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Enforcement of Laws against Discrimination in Employment

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ENFORCEMENT OF LAWS AGAINST DISCRIMINATION IN EMPLOYMENT

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LAWS against discrimination in employment are now a well-established aspect of our American legal scene. They have been in effect and in operation for a large part of the 20th century. Were it not for some of the discussions now going on, on and off the floor of the United States Senate, concerning the fair employment practice provision of the pending civil rights bill, one could safely have assumed that the principles upon which such legislation are based are now beyond question.

A reasonable man might well doubt the validity of any claims that the adoption of a federal fair employment practices law by Congress calls for the imposition of any pattern of "due deliberate speed" aimed at cushioning the impact of such a law on established customs. One would never think, from reading about these discussions, that fair employment practice laws have been in operation in New York and a few other states for almost nineteen years with none of the horrendous effects which were cited as imminent dangers which must be guarded against.

But we are not here to convince the doubting Thomases or, should I say, Senators. Rather, we are here to discuss the experience accumulated under those laws—and there are now twenty-five such state laws in operation—to see how their effectiveness can be improved. This paper will deal with one aspect of that problem, techniques of possible improvement of enforcement of such laws. It will not undertake to deal with even all aspects of that subdivision of the problem. Rather, it shall be confined to a consideration of methods of reducing delays in the handling of complaints, methods of insuring compliance with the law and methods of strengthening existing sanctions for use against violators of laws against discrimination in employment.

Discussion of easing the initiation of complaints of violation of the laws, of liberalizing formal requirements for such complaints, altering and lowering the established standards for finding of probable cause are all to be dealt with in another paper to be presented to this conference. That other paper will also deal with the wisdom of separating the enforcement and adjudication functions of executive agencies enforcing such laws. We shall endeavor in this paper to observe the limitations described above. Occasionally, however, it may be necessary in connection with the subject matter of this paper to make mention of some of the proposals which are outside the scope of this paper. If that happens, we beg your forgiveness and the forgiveness of the author of the paper dealing primarily with those aspects of the problem.

Even though this paper deals with a limited aspect of possible changes in

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enforcement of laws against discrimination in employment, it is impossible to deal with even such a limited phase of the problem without some consideration of the background of FEPC statutes and their purposes. The first such law was the statute adopted here in New York in 1945. This pioneering law really embodied a recognition that the government of the state has a special interest in vindication of the right to equality of employment opportunity; that the state's countenancing of existing patterns of racial and religious discrimination in employment resulted in the imposition of economic disabilities on the groups thus discriminated against which created hazards to the health, welfare and peace of the entire community.

Implicit in the adoption of this law were several things. First, there was an abandonment of the patterns used in prior laws against discrimination, the state's civil rights law, which barred racial and religious discrimination in places of public accommodation, depending for its effectiveness on the imposition of criminal or civil remedies. It was recognized that such remedies had been of little effect. Another assumption implicit in the New York state fair employment practices act[1] was a recognition of the inequality of resources available to an employer, union or employment agency engaging in racial or religious discrimination and the applicant for work who was the victim of such discrimination.

It was the recognition of these facts that led to the use of a pattern originally established in the first National Labor Relations Act. That Act sought to avoid the delays implicit in any court proceeding. In addition, it was, on its face, a one-sided act intended to lend the aid of the government to one of the parties in an unequal struggle, the struggle between laborers seeking to organize into unions for the purpose of collective bargaining and employers opposing such efforts in order to maintain their existing superiority of bargaining power.

The Act was adopted in 1935 as our country was struggling to recover from the deep economic depression in which it had been. One aspect of that recovery was aimed at increasing the income of the ordinary American consumer, employees in factories, fields and offices. This could be done only if the economic bargaining power of these employees was strengthened by means of collective bargaining between employers and labor organizations created by the employees. In the depression, the workers' organizations for collective bargaining—the trade unions—had suffered severely. Some employers used labor spy agencies to undermine the trade unions and to gain greater economic advantage over their employees.

Hence, the Wagner Act set up an administrative agency which was empowered to help unorganized employees, who sought to organize themselves into trade unions, to achieve recognition by their employers and to engage in collective bargaining with their employers through those trade unions. The administrative agency permitted the processing of complaints of employer interference with trade union organization and other processes of collective bargaining with

1. Law Against Discrimination, N.Y. Executive Law, art. 15.

speed and with the insight which was the result of the specialized function of the agency. The agency could dispense with the delays attendant on court procedures and could also speed up the processes of certification of majority unions for collective bargaining. It could put a speedy end to unfair employment practices by issuing a cease and desist order which was enforceable not in the district federal courts but in the federal courts of appeal if the record before the administrative agency contained evidence to sustain its findings.

