction with state and local fair employment laws, it may be well to emphasize the extraordinary impact which automation has had on those occupations which had been sources of relatively stable, even if lower paying, employment for the bulk of Negro workers—agricultural employment and blue collar employment. While the total number of jobs increased by almost 19 million between 1940 and 1960, farm employment decreased by 4 million. In addition, production jobs have declined 600,000 overall since 1947. Documenting the effect this has had on Negro workers, especially in the north, the Labor Department reports that “. . . the proportion of nonwhites employed in blue-collar occupations fell slightly between 1955 and 1962, returning to levels prevailing in 1948.”⁴ Comparison of unemployment figures may complete the economic list in this discouraging picture. In 1962, for example, the rate of unemployment for white workers averaged 4 per cent, for nonwhite workers it averaged 11 per cent.⁵ It is not hard to estimate the impact of an even more shattering statistic: even in the north, unemployment has averaged twice as great for nonwhite workers for *every year since the Korean War*.⁶

Thus, it is apparent that the last two decades have not been witness to the uninterrupted economic progress of the Negro worker that we have tended to believe. To many observers, much of this progress seemed to derive from the fact that a more favorable climate providing “equal employment opportunity under law” had been growing throughout the northern states and that Negroes were inevitably benefiting from this climate as they geographically migrated from the old south into the urban north and west. Certainly, a decline in Negro residence in the southern states from 77 per cent of all Negroes in 1940 compared to 51 per cent today did have a favorable influence on their economic status during the decade between 1940 and 1950, but has apparently had little effect since. In fact, from a national perspective, the economic position of the Negro appears to have been deteriorating since the Korean War.

While the influence of equal employment opportunity laws has apparently been unable to cope with the enormity of this problem, I, for one at least, believe there is ample evidence to demonstrate that conditions today would be far worse were it not for such public policies. To blow up the dyke because the flood crested higher than our bricks seems to me somewhat more foolish than examin-

3. *Id.* at 324.

4. Kessler, *Economic Status of Nonwhite Workers, 1955-62*, 86 Monthly Labor Review 782 (1963).

5. *Ibid.*

6. U.S. Dep't of Labor, Manpower Report (1963).

ing our weak points and doing something constructive about them. Thus, while I happen to agree with many of those who contend that we could have done better with our local and state laws and our federal regulations than we have, the basis of our opinion may differ.

Looking backward, it seems to me the reasons for our limited performance with our FEP laws are traceable to at least five kinds of problems. First, there is the limited authority given the local or state administering unit by these laws, either with respect to procedures for invoking that authority or with respect to the coverage or jurisdiction of the law. It is true that administration of such laws by independent, multiple-member commissions is cumbersome and less efficient than that which is possible under a single administrator with more direct administrative power. It is also true that the exemption of large numbers of business establishments employing a significant number of people has tended to be a drag on the effective application of law. Most important, it is evident that those states that have not authorized their administrative unit to *initiate* actions on their own motion—backed up with sanctions—have been less effective. The recent impressive experience of the federal agencies in initiating compliance reviews of contractors and the establishment of requirements for affirmative action designed to extend equal employment opportunity has amply illustrated the desirability of providing the administering unit with “initiatory power.”

Secondly, there have been political problems which have shaped the judgment exercised by those responsible for administering these laws. Generally speaking, the state and local fair employment laws have been administered with a high degree of caution if not timidity. Certainly, prudence in gaining public acceptance and in clearing away legal challenges during the early years of the operation of new laws was understandable. Undoubtedly, political considerations have had the effect of both restraining vigorous enforcement activity in many instances and, as during World War II and later with the advent of the Kennedy administration, the effect of stimulating more vigorous action. When President Eisenhower appointed Vice President Nixon to head his FEPC, we perhaps should have realized that the issue had become respectable and that the time to push forward had arrived. On the whole, my personal judgment, witnessed by hindsight, is that politically our enforcement thrust, in contrast to our conciliation efforts, could and should have been more decisive.

Thirdly, there has been the problem of resources. I think the lacks in this area have been more critical and more damaging to our ability to cope with employment discrimination than any other single factor. The budgets and staffs provided local and state commissions, considering the dimensions of their administrative responsibility, have been and are pitifully inadequate. The typical challenge runs something like this. Until recently, the Michigan Commission, for example, had jurisdiction over 38,000 employers which they regulated with a staff of 10 professionals. At such a ratio, even if each staff member were to

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review two employers a week, they will still not have completed their program for another 30 years. The state of Illinois with an even greater number of employers started its program two years ago on a budget of \$50,000 and a staff of five. Even today the state of California, reputed now to be larger than the state of New York, has a total staff of less than 35 compared to about 175 in New York—the only state that seems to be showing any sense of realism about budget.

