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Enforcement and the Future

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EMPLOYMENT DISCRIMINATION:
45 YEARS OF ENFORCEMENT OF TITLE VII OF THE
CIVIL RIGHTS ACT OF 1964
ENFORCEMENT AND THE FUTURE

BEGIN TRANSCRIPT

RICHARD UGELOW: [T]he next panel [will be led] by my colleague, Bill Yeomans, who teaches in the Law and Government Program at [Washington College of Law], which [Dean Grossman] mentioned at lunch, and [who] is a former Chief of Staff, Civil Rights Division, Acting Assistant Attorney General. We have three Acting Assistant Attorney Generals, people who have acted in the room, and [Bill Yeomans] was in the Appellate Section for many years. And were you in the Trial Section?

BILL YEOMANS: Criminal Section.

RICHARD UGELOW: And Criminal Section, Deputy Chief in the Criminal Section. [He] is going to lead [and] facilitate this panel and [talk] about the future, where we are now, and where the future will be. And if somebody asked about the next forty-five years of the Civil Rights Division, well maybe this panel has some answers or can point us in the right direction

BILL YEOMANS: Okay, thank you, Richard. I want to say a special word about Richard for putting all of this together. He is an exceptional colleague, and we interact on a regular basis here, and he really is a driving force in this law school; it's amazing. But he has done us all—and done the legal community here—an enormous service by bringing us all together today and I think we ought to give him a round of applause.

(Applause)

BILL YEOMANS: All right, enough with the nice stuff; let's get on [with it]. No, actually we are going to talk about current enforcement and future enforcement. And we are building on a day of very wise words and so our

burden is heavy because we have some tough acts to follow and, also, we're all that stands between you all and a reception; so bear with us, but we have the people here who can keep it interesting. And I'm not going to do extensive introductions, but I will do quick ones.

I think most of you probably know everybody. Everybody here, with the exception of Jocelyn and I, served in the [ELS] as a trial attorney, right Jocelyn?

JOCELYN SAMUELS: I did not.

BILL YEOMANS: And served with great distinction. They all fall into that category of people, like many of you who came to the Section, who were enormously talented, incredibly dedicated, terrifically productive, and who made an enormous contribution to the country. And so I won't go through their Section histories, and I'm sure they'll talk about some of their experiences, but they have all gone on to do extraordinary things after leaving the Section and the Department.

And so just going down [the] line: Bob Libman, who came in from Chicago for the tropical weather, and is a partner [at] Miner, Barnhill & Galland in Chicago and has been practicing there for a number of years after leaving the Department in 2004, I believe, so he's pretty fresh.

And next to him is Aaron Schuham, who serves as the Legislative Director of an organization that I love dearly, but its name always gives me a headache. It's the Americans United for Separation of Church and State; it's a difficult concept to be united for separation.

(Laughter)

BILL YEOMANS: And then next to him is John Gadzichowski, who, of course, [is]—we might want to talk about changing that—[the] current Chief of the Section, and we're looking to him, for the inside view on what's going on inside the building right now.

And next to him is Jocelyn Samuels, who serves as Counselor to the Assistant Attorney General, and has responsibility for both the Employment Section and the Education Section. And next to her is Michael Selmi, who is a Professor of Law at George Washington University Law School, and is one of the country's leading scholars on employment law.

So we are delighted to have all of you here today. And I'm not going to say a whole lot. I did want to just get my chance to talk about Dave Rose very quickly. And what I want to say is: Dave, I'm sorry to hear that you're still bitter about the *Cicero* argument.¹ I thought we had gotten over that.

(Laughter)

DAVE ROSE: Respectively.

BILL YEOMANS: We won; it's time to move on.

1. United States v. Town of Cicero, 786 F.2d 331 (7th Cir. 1986).

(Laughter)

BILL YEOMANS: But, no, that was a wonderful experience, because I was, at that point, a relatively young attorney in the Appellate Section. And when I came to the Civil Rights Division, there were a few people who were sort of gods at that point because they had been there from the creation and had had just a real fundamental impact on the development of civil rights law and—of course, Dave was one of those; Brian Landsberg was another—[I] looked up to these people enormously.

And so Brian told me I was going to argue this case; [it] seemed like a good idea to me, and, of course, I had to write a brief—and by the way, I don't remember Dave volunteering to write the brief.

(Laughter)

BILL YEOMANS: And so I wrote the brief and I was going to go to the argument. And I knew there was some buzz about Dave being a little unhappy, and lo and behold there I am out in Chicago before the Seventh Circuit, and he shows up. And it was bad enough that I was going to face Judge Posner on my panel, [I] wasn't really looking forward to that, but there I had the added pressure of having Dave in the courtroom, and it turned out really well.

