A Practical Legal Services Approach to Addressing Racial Discrimination in Employment

By Sharon M. Dietrich and Noah Zatz

For legal services clients, employment discrimination based on race remains an insidious barrier to reaching their income potential and earning enough wages to support their families and themselves adequately. Almost forty years after the Civil Rights Act of 1964 outlawed racial discrimination in employment in this country, minorities still do not share equally in the rewards that can come from employment. As a group, minorities continue to earn less than white workers. Their unemployment rates are higher. They are underrepresented in entire occupations, such as professional jobs and the building trades.

Legal tools do exist to challenge racial discrimination in any phase of the employment relationship—hiring, compensation, promotion, employment conditions, termination.[1] Among these tools, Title VII of the Civil Rights Act is the most well known.[2] However, a Reconstruction-era federal statute that bars racial discrimination in contracts can also be used.[3] Most states and some cities also have laws that bar racial discrimination in employment. The problem for legal services programs in combating racial discrimination is not lack of remedies but lack of resources. As discussed below, racial discrimination litigation is almost always time-consuming and costly, and it can be difficult as well.

In this article we look at the role of legal services in fighting racial discrimination. We begin by examining the history of employment discrimination litigation in legal services programs. We then examine the three types of racial discrimination in employment cases (disparate treatment, pattern-or-practice, and disparate impact), along with recommendations as to which types of cases are best selected by legal services attorneys for maximum results with limited resources. We discuss, in particular, the potential of disparate impact claims as a strategy to remove common employment barriers experienced by legal services clients. We conclude with recommendations for strategies which the legal ser-

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[1] A good resource on the antidiscrimination laws for advocates new to this issue is the National Employment Law Project's *Discrimination in the Workplace: A Legal Survey* (1997). For orders, call 212.285.3025 or see www.nelp.org/order_form.htm.

[2] 42 U.S.C. §§ 2000e *et seq.* (1991).

[3] *Id.* § 1981. Section 1981 is sometimes considered a remedy preferable to Title VII because (1) it does not require administrative exhaustion; (2) it probably has a longer statute of limitations, depending upon the state (the state's statute of limitations for personal injury actions is applied); and (3) it does not have caps on damages. However, because Section 1981 requires proof of intentional discrimination, it does not provide a remedy for disparate impact claims, discussed below.

vices community can adopt as a measured approach to eradicating the racial discrimination that its clients experience in employment.

I. Employment Discrimination Litigation

Today employment law is not a primary focus of most legal services offices, although there is a small, but growing, number of exceptions.[4] In 1998, for instance, the Legal Services Corporation (LSC) reported that only 2 percent of its grantees' cases concerned employment issues.[5] Among employment-related issues addressed in legal services practices, employment discrimination lags far behind access to unemployment insurance benefits and, especially in the farmworker context, unpaid wages and minimum-wage violations.[6]

In the early days of publicly supported legal services, however, employment law was a major program area, and employment discrimination, especially race discrimination, occupied an important place in the employment law docket. Although a statistical portrait of employment work in field offices is not readily available, one useful indicator is that in 1981 national support center funding for employment received by the National Employment Law Project was comparable in order of magnitude to that for housing and welfare.[7] For the project, support for employment discrimination litigation was a high priority, reflecting the needs of lawyers in the field. There was also a close connection between the development of legal services and the expansion of Title VII litigation, which was still a trickle in the early 1970s.[8] Throughout that decade, the Equal Employment Opportunity Commission (EEOC) contracted with the National Employment Law Project to produce a *Manual for Title VII Litigation*, which had already reached its fifth edition by 1977. Title VII was an early focus of southern legal services offices, as both an outgrowth of the civil rights movement and a reaction to the reluctance of the white-dominated private bar to litigate on behalf of African Americans.[9]

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[4] Two unrestricted general legal services programs, Greater Boston Legal Services and Community Legal Services in Philadelphia, have well-established employment practices focused on low-wage workers. The Legal Aid Society–Employment Law Center in San Francisco has a large freestanding employment practice that is national in scope. In 2002 the D.C. Employment Justice Center began providing counseling and representation to low-wage workers, and the Legal Aid Society of New York, MFY Legal Services, and the National Employment Law Project collaborated to launch in New York City a new employment law clinic supported by three full-time staff lines. A growing number of other field programs have added some staff to develop an employment practice. Although no longer a legal services support center, the National Employment Law Project attempts to promote and support local legal services practices whenever possible. *See*, *e.g.*, Sharon Dietrich et al., *An Employment Law Agenda: A Road Map for Legal Services Advocates*, 33 CLEARINGHOUSE REV. 541 (2000).