The administrative agency, even though it had quasi-judicial functions arising from its responsibility to make findings as to the existence of unfair labor practices and as to which of several competing trade unions represented a majority of the workers, was still essentially an agency enforcing the right of workers to engage in collective bargaining. It was primarily an agency which was enforcing a law aimed at insuring that all workers engaged in interstate commerce would have the right to collective bargaining.

The administrative agency established under the New York state fair employment practices act was set up in order to insure vindication of the right established by the statute of an applicant for employment or a person already working to be free from discrimination based on race or creed in obtaining a job or in obtaining promotions or other benefits attached to the job. The primary purpose of the agency is to eliminate discrimination based on race or creed in employment. Even though the New York statute requires as a condition of a formal complaint the filing of a verified complaint, we would respectfully submit that the commission, as a law enforcement agency, has a duty not to close its eyes to obvious violations, even in the absence of the receipt of a verified complaint.

Similarly, even though the commission does have an adjudicatory function in connection with its hearings and in connection with its findings of probable cause to credit the allegations of the complaint, we would respectfully submit that this element of adjudication should not be permitted to obscure the basic fact, which is that the primary responsibility of a commission enforcing a state law against discrimination is to bring about the cessation of discrimination in employment wherever it finds it.

When state fair employment practices laws were in their infancy, commissions charged with enforcement of such laws tended to operate on the theory that there was a need to demonstrate to those regulated by the law, employers, employment agencies and unions, that the law would not unduly interfere with their operations nor subject them to the expense and trouble of having to defend complaints by all applicants for employment who were members of minority groups and whom the employer refused to hire. When the laws were originally being considered by the state legislatures which enacted them, there was much talk on the part of employer groups and employment agencies that the result would be witch hunts directed against innocent employers and employment agencies and unions by disgruntled rejected applicants for employment. Most of the agencies charged with enforcement of fair employment laws took

cognizance of such talk and tended to insist on airtight complaints and cases before they were willing to press ahead to public hearings in cases where the process of conciliation and persuasion proved unsatisfactory. Furthermore, the agencies sometimes were unwilling to insist on speedy answers by respondents during the process of adjustment by conciliation and persuasion.

The fact is that the experience up to this point, primarily with the labor act, has demonstrated that lawmakers are quick to alter such one-sided laws if it develops that the aid given by government to the victims of discrimination or of interference with the right to organize for purposes of collective bargaining has tipped the scales so as to give such people undue advantage over the employers. The Taft-Hartley law was a reflection of the lawmakers' readiness to adjust any such imbalances which developed.

The technique of administrative agency enforcement of such laws has demonstrated its usefulness. The sanctions available to such agencies, consisting essentially of the right to apply to a court for an order to compel compliance with their determinations, violation of which is punishable by a contempt procedure, have proved more than effective. It is a rare employer or employment agency or labor union officer who is willing to risk imprisonment for even a day in order to give free rein to his racial or religious prejudices. Hence, the sanctions devised in such laws may well have effect far beyond what one would expect. In addition, the virtue of the type of law discussed herein is that almost every such law has a declaration that the policy of the state is opposed to discrimination in employment based on race or creed.

The final virtue of the administrative device for enforcement of laws against discrimination in employment is that these laws are completely consistent with the established customs and mores of the community. Despite the fears of witch hunts expressed by employers and others policed by such laws, there is no danger of popular defiance of such laws such as developed in connection with the prohibition amendment to the federal constitution. Clearly, the vast majority of the people are benefited by such laws and support them. Clearly, defiance of such a law would result in popular disapproval, unlike prohibition.

