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Why the Veto Hurts More Than You Think

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ANALYSIS

Why the Veto Hurts More Than You Think

BY SUSAN GROVER

The Civil Rights Act of 1990 is dead. Its slayers—chief among them President George Bush—claim to have made the business world safe from dreaded employment quotas.

In fact, they have given some employers an even bigger prize: a good chance of avoiding altogether litigation to correct systemic workplace discrimination.

For minority employees challenging workplace practices under Title VII of the Civil Rights Act of 1964, consent decrees have been the primary vehicle for institutional reform. Such court-approved settlements, which generally establish affirmative-action plans, have promised the cheapest and speediest resolution to many discrimination suits.

Martin v. Wilks, 109 S. Ct. 2180, a 1989 Supreme Court decision, changed that. In that case, the Court exposed consent decrees to interminable "reverse discrimination" attacks by white employees who complain of the affirmative action called for by such decrees. The vetoed civil-rights bill included a provision to reverse that decision, restoring the status of a fairly drawn consent decree as generally binding on all affected employees.

With President Bush's veto of the bill (which the Senate sustained on Oct. 24), consent decrees to settle discrimination suits are at risk of becoming useless. And if consent decrees are at risk, so is employment discrimination litigation itself.

The reasons for this assessment are complicated, but bear out such pessimism. Before *Wilks,* most federal appellate courts recognized an "impermissible collateral attack doctrine," which effectively required white employees who wished to challenge a consent decree in a discrimination case to intervene in the suit in question. The doctrine encouraged parties to settle their disputes and avoided duplicative litigation.

In *Wilks,* the Supreme Court rejected this doctrine. Writing for the Court, Chief Justice William Rehnquist concluded that the practice of binding non-parties to the terms of a settlement was inconsistent with the scheme of the Federal Rules of Civil Procedure (FRCP), which contemplates permissive, as opposed to mandatory, intervention.

Problematic Proffer

Wilks proffers to employers and minority employees a different procedural device for preventing subsequent suits by white employees. But the *Wilks* "solution" is fraught with problems for black plaintiffs—and ultimately is no solution at all.

Wilks would have discrimination plaintiffs use FRCP 19 to bring in as parties—in other words, to "join"—the white employees in the suit that may give rise to a decree. The result of joining all white employees who may be affected by an affirmative-action plan will in almost all cases be an extremely complex and unwieldy suit at best.

But unwieldiness and complexity are the least of the hurdles. Rule 19 joinder suffers from even more severe limitations that make it a completely inadequate means of producing and protecting consent decrees.

Chief Justice Rehnquist in *Wilks* did not predict the outcome that Rule 19 would or should yield in these cases. He simply pointed to the rule as the only device available to plaintiffs who wish to bind white employees by a consent decree.

The problem is that Rule 19 frequently won't do the job. Some courts will construe the rule *not* to require joinder of white employees in the original suit, and will reject plaintiffs' efforts to invoke Rule 19. Courts have interpreted the rule to require that non-parties—like the white employees in a discrimination suit—be joined only when it is likely that the defendant-employer will be otherwise be threatened by conflicting obligations.

And courts disagree on what constitutes this threat. Some judges will require Rule 19 joinder if a later suit by the white employees could lead to a judgment requiring promotion or hiring decisions different from those required by the consent decree.

But other judges will not require joinder unless the employer would have to violate the consent decree to comply with the judgment in a subsequent suit. If a decree required that an employer promote a minority employee to a stated position and the subsequent judgment required that the employer promote a majority employee to the same position, the employer might be able to promote both. This response may be uneconomical, disruptive, and illogical, but it is not impossible. As long as compliance with both the decree and the later judgment is possible, some courts will decline to bring in the white employees under Rule 19—and they will remain wild cards who can destroy whatever settlement the parties reach.

Spoilers at Large

Another important component of Rule 19 has the potential to backfire on civil-rights plaintiffs. The rule requires joinder if it appears that the suit will result in a judgment prejudicial to the non-parties'—white employees'—interests. Before *Wilks,* white employees who would be barred from subsequently challenging a consent decree could be joined under this test. *Wilks,* though, cut off the possibility that the absent white employees will be injured—because it guarantees that they will have an opportunity to file an independent suit. Again, no joinder required, and the white employees remain potential spoilers at large.

Of course, some courts might require joinder of white employees under the conflicting-obligations criterion of the rule, perhaps even seeing the *Wilks* opinion as an invitation to do so. Even here, the situation presents serious hazards for plaintiffs. Besides yielding unwieldy suits in some of these cases, in others, application of Rule 19 will yield no suit at all. This is because the rule gives the court discretion to *dismiss the suit entirely* if jurisdiction cannot be obtained over all white employees who must be joined under the rule. Rather than protecting against challenges to the decree, then, Rule 19 may simply put the plaintiffs out of court.

Even assuming that Rule 19 can yield a manageable case which includes the white employees as parties, their joinder will have little effect if the suit is settled by a consent decree. Although joined as parties, white employees will not be bound by a consent decree between the employer and minority employees unless they accept the terms of the decree.

There is nothing the other parties can do to force the white employees, once joined, to accept the decree; they are free to reject it and may succeed in dismissing their part of the current suit and bring a subsequent discrimination suit based on race-conscious decisions made pursuant to the decree. To forestall these subsequent suits, the employer and minority employees must litigate to a final, binding judgment after the majority employees have been joined. Obviously this thwarts the Title VII policy favoring settlement of discrimination cases.

President Bush's rejection of the civil-rights bill is more than an attack on quotas; its effect will be to subvert entirely the use of consent decrees in employment discrimination litigation. Consent decrees promise a more efficient, more flexible resolution to employment discrimination suits than full adjudication on the merits can provide. Unless consent decrees are protected from subsequent attacks in reverse discrimination suits, the danger of these attacks will outweigh the decrees' advantages. The only "protection" available at present—joinder of majority employees under Rule 19 of the Federal Rules—is illusory.

Much of the public attention to the Civil Rights Act of 1990, and President Bush's veto, has focused on disputes over the allocations of burdens of proof between employers and plaintiffs in suits charging unintentional but systemic bias in the workplace. The defeat of the civil-rights bill and the continued force of *Martin v. Wilks,* however, promise to bring institutional civil-rights litigation to its knees at a much more fundamental level. Burdens of proof? No matter, these cases won't even get off the ground anymore. □

TODD DAWSON

All the talk of quotas and burdens of proof has diverted attention from the traps President George Bush set—perhaps unwittingly—for discrimination victims by rejecting the civil-rights bill.

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