[5] LSC (Legal Services Corporation), 1998 Case Services—Reasons for Closure and Legal Problem Type, *at* www.lsc.gov/pressr/pr_cases.htm (visited Mar. 4, 2002).

[6] An important exception is the Legal Aid Society–Employment Law Center, which litigates a wide range of employment discrimination cases.

[7] PROJECT ADVISORY GROUP, REPORT ON NATIONAL SUPPORT CENTER FUNDING GOALS (1990).

[8] John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 STAN. L. REV. 983, 985 (1991) (reporting that only 350 Title VII cases were filed in the United States in 1970); David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1139 (1989) (noting that there were no federal appellate decisions on the merits of Title VII claims until 1969).

[9] Civil rights organizations were also actively litigating Title VII violations, leading most notably to the landmark Supreme Court decision in *Griggs v. Duke Power*, 401 U.S. 424 (1971), brought by the National Association for the Advancement of Colored People on behalf of entry-level workers and applicants at a North Carolina power plant. Employment's importance as the economic front of the civil rights movement is also illustrated by employment being the largest unit within the U.S. Department of Justice's Civil Rights Division in 1970. Rose, *supra* note 8, at 1143.

Many of the Title VII race discrimination cases targeted large public employers (considered easier to litigate against than private companies), especially but not exclusively in the South, or heavily unionized trades in urban centers.[10] The focus was on hiring into entry-level jobs, and often cases that began with complaints from individuals walking into local legal services offices could be transformed into class actions.

By the late 1970s and early 1980s, however, retrenchment had begun both in employment law's role with legal services generally and in employment discrimination's prominence among employment-related issues that legal services attorneys addressed. Lawyers had to devote extensive time and resources to enforcing existing consent decrees, not new litigation, and even individual cases could be all-consuming, especially as the courts steadily increased the evidentiary burdens on Title VII plaintiffs.[11] As one former National Employment Law Project attorney put it, many people "jumped in, got buried, and got discouraged."[12]

Not only was Title VII litigation proving to be resource intensive, but also resources themselves were drying up: 1981 saw both the end of the EEOC's support for the National Employment Law Project and the beginning of declining LSC funding for support centers and legal services generally. In New York City, for instance, by the late 1970s there had coalesced a regular working group of legal services employment attorneys from several local offices, but by the late 1980s there were no remaining employment law units. Even where employment remained a focus, discrimination declined in importance relative to problems that seemed both more tractable and more pressing during the hard times of the 1980s, especially income support for the unemployed through unemployment insurance benefits. Reflecting this shift in priorities, for instance, the National Employment Law Project stopped updating its Title VII litigation manual after the 1986 edition.

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Meanwhile, employment discrimination practice more generally was changing as well. Commentators note three major trends: (1) an enormous increase in the total number of lawsuits; (2) a sharp decrease in the use of class actions; and (3) a profound shift away from hiring cases in favor of discharge cases.[13] The volume of employment discrimination lit-

[10] For a published account of efforts to break down racial discrimination in federal employment, see Elliot M. Mincberg et al., *The Federal Sector Employment Project: Efforts by the Washington Lawyers' Committee to Combat Employment Discrimination in the Federal Government, 1972–1983*, 27 How. L.J. 1339 (1984).

[11] Consider the development of the Supreme Court's treatment of plaintiffs' and defendants' burdens in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), as well as the tightening of the showing needed for class certification in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).

[12] Interview with Merrick Rossein, professor of law, City University New York Law School (by Noah Zatz) (Feb. 27, 2002).

[13] Donohue & Siegelman, *supra* note 8; Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 Ohio St. L.J. 1 (1996); J. LeVonne Chambers & Barry Goldstein, *Title VII at Twenty: The Continuing Challenge,* 1 Lab. Law. 235, 238 (1985).

igation has produced more aggressive gatekeeping by the courts, even as the lawsuits that offer the most hope for long-term economic security for our clients—by opening jobs and pathways to advancement—become increasingly rare. Unfortunately the same considerations that create a tremendous unmet need for legal representation—the relative ineffectiveness of the EEOC at identifying and resolving discrimination, the uncertainty and tremendous up-front costs of litigation that deter private attorneys even though statutory fees are available—also make it imperative that legal services offices choose carefully when trying to meet that need by embarking on Title VII litigation.[14]

II. Selecting Cases

Our recommendations for how legal services programs can target appropriate race discrimination employment cases come from Sharon M. Dietrich's more than fourteen years of practicing employment law with Community Legal Services in Philadelphia. We have learned through hard experience that some of these cases have tremendous opportunity costs, which must be carefully evaluated before a complaint is filed. Others are creative tools for the removal of employment barriers. The main lesson to be drawn from the following is to choose cases thoughtfully.