Enforcement—Reducing Delay

As has been indicated, a most important novel aspect of most of the fair employment practice laws adopted by states, beginning in 1945, was the device of enforcement by an administrative agency set up specifically for that purpose, to which the person believing himself the victim of a violation of the law, of discrimination in employment, could apply for redress. Thus, the complainant could find in one agency an investigator, a conciliator, and finally, if needed, an adjudicator and enforcer.[2]

After a verified complaint had been filed charging a violation of the law—in the preparation of which the complainant could obtain aid from the same

2. See for example New York State Law Against Discrimination § 297.

agency—the task of moving ahead with the process of investigation and further steps shifted from the complainant to the enforcing commission. No longer need the complainant obtain his own attorney and undertake at his own expense the onerous and often costly and slow task of accumulating evidence to sustain his charge. Instead, ". . . the chairman of the commission [designates] one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. . . ."[3] It is axiomatic that justice delayed is justice denied.

When the first FEPC statute specifies that the investigation shall be "prompt," it is in recognition not only of this axiom but also of the fact that the person believing himself the victim of racial or religious discrimination is also highly likely to be one whose prior dealings with state officialdom have been such as to cause him, out of ignorance or feelings of inferiority or a distrust of the organs of law enforcement, to view the machinery of the state with suspicion and skepticism.

Viewed against this background, it is surprising that inspection of the annual reports of the various agencies charged with enforcement of the existing twenty-one state enforcement laws, which provide for an administrative enforcement agency, fails to disclose any which includes a report on the length of time consumed in investigation of complaints, or devoted to any conciliation and persuasion which may ensue. No indication is given of how soon after receiving a verified complaint the investigation is begun, how much time is allowed for completion of the investigation, whether the staff member or members assigned to the investigation is pressed to move with all possible speed, whether time limits are applied to the various steps in the investigation.

Manuals of investigation which may have been developed in agencies enforcing laws against employment discrimination are not available to outsiders. Hence, it is impossible to determine whether the established investigatory procedures include an acknowledgment of the statutory injunction of promptness in the investigation. Although, as has been noted by one of the best studies of the administrative enforcement of such laws, "Investigation is not normally governed by rigid procedures, and may serve a variety of formal and informal functions,"[4] it would appear that at the very least, such investigations must be policed to insure speed and avoidance of unnecessary delay. And the annual reports on the activities of enforcing agencies should reflect the machinery set up to insure the required promptness of investigation and information to allow some determination of the effectiveness of such machinery.

Establishment of employment discrimination is often a complex problem. The employment pattern of the respondent is often a major aspect of the investigation. Hence, the investigator may have to look into the racial or religious composition of the respondent's personnel. He must also examine the qualifica-

3. *Ibid.*
4. Note, 74 Harv. L. Rev. 526, 533 (1961).

tions of the complainant as contrasted with those of other applicants for the same position or incumbents of similar positions. This would require him to examine the respondent's records and to meet respondent's employees and other applicants to respondent for employment so he can obtain data on their race, religion or ancestry and on their qualifications. Obviously, the respondent is in a position to impose delay, if he so wishes. Equally obviously, there is no basis in the reports of most commissions to enable a member of the public to evaluate the diligence shown in pressing forward with such an investigation.[5]

Relation of Investigation to Conciliation

Section 297 of the New York Law Against Discrimination provides that if the investigating commissioner determines after investigation that probable cause exists for crediting the allegations of the complaint, ". . . he shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion." The word "immediately" calls for comment, for it, like the word "prompt," which qualifies the direction to investigate in the preceding portion of this sentence of the statute, reflects the legislative recognition of the need for speed in ending any discrimination found to exist.

Of course, the statutory direction to confer, conciliate and persuade necessarily places the power to impose some delay in the hands of the respondent. Conference, conciliation and persuasion, with their implications of palaver and talk and appeal to reason, bar any possibility of "prompt" or "immediate" progress to a public hearing. This process offers to respondents in complaints of employment discrimination the opportunity to extend unduly processing under the statute. If there is to be conciliation and persuasion, it is absolutely necessary for the agency negotiator to avoid any appearance of arbitrariness or impatience. These attitudes are hardly consistent with the attitude of reasonableness and willingness to negotiate which is an essential prerequisite of successful conciliation.

Other sources of delay may arise at this stage of the handling of the complaint from the fact that the greater resources of the respondent can here be involved. He may bring into the conciliation discussions his legal counsel, his personnel specialists and all the other resources which his economic reserves make available to him. Furthermore, by indicating a willingness to go to public hearings and to resort to court action, if necessary, the respondent may inject an additional element of delay by causing the enforcing agency to lean over backwards to establish a record of reasonableness in conciliation intended to strengthen its hand with possibly unfriendly courts. This might well occur even though the statute provides that what goes on in the process of conciliation may not be disclosed by members of the commission and its staff.[6] While no

5. *Id.* at 534.
6. New York State Law Against Discrimination § 297.

disclosure may be made as to what transpired in the course of such endeavors, the time between the date of the complaint and the noticing of the matter for public hearing is easily calculable from the bare dates shown in the administrative record of the case.

