

Bring Civil Rights Enforcement Out of the Shadows

Only Human

By Kathleen Peratis

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More than 40 years ago, Congress banned most forms of job bias in almost all places of employment across the United States, through a sweeping law known as Title VII of the Civil Rights Act of 1964. At the same time, whether cynically or due to a political compromise, it created a weak system for enforcing this new law.

The primary enforcement agency, the Equal Employment Opportunity Commission, was and remains underfunded and more or less invisible to the public at large. It is mentioned in the major media no more than a few times a year. An exception was a period of several months during 1991 when the EEOC's former chair, Clarence Thomas, and Anita Hill, who had been his aide, were in the news daily, but hardly because they had done such a good job.

The EEOC files relatively few lawsuits, and so the balance of all enforcement comes from the victims themselves. If you file a charge with the EEOC and you and the employer do not agree to a resolution, you have two options: drop the claim, letting the employer get away with whatever it is that was done to you, or get a lawyer and start your own private lawsuit. In the language of civil rights enforcement, you are a "private attorney general," vindicating not only your own rights but also the right of the public to a discrimination-free workplace.

Looking back, we can now see that Congress had privatized this aspect of civil rights enforcement long before we even knew the term, and to mixed results. Plenty of disincentives to private enforcement have emerged along the way. To be fair, some have been addressed. In 1991, for example, Title VII was amended to allow winning civil rights plaintiffs to recover not only reinstatement, lost pay and attorney's fees, but also damages for emotional injury and punitive damages.

Lately, however, a new and alarming flaw has emerged, a flaw that urgently warrants response: Although the number of employment discrimination cases filed has nearly tripled in the last 10 years, the amount of public information about them has dwindled to practically nothing. About 70% of employment discrimination lawsuits are settled — less than 4% actually go to trial — and nearly all settlement agreements require strict "confidentiality," meaning no one can reveal the terms of the settlement, including the amount paid to the plaintiff.

Thus, an important aspect of civil rights enforcement has become invisible. A weak system has become a secret system, and the public interest is suffering. None of this was supposed to happen.

“Employment discrimination statutes were not envisioned to promote secret settlement,” says Minna Kotkin, a law professor at Brooklyn Law School who has studied the issue. “The whole thrust of the legislation was that, by facilitating employee suits, discrimination would be brought to public attention and the litigation process would serve to deter other employers from similar conduct.”

And early on, in a more innocent age, that is how it worked. Most plaintiffs were represented by public interest lawyers who would, if asked by defense counsel — and they rarely were — refuse as a matter of principle to agree to a “confidentiality” provision, understanding that transparency was fundamental to the process.

Now, in most employment litigation, both (or all) parties are represented by private lawyers for whom the public interest is, to say the least, not paramount. Defendants not only expect confidentiality but most will not settle without it. They believe, and they might be right, that public knowledge of a settlement, especially in the Internet age, will only encourage others to bring claims.

Most plaintiffs don’t like being muzzled, but not enough to walk away from the money — which is what defendants count on. The lawyer is not ethically permitted to reject an offer just because of her own anti-confidentiality principles, a position I myself have been in many times.

And, because the settlement is ordinarily a private contract, courts are usually no impediment to secret deals. All the court knows is that the case was dismissed, and for that, they too are happy.

And why not? Why shouldn’t private parties be able to settle their disputes privately? Isn’t that their business and not ours?

Well, no. Some secret settlements are prohibited. Most class actions, for example, and, in some states, claims involving hazardous products or environmental dangers, can’t be settled secretly.

And some secrecy agreements will just not be enforced because they are against public policy. The Catholic Church exacted confidentiality agreements in their early settlements of sexual abuse claims against priests, but, when the claimants talked anyway, the church did not even think of suing them for breaching the settlement contract.

With secret settlements, the penalties for job discrimination become invisible. Deterrence value is squandered. After expenditure of judicial resources and perhaps a blaze of media coverage, the silenced victim appears to say, “Oh, never mind.” The general public comes to believe, as some surveys suggest, that employment discrimination is a thing of the past, attitudes of jury pools are skewed, and the chances of success for the next victim are diminished.

Although most judges are indifferent to this secretized system, there are some who resist. When advised last year of a secret settlement reached by the parties in a major gender discrimination claim brought against Deutsche Bank by Virginia Gambale, New York federal judge Harold Baer “wondered aloud,” according to the appellate court, “why the public should not know of discrimination at a major banking institution,” and he wrote a scorching opinion refusing to give the court’s imprimatur to the parties’ secrecy agreement.

The problem has an easy fix: Prohibit the parties from withdrawing or dismissing any employment discrimination lawsuit unless the settlement agreement is filed as a public document with the court. Of course, as with all rules, there could be exceptions for good cause shown, but the default position would favor openness.

Scholars disagree about whether such a rule would decrease the number of settlements. I think such a rule would encourage more pre-lawsuit settlements, but even if it did not, fewer settlements would be an acceptable price to pay for bringing civil rights enforcement out of the shadows.

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