A. Disparate Treatment Cases

Disparate treatment cases are the most typical of racial discrimination cases. Plaintiffs must show that they were subject to an adverse action because the employer intended to treat them differently because of race. For instance, if a black worker and a white worker engage in a fight and the employer fires only the black worker, the employer may have intended to discriminate on the basis of race.[15] Discriminatory intent can be proved by either direct or circumstantial evidence.[16] A wide range of proof may establish circumstantial evidence of discriminatory intent—different treatment of comparable employees of different races; recruitment that is designed to hire or avoid applicants of a certain race; preconceptions about an employee's abilities and qualifications without knowing them; a pattern of promoting only white employees; a pattern of harassment of the plaintiff.

The problem for a legal services attorney thinking about accepting such a case is that predicting exactly how work-intensive such a case may be is difficult. By the nature of the case, you can be expected to conduct extensive discovery into not only what happened to your client but also what happened in the cases of five, ten, or fifteen other comparable employees. The more examples of disparate treatment of other minorities (or favorable treatment of comparably situated white workers), the stronger your case. The more instances of what you view as disparate treatment, the more your opponent wants to explain each case away, leading to minitrials on numerous individuals other than your client. In most disparate treatment cases you can expect boxes of documents produced in discovery and numerous lengthy depositions.

Also by their nature, disparate treatment cases, which require discriminatory intent as an element of liability, generate particularly aggressive and unpleasant litigation. Defendants take being charged with racial discrimination personally. Even if they were discriminating, they know that others might view such behavior critically. In race discrimination cases, circumstances that would otherwise tend to lead toward settlement in other types of cases (such as the cost of the litigation) are less likely to produce a negotiated result.

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[14] On the relative ineffectiveness of the Equal Employment Opportunity Commission (EEOC) see Donahue & Siegelman, *supra* note 8; Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 479–90 (1992). On the uncertainty and tremendous up-front costs of litigation see *id.* at 487–88.

[15] *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 10 (3d ed. 1997).

[16] A seminal case on this type of claim and the proof of discrimination through circumstantial evidence is *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Factors such as these led to perhaps the most problematic case in Dietrich's career. Dietrich sued the Pennsylvania state police for having fired a probationary trooper for incompetence. The theory of the case was that even though the state police had been forced to integrate as a result of litigation, a renegade captain made one black trooper a year his scapegoat. Dietrich and her cocounsel examined the cases of around thirty officers whom they claimed were comparable, and they tried to prove that their client's paperwork mistakes were overblown. Their opponent insisted on calling around twenty-five witnesses against them. The trial lasted four weeks. Meanwhile, Pennsylvania's unemployment insurance system was in crisis because of a recession and needing attention, but we were tied up in the trial.

The point of this story is not to convince you never to take a disparate treatment case. Rather, you should choose cases very carefully and strategically. We recommend the following considerations:

- Pick cases that are particularly meaningful and in line with your program's priorities. For instance, urban welfare-to-work participants being sent to suburban jobs that had never hosted minorities and encountering racial hostility may be a high-priority case. But the garden variety disparate treatment case probably should be avoided.

- Another factor may be what relief the client is seeking. Community Legal Services is much more likely to take the case of someone who is looking to be hired or reinstated (because the case could produce a steady income stream) than of someone who solely wants back pay.

- Take a hard look at assessing the worst-case scenario: might you get cartloads of documents and have a four-week trial? The more paper and comparable employees that your case is likely to involve, the more likely that the case could come to dominate your practice. Weigh the risks as if you were about to jump off a cliff blindfolded. Do you know enough to believe that you will not get hurt when you land?

B. Pattern-or-Practice Cases

Pattern-or-practice cases are disparate treatment cases expanded to class action scope. Essentially these cases allege that the employer generally and intentionally discriminates against minorities in its work force.[17] Proof typically consists of both statistical evidence and stories of disparate treatment of individuals.[18] When the plaintiff class is successful, remedies can be extensive, including affirmative efforts such as training programs and hiring goals in addition to monetary awards to class members.