The language of most state fair employment practice laws clearly distinguishes between the process of investigation which leads to a determination as to whether probable cause exists to credit the allegations of the complaint, and the ensuing process of conference, conciliation and persuasion called for if there is a finding of probable cause. Yet, there is no indication in the reports of the various enforcing agencies that the investigation does not often, in fact, merge into the efforts of the enforcing agency to resolve the matter by conciliation.

Such a development is hardly unexpected, since what is more normal than for the respondent to ask the investigator as to the reason for his inquiry and, on being told, to protest his innocence and his eagerness to do the right thing, if it be shown that he, the respondent, has erred. But an equally inevitable concomitant of such a development is the merging of the process of investigation and the process of conciliation, the delaying and possible frustration of a finding of probable cause, and the creation of a possibility of substantial delay.

It may well be that the procedures followed by agencies enforcing laws against discrimination in employment are framed to avoid this danger. But since this issue is not discussed in reports of such agencies, and what occurs in the conciliation process must be kept secret by them, it cannot be known whether this potential source of delay is avoided or minimized. It would seem desirable to formally separate the process of investigation aimed at establishing whether probable cause exists to credit the allegations of the complaint from the ensuing process of conciliation. Such a separation would also allow the maintenance of a time check to make it clear even to the most skeptical complainant that his charge of discrimination is receiving the prompt investigation required by statute, whether or not this has resulted in a finding of probable cause, and, finally, whether it is being moved immediately thereafter to conciliation.

Mention has been made of the danger of delay inherent in the process of conference, conciliation and persuasion. While this cannot be wholly avoided, its effect as a source of distrust for members of those racial and religious groups which may be more subject to discrimination than others may be minimized if agency procedures set time limits on this process as well as on the process of investigation. If such limits are set—and, of course, they may be varied where the chairman of the enforcing agency makes a finding that such a variance is proper—the annual reports of the agency should include sections on the time needed for successful handling of complaints, with indications of cases in which the time limits were waived and those in which the handling was even faster than the established limits. In establishing good faith and dedication to those

whose rights the statute is intended to protect, such time reports would be most helpful.

And that this is important is clear from the unwillingness of members of many civil rights groups to accept the delays in dealing with employment discrimination which are all too often characteristic of agencies enforcing such laws. While such delays are by no means the sole cause of such reluctance, it may safely be assumed that they are a contributing factor to the picketing and chain-ins, which have occurred at many construction sites, aimed at alleged job discrimination in the building trades in a number of FEPC states.

Where sufficient progress is being made in the process of conference, conciliation and persuasion to justify its further extension, it is suggested that the person carrying through the process for the enforcing agency seek to condition such extension on a commitment by the respondent to keep open the job vacancy in question pending the completion of the conciliation and to make up for the complainant any loss in pay he may suffer as a result of the delay. Such requirement would serve to demonstrate to the complainant the zeal and good faith of the enforcing agency in carrying out its responsibility to prevent discrimination in employment. It would make clear to the complainant, and others in like situation, that the enforcing agency is committed to protection of members of his group against employment discrimination, to make his right to equality of employment opportunity a present and immediate right, not a distant goal.

Finally, it is suggested that consideration be given to amending the statute to make it follow more completely the pattern established by the Wagner Act. The enforcing agency should be allowed to seek court enforcement of its cease and desist orders issued after hearing, not in the trial courts of its state but rather in the appellate courts thereof, with the appellate court's review of the findings of fact being limited to determining whether such findings are based on evidence. Similarly, if a respondent resorts to the courts to estop the enforcing agency from proceeding with a complaint against it, such action should be removable to the appellate courts, if the suit is brought after hearing.[7]

What is essential is that the enforcing agency adopt a philosophy consistent with the major role assigned to it by the statute it is enforcing. Such statutes are enacted under the police power of the state. Many of the statutes specifically provide that they are to be interpreted liberally to effectuate thier purpose, which is to eliminate discrimination in employment based on race or creed.[8] They are remedial statutes enacted to meet a danger to the public peace and welfare found to exist by the legislature. Hence, even though the enforcing agency may be given quasi-judicial powers in connection with its authority to hold hearings and its responsibility to determine if probable cause exists to credit the allegations of the complaint, it does not follow that the agency should

7. N.Y. Civ. Prac. Law & Rules § 7804.
8. See for example New York State Law Against Discrimination §§ 290, 300.

conduct itself like a court of law seeking merely to adjudicate disputes between complainants and respondents. Rather, the enforcing agency should, it is submitted, regard itself as a means set up by the state to combat discrimination whenever and wherever it has reason to believe it exists and is amenable to its powers.