Moreover, the budget and staff allocations of the federal agencies under their contractor programs make these deficiencies, however inadequate, look rather less so by comparison. For example, there are fewer persons assigned to regulatory activities even in the present federal program dealing with contractors than are currently employed by the New York State Commission alone. The federal agencies are responsible for regulating the staggering total of an estimated 300,000 establishments involving nearly 20 million workers. Few undertakings of such magnitude with such limited resources could expect to succeed. They could not be much more than the “minimum deterrent” which these laws have been and for which they are now being properly criticized.

The political relationship of funds and policy is, of course, self-evident. During World War II, the Federal FEPC had a staff of more than 100 and maintained 15 regional offices. By 1953, under Nixon, we had a federal staff of fewer than 30 and only two regional offices. The Kennedy-Johnson administrations, building on a new political climate at the beginning of the Sixties, have committed more manpower and resources than at any previous time and it still remains, in my judgment, at a token level. (We spend more on a single missile mis-firing at Cape Kennedy, for example, than we do at present on the entire Federal Equal Employment Opportunity Program. I could understand better some of the scatter-shot criticism that is being leveled at state FEP commissions if their alleged “mis-firings” had at least been budgeted as well.)

Finally, I would point to a problem that goes beyond the matter of law and beyond the matter of administration and administrative resources. Those who have been dealing with employment discrimination have always been mindful of the inseparable relationship between our skills development systems and job opportunities. They have been mindful that where and how a person obtains his training is of critical importance to his ultimate job future. They have known that the impact of rural, segregated education was having its cumulative effects in the northern and western cities during these past two decades of massive Negro migration. They have known that the practices of guidance counselors, of placement services, whether public or private, and of recruiting officers are actually a critical part of the employment system and its potential for disadvantage (or benefit) to the Negro worker. They have known that the system of selecting apprentices for the building trades has contained restrictions not greatly different from those involved in the selection of medical interns or junior law partners or accountant trainees. In other words, they have

known that the regulation of the practices of employers, unions, and employment agencies has not been enough and that the vocational development system was profoundly involved in their ability to improve the occupational status of non-white workers.

The conclusion which I draw from an examination of these problems leads me, therefore, if I may now look forward, in the following direction. Whether it be at the local, state or federal level, I would like to see both state and federal FEP laws administered by a single, strong administrator with the power to initiate action and with adequate safeguards for appeal and review of his functions and decisions. I would like to see this administrator have comprehensive jurisdiction of those whose practices are affecting employment opportunities including all vocational development institutions, relationships and activities. I would like to see this administrator provided with adequate resources and staff. In this connection I would like to see greater experimentation with and use made of existing regulatory inspection staffs already available to the various levels of government such as building inspection departments, wage and hour units, certification agencies. I have the feeling that the staff resources problem at most levels of government is primarily one of manpower allocation and training and that we should move more in the direction of greater integration of functions rather than establishing new and independent administrative units. The Manpower Development and Training Act and the War on Poverty are as integral to the effective implementation of the Federal Civil Rights Act as they are to each other. The manpower aspects of all three could be unified administratively with considerable benefit. Dozens of illustrations of the same kind could be drawn from present day state and city levels.

Finally, I would like to see this administrator function at a more direct, less independent, political level than has been true of most FEP commissions during the past 20 years. I think we have gone too far in making them bi-partisan. The problem which we confront involves many aspects of governmental coordination that can only be achieved at the highest policy level. It necessarily involves political judgments. It involves the establishment of priorities among functions of government which must be made to be complementary and must be coordinated with one another.

As a footnote, I have the impression that we may have turned another corner as the Sixties unfold. Improvements along the lines I have outlined or any other reasonable improvements, if supported with greater resources, may start us once again on the road toward the widespread enlargement of equal job opportunities that the present situation demands. The impact of automation will clearly be of less significance to today's minority youth than it was to their fathers. Educational opportunities are headed toward greater equalization. The political importance of public policies in the form of better and more comprehensive civil rights laws has never been more clearly or widely recognized than it is today. The time for reform has either arrived or we are dangerously passed it.

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And finally, I think the experience of those who have been trying to deal with this problem has become in itself a formidable asset. We now have more than 2000 reasonably well trained and experienced professional workers working in the field. Twenty years ago we had less than 100. Given the resources, they ought to know what to do better today than they did when they started. At least, I like to believe that we have learned something in the past 20 years.