As is probably readily apparent, pattern-or-practice cases have both huge benefits and costs. On the positive side, an entire industry or profession can be opened up to hundreds of minority clients. In a way this can be a type of "job creation" for clients who may be wrongly deprived of good jobs. On the negative side, an immense amount of resources must be devoted to this type of litigation, and the program must be prepared to stick with it for years, even decades. Moreover, even court findings that an institution has been acting with discriminatory intent may not be enough to overhaul an organization in which discrimination is the operating principle.

Dietrich's program has litigated several long-running pattern-or-practice cases. One was against the Pennsylvania state police.[19] Few would dispute that this case has been an unmitigated success, essentially integrating the state's premiere law enforcement agency. In fact, one of the program's clients became the commissioner in the late 1980s. The district court officially ended its supervision of the case in 1999.

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[17] *See*, *e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

[18] *See generally* Lindemann & Grossman, *supra* note 15, at 44–47.

[19] Bolden v. Pa. State Police, No. 73-2604 (E.D. Pa. filed Nov. 16, 1973); Oburn v. Shapp, 393 F. Supp. 561 (1975), *aff'd*, 521 F.2d 142 (3d Cir. 1975) (liability opinion).

The program's litigation against a union of operating engineers has not led to such unambiguous results.[20] The litigation was filed in 1971. In 1978 and after a yearlong trial, the Honorable A. Leon Higginbotham Jr. found that the union had used a non–bona fide referral system to deny entry and jobs to hundreds of qualified minority operators of heavy construction equipment. Years of further litigation and contempt findings ensued. In 1989 the district court phased out active supervision of the union, which had improved its compliance with remedial orders over the previous few years. In 1993 the court reopened the case for a report on minority participation in the union in light of complaints from class members that there had been backsliding. The case has been actively monitored by a special master since then, and numbers on minority membership and hours worked are as low as they were when the union was in contempt in the mid-1980s. The case is an open file, more than thirty years after it was filed.

If you are prepared to take the plunge with an employment discrimination case, chances are that the Legal Services Corporation restrictions should not be a bar.

C. Disparate Impact Cases

In our opinion, disparate impact cases are the most promising type of race-discrimination-in-employment cases for legal services to handle. These cases do not require a showing of discriminatory intent. Under this theory, even unintentional discrimination where a facially neutral policy disproportionately harms minority job seekers and is not required by business necessity violates the law.[21]

A 1981 EEOC guide illustrates the potential that the disparate impact claim holds for us to remove employment barriers that many of our clients encounter. It identifies the following preemployment inquiries as potential Title VII violations: requirement of a high school diploma where not significantly related to job success; nepotism policies; arrest and conviction records; dishonorable discharges from the military; poor credit ratings; and bankruptcy filings.[22]

Criminal records are an issue worth spotlighting. Perhaps the single most prevalent type of problem that Community Legal Services is presented in our employment intake is of ex-offenders who were denied jobs or fired because of their arrests or convictions. According to the EEOC guidance, blanket rejections of job applicants because of criminal convictions have an adverse impact on African Americans and Hispanics and violate Title VII unless the employer demonstrates a business necessity for the policy. The EEOC identifies three factors relevant to the business necessity justification: (1) the nature of the gravity of the offense or offenses; (2) the time that has passed since the conviction or the completion of the sentence or both; and (3) the nature of the job held or sought.[23]

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[20] Pennsylvania v. Local Union No. 542, 469 F. Supp. 329 (E.D. Pa. 1978), *aff'd*, 648 F.2d 922 (3d Cir. 1981) (en banc) (liability opinion). This case has been before the Third Circuit thirty times.

[21] Title VII disparate impact claims are codified at 42 U.S.C. §2000e-2(k) (1991). *See also Griggs*, 401 U.S. at 424.

[22] Indeed, the seminal *Griggs* case involved a high school diploma requirement; *EEOC Guide to Pre-Employment Inquiries,* Fair Employ. Prac. Manual (BNA) 443 (Aug. 1981).