Thus, where there are rumors that in a certain area of employment a policy exists of excluding members of one racial group, the enforcing agency should look into the matter on its own, informally if necessary. If it finds reason to believe that the rumors are well based, it should seek to invoke whatever power the state may have to bring the matter to public light in order to remedy the situation. For example, in New York, where the statute requires a verified complaint as a basis for a formal investigation, such problems might well have brought into use paragraph 9 of Section 63 of the Executive law which authorizes the state's enforcing commission to request the Attorney General to bring any civil action necessary for effective enforcement of the state's laws against discrimination. The State Commission For Human Rights is to be commended for its recent ruling against the Sheet Metal Workers Union in such a situation, but one might wonder why it took so many years for it to move into the matter when the pattern of exclusion was one well known to anyone acquainted with the employment pattern in this field.

Insuring Compliance

Examination of the statistics contained in the reports of the various agencies enforcing laws against discrimination shows that very nearly all of the cases which involve findings of probable cause are ultimately settled by means of conciliation agreements. As has been indicated, the process of conciliation is required by statute to be shrouded in secrecy. Of course, the conciliation agreement itself need not be kept secret though, possibly in an excess of zeal, some agencies enforcing laws against discrimination in employment maintained a policy of secrecy with respect to conciliation agreements for a while. It is suggested that any consent order entered into through conciliation proceedings should be made a matter of public record.

Many of the statutes give the investigating commissioner free rein in seeking to adjust a complaint by conciliation. Of course, if the commissioner views his job as being primarily one of eliminating discrimination and only secondly one involving exercise of quasi-judicial powers, he will insist on conciliation agreements which advance the goal of the law, the elimination of discrimination in employment. On the other hand, it is understandable that the investigating commissioner, when entering into the process of conciliation, may well seek to achieve the speediest possible compromise by splitting the case down the middle. This may result in the denial to the victim of discrimination of complete redress of his grievances. It is suggested that every conciliation agreement, before being finally accepted and approved by the commissioner, should be submitted to an

automatic review by the entire commission. In other words, every enforcing agency should set up a procedure for auditing proposed conciliation agreements to make sure that the agreement does the maximum job for advancing the goal of the law, the elimination of discrimination in employment.

Within the past few years, some enforcing agencies have sought to embody in conciliation agreements consent orders under which the respondent not only agrees to take such action as is necessary to implement the law, but also consents to the issuance of a court order against him if he should fail to carry out his responsibilities under the conciliation agreement. It is suggested that this means of proceeding be expanded by administrative means and, where necessary, by statutory means.

A number of the agencies enforcing such laws include in most conciliation agreements a provision calling for reinspection of the respondent's working staff and hiring practices at specified periods after the completion of the conciliation agreement. It is suggested that one aspect of such reinspection should be an examination of the sources and techniques of staff recruitment employed by the respondent. This would insure that respondents could not adversely affect a proposed pattern of nondiscriminatory hiring by stressing sources of recruitment which are in themselves selective in terms of race or religion. Where such reinspections leave the commission in doubt as to whether the conciliation agreement is being implemented with the best possible speed, the commission might well refer the question of this implementation to the Attorney General so that the resources of his office can be brought to bear on the complex fact problem involved.

In such reinspections, the enforcing agency might properly undertake, through its research division, to make an independent survey of the respondent's working staff if the respondent is an employer, of its employment seeking clients if the respondent is an employment agency, or of its membership if the respondent is a union, in order to determine whether the groups examined are reflecting in terms of their racial or religious composition progress in manifesting a pattern of nondiscrimination. Such research surveys might also look into the matter of promotions within a respondent-employer's working staff. Naturally, the data on race or creed accumulated by the enforcing agency's research division would be obtained on the basis of a promise of confidence and would under no circumstances be made available to the respondent in such terms as to enable him to identify particular employees in terms of their race or creed.

The enforcing agency should also establish a policy of speedy publicity in cases where it finds that respondents have breached conciliation agreements. In addition, they should establish procedures under which, where such breaches are found to have occurred, the enforcing agency should be able to revive the original complaint and proceed with the greatest possible speed to public hearings on it. In this connection, the enforcing agency should explore means of setting up close lines of contact with minority group agencies concerned with

problems of equality of opportunity. Through these contacts, it should call to the attention of such agencies the breach of previous conciliation agreements and the fact that certain respondents, under such a conciliation agreement, are now more likely to welcome applicants from the minority groups which might formerly have been the objects of discriminatory treatment.

Finally, in this regard, it is suggested that the enforcing agencies adopt a policy of allowing only one conciliation to a respondent. Where, if a conciliation agreement has been reached and supposedly implemented, the enforcing agency receives a complaint on which it finds probable cause, it should then advise the respondent that unless he immediately settles the complaint satisfactorily to the enforcing agency, or produces strong proof to rebut the finding of probable cause, it will notice the case for public hearing and bypass the conciliation process as demonstratively an unnecessary waste of time.

Possible Additional Sanctions

It has been noted above that the technique of enforcement by exercise of the contempt power of the courts is generally a most effective technique. The threat of imprisonment to a respondent, even brief imprisonment, serves to make most people eager to comply with orders enforceable by the courts. Unfortunately, however, this ultimate power of enforcement by court order, violation of which is punishable by exercise of the contempt power, cannot be invoked until far too many hurdles have been crossed and far too much time has passed. Furthermore, the enforcing agency charged with administration of laws against discrimination in employment has often tended to avoid resorting to the courts for fear that courts will react with hostility to new-fangled administrative agencies whose quasi-judicial activities necessarily diminish the court's jurisdiction. Hence, enforcing agencies have generally shown an unwillingness to proceed with cases where the preponderance of truth was not so strong as to greatly minimize the likelihood of court reversal.

In the early days of FEPC laws, this attitude may well have served a purpose. It may have tended to make otherwise reluctant courts more willing to exercise their powers to enforce cease and desist orders aimed at employment discrimination. Those enforcing agencies which have had to resort to the courts or which have been brought into the courts by respondents have maintained an excellent record. The proportion of victories is overwhelming. It is submitted that most courts in states with laws against discrimination in employment are long past the attitude of distrusting administrative agencies charged with combating discrimination in employment.

It is not surprising that Mr. Justice Hofstadter of the New York Supreme Court, in *Bachrach v. 1001 Tenants Corporation,* 245 N.Y.S.2d 912 (1963), has said, "Public policy in this direction has continued to date as is evidenced by the recent report of the New York County Lawyers Association Civil Rights

Committee which called for 'a shift in emphasis from persuasion and conciliation to vigorous law enforcement.' "

Mention has been made of the fact that the technique of enforcing by administrative agencies in discrimination complaints was developed because of severe defects in the techniques of enforcement by penal provisions or by private civil suits. The defects of use of the ordinary procedures of criminal law enforcement still make it unwise to authorize penal sanctions, except in the limited cases where a person interferes wilfully with the employees of the enforcement agency carrying out their duty, or deliberately and wilfully prevents the carrying out of a conciliation agreement or a cease and desist order. An example of such limited use of penal sanctions appears in Section 299 of the New York State Law Against Discrimination.

Mention has also been made of the difficulties normally faced in using the device of enforcement by civil suit. However, since the climate of public opinion has changed substantially with respect to such laws and since there has been an increasing general concern with the existence of racial or religious discrimination in such fundamentally important fields of community life as employment, it may well be that juries faced with civil suits in such issues would be less reluctant to find for the complainant. Furthermore, it may well be that complainants in such matters, because of a possible distrust of the dedication of the enforcing agency, might prefer to seek redress in the courts by means of their own civil suit. Such procedures should certainly be allowed and, if the statute bars such alternative remedies, the statute should be amended.

Another reason for permitting such an election of remedies is that it may well be that complainants in some instances may have sufficient financial and legal resources to make them prefer to deal with the respondent in the neutral forum of the courts. After all, as has been pointed out above, state laws against discrimination in employment setting up administrative agencies were enacted on the assumption that most victims of employment discrimination are not able to deal on a basis of equality with those responsible for such discrimination. If, in fact, they are so able, there is no reason why they should not be allowed to elect to handle the case themselves with their own counsel in the courts as a neutral forum.