[23] *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, *in* 2 EEOC COMPLIANCE MANUAL § 604 (1987). For evaluating arrests, the EEOC added to the three criteria established for evaluating convictions a fourth criterion: the employer must evaluate the likelihood that the applicant engaged in the conduct for which the applicant was arrested. Under the detailed analysis that the EEOC set forth in its 1990 policy statement, a blanket exclusion from employment of persons with arrest records is rarely justified, as the criteria require individual assessment of the applicant's situation. *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, *in* 2 EEOC COMPLIANCE MANUAL § 604 (1990).

Using the EEOC guidance, we have prepared discrimination charges for ex-offenders who lost jobs for criminal records remote in time or unrelated to the job.[24] Based on such a charge, the EEOC recently found "probable cause" of discrimination against our regional public transit authority, which required its contractors for paratransit services to reject some ex-offenders without individualized assessment.

When disparate impact litigation is successful, policies that have been excluding our clients from the work force can be eliminated, and clients can get jobs.[25] The challenge is that this litigation too can be expensive and difficult, particularly in presenting expert statistical testimony to prove that the policy has a disparate impact based on race.[26] However, such proof is not needed to file with the EEOC an administrative charge of discrimination.[27] At least that initial step can be taken to attempt to alter a policy that excludes minority workers.

III. Leveraging Resources for Race Discrimination Cases

Legal services programs may adopt the following strategies to leverage their resources for race discrimination cases:

■ *File charges with the EEOC.* Race discrimination litigation can place major demands on legal services programs already overwhelmed by client demand. But filing a charge with the EEOC need not be so resource-consuming. If you help a client frame a charge, the EEOC may press the employer to settle the case or make a finding of cause (although admittedly the latter happens infrequently). Your involvement can especially make a difference in disparate impact cases, where the EEOC intake and investigatory staff may not recognize the case as one of discrimination.

■ *Cocounsel with other lawyers.* When you identify a case which you think is of high priority for your program, look for help. Civil rights lawyers, plaintiffs' employment, and other lawyers may be more willing to take a case that involves low-wage workers who do not stand to recover a great deal of money if you are there to help.

■ *Encourage your local EEOC and civil rights organizations to focus on claims important to our clients.* The EEOC occasionally asks for input on its enforcement priorities. Even if the EEOC were not conducting formal priority setting, its staff would probably welcome a meeting to discuss your concerns for legal services clients. Tell them about racial discrimination claims particularly important to our clients, such as discrimination in welfare-to-work settings and disparate impact cases on issues such as criminal records and credit histories.

■ *Do not let LSC restrictions stop you.* If you are prepared to take the plunge with an employment discrimination case, chances are that the LSC restrictions

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[24] A sample charge of discrimination, letter brief, and client declaration can be obtained from the National Center on Poverty Law, 205 W. Monroe St., 2d Floor, Chicago, IL 60606 (www.povertylaw.org); Debbie A. Mukamal, *Confronting the Employment Barriers of Criminal Records: Effective Legal and Practical Strategies*, 33 CLEARINGHOUSE REV. 597 (Jan.–Feb. 2000); Sharon Dietrich et al., *An Employment Law Agenda: A Road Map for Legal Services Advocates*, *id.* at 541.

[25] Another example of successful disparate impact litigation that we have brought was a challenge against a psychological examination that the City of Philadelphia used to screen police force applicants. In our settlement, the city agreed to revamp its examination to eliminate disparate impact and make it job-related and to give 250 of our clients opportunities to become police officers. Avery v. City of Philadelphia, No. 92-CV-7024 (E.D. Pa. filed Dec. 8, 1992). One of our class members who became a police officer wrote us that the lawsuit "has made such a difference in my life."

[26] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991).

[27] In criminal record charges, for instance, the EEOC applies, on the basis of national and regional conviction rate statistics, a presumption of an adverse impact on African Americans and Hispanics. *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, *in* 2 EEOC COMPLIANCE MANUAL app. 604-B (1987).

should not be a bar. Private attorneys are not interested in taking the type of cases discussed above, notwithstanding the statutory attorney fees. You will probably be able to get a turndown of the case (and then the case is not fee-generating). Attorney fees need not be sought. The mere fact that a statute provides for fee shifting does not implicate the restrictions. Moreover, except for pattern-or-practice cases, race discrimination cases, including disparate impact cases, need not be brought as class actions.

FOR RESOURCE-POOR LEGAL SERVICES PROGRAMS, a decision to take a race discrimination in employment case is a high-stakes decision. But choose your cases wisely, and you can help get clients good jobs, changing their lives.

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