The Sanction of Publicity

Throughout the discussion of the development of statutes against discrimination in employment, notice has been taken of the fact that publicity with respect to complaints of such discrimination might well entail substantial dangers. Premature publicity based on a complaint which is founded on probable cause might severely damage the innocent respondent. The result might be rumors of hostility toward the group of which the claimed victim is a member, and this, in turn, might result in baseless boycotts. Furthermore, the complainant in such matters is often a victim. First, he may become in the eyes of members

of the public a troublemaker and someone who has been branded as undesirable and, therefore, subjected to discrimination. Secondly, other employers may be unwilling to hire him because he has acquired a reputation as a troublemaker. Finally, premature publicity might well tend to harden the position of the respondent and make him less amenable to speedy adjustment of the complaint by conciliation. It was some of these considerations which may have impelled the legislature to impose a gag on the enforcing agency with respect to what occurs in the conciliation process. At the same time, the limitations of publicity have made more difficult the job of the enforcing agency because it imposed clogs on the agency program of educating the general public to the existence of a statutory right against discrimination in employment. Of course, here in New York, as long ago as 1951, the enforcing agency has followed a policy of releasing selected conciliation agreements without first obtaining the consent of the respondent.[9]

It is suggested that an important aid in implementing the findings of the enforcing agency and its decisions would be a substantial expansion in its efforts to obtain publicity for its reported successes. Furthermore, the agency should develop a pattern of making awards for cooperation to employers, unions and employment agencies which demonstrate their dedication to the principles of the laws against discrimination in employment.

The terms of conciliation agreements should be made public. Such a practice will serve to demonstrate to respondents that their fears of adverse repercussions are baseless. Furthermore, it would serve to prevent rumors of discriminatory policies from circulating among the groups which are generally the victims of employment discrimination and thus would serve to prevent improper boycott developments.

Such publicity would make known to the public the existence of a statutory right to be free from discrimination in employment. It would encourage members of minorities which have in the past been the subjects of discrimination to make application to employers who, by conciliation agreements, have demonstrated their desire to comply with the ban on employment discrimination. Such publicity would also alert the recruitment sources of respondents to the fact that their major client is committed to fair employment practices.

Consideration should also be given to giving publicity to complaints where the investigating commissioner has found probable cause to credit the allegations of the complaints. Such publicity might well prove helpful in speeding up the process of conciliation. Furthermore, there is nothing in existing statutes which bars such publicity since the imposition of a secrecy requirement is applicable only to endeavors to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. Such early publicity on the filing of complaints would also serve to demonstrate to the skeptics

9. Spitz, *Patterns of Conciliation under the New York State Law Against Discrimination*, 125 N.Y.L.J. 1246 (April 6, 1951).

among the groups which are normally victims of discrimination that the enforcing agency is fully committed to carrying out the law and to seeking the elimination of discrimination in employment wherever it can be found.

Finally, it would be helpful if enforcing agencies announce programs of research in fields where it is rumored that discrimination exists. For example, much furor has developed leading to picket lines and chain-ins and lie-downs on the major building projects because it is charged that there is widespread racial discrimination in the building trades. Before the situation reached its present heat, rumors had long been rife of the existence of such discrimination. It is suggested that an aggressive program of research by enforcing agencies might have headed off such demonstrations leading to violence both by showing to the claimed victims that the enforcing agency is concerned with and seeking to deal with the problem and by demonstrating to the employers and unions in the field that unless they could show compliance with the ban on discrimination, they would soon be the subjects of complaints of employment discrimination.

So, too, programs of research into the population mix of the executive suites in major companies operating in states with fair employment practice laws would do much to insure equality of opportunity at this higher employment level. There is no reason why such research projects should have to be initiated by private defense agencies such as that from which I come, the Anti-Defamation League of B'nai B'rith.

Conclusion

What has been said above, while critical in tone, is in no way intended as destructive. It is our hope that those of us who are concerned with this problem will be able to work constructively with the enforcing agencies to achieve the speediest possible elimination of discrimination in employment everywhere in this country. Certainly, the problem of such discrimination should have been substantially solved at all levels in states such as New York where we are in our 19th year of living under such a law. Let us work together to make equal opportunity in employment a present and immediate right.