I think in the twenty minutes, or a total of forty minutes in that oral argument, we bonded because, as Dave said, he didn't feel that good about it before I started [talking] but, by the time I finished, he felt better.

(Laughter)

BILL YEOMANS: And I can vouch for that because at the very end of the argument—Judge Posner turned out to be very helpful during the argument, after sort of the light bulb went on halfway through, and so he was just eating the City Attorney alive—[I] wrote sort of a little note to Dave: “No rebuttal, right?” And Dave wrote back: “No!” So we had come together.

(Laughter)

BILL YEOMANS: Anyway, we're going to talk about current enforcement and future enforcement. Just to set the stage, I mean you've heard a lot about the Section's troubles, shall we call them, during the last number of years, and those troubles, we're all quick to say, came from the political level, certainly not from the career level, but it was a difficult time. It was a time when, from outward appearances, the Section really failed to perform its traditional mission.

It pretty much stopped filing cases on behalf of African-American victims for a while. In fact, there was a long stretch where it filed more cases on behalf of white victims than African-American victims. And I kept standing up and saying, “My people don't need that kind of help,” but I think toward the end of the last administration there was some moderation of that. And I think, as we all heard at lunch today, it is an exciting new time.

And Tom Perez [the Assistant Attorney General for the Civil Rights Division] frequently says, “The Division and the Section are open for business again,” which is nice—it makes me a little nervous because it makes me think they’re taking bribes.

(Laughter)

BILL YEOMANS: But I think it is true—that it really is the dawning of a new age—it’s an occasion! It’s an occasion for all of us to think about where we should be headed, because the Section is an enormous resource; as you heard, it’s getting more resources.

We are living in an ever evolving society. We are going to be dealing with a new economy emerging from this economy’s recent near-death experience and we are facing new living patterns. We are facing non-traditional ways of living and we need to think hard about how we can use some of the tools that we traditionally use, not only to do the work that the Section has been so important in doing, but [to think about] how we can expand the reach and the impact of the Section.

So I hope we’ll deal with some of those issues today. And I hope we’ll talk, obviously, about some of the legal challenges that Title VII faces. There has been mention of the *Ricci* decision;² there is some disagreement about how serious a blow that is to Title VII, and maybe we’ll talk about some of that. And we’ll talk about whether there are changes in the law that should be thought about.

So I’m going to stop talking and we’re going to turn first to our government witnesses, and we’re going to start with . . .

JOCELYN SAMUELS: Witnesses?

BILL YEOMANS: Yeah.

(Laughter)

BILL YEOMANS: And we’re going to start—that’s all right—back in congressional hearing mode. One thing I didn’t say about Jocelyn, of course, is that she worked for Senator Kennedy too, and so she is a part of that incredible group of uniquely and unvaryingly talented people who are also very good looking.

(Laughter and applause)

BILL YEOMANS: So I would like to start with Jocelyn and let her tell us a little bit about the current thinking in the Division about the Section.

2. *Ricci v. DeStafano*, 129 S. Ct. 2658 (2009).

JOCELYN SAMUELS: Well thanks, Bill, and I'm delighted to be here, although I sort of think Bill has now set me up in many ways (Samuels and audience chuckling). He started by, after congratulating Richard for putting together this great day, which I am delighted to be a part of, saying "okay, that's enough with the nice guy," follow[ed] by calling me a witness, and pointing out that I was not a trial attorney in the [ELS].

BILL YEOMANS: Nor was I.

JOCELYN SAMUELS: I'm prepared for some tough cross examination here.

(Laughter)

JOCELYN SAMUELS: But let me make clear at the outset, we are not open for business by taking bribes. We don't take bribes, lest anybody have any doubt about that.

What I think Tom does mean by "open for business," though, is that he and the rest of the Division are now firmly committed to really aggressive enforcement of Title VII and of all of the other laws under our jurisdiction, [as well as] ensuring that the Section is restored to its original mission and role as a promoter of real social change and [to being] an entity that really does combat employment discrimination against those disadvantaged in . . . society.

Tom often uses the terms "reformation" and "transformation," and I think that's sort of consistent with what Bill was talking about, because certainly reformation plays a part in what we want to do over the course of the next three years. Because, as Bill pointed out, we lost a lot of experienced attorneys during the last administration; we brought minimal numbers of cases. I think Tom referenced in his remarks the GAO report that showed that the pattern or practice caseload of the Section diminished significantly; and there were, I think, significant issues about morale and direction in the Section.

So, by "reformation," I think he really wants to look toward restoring the Section to the role that it has played over the course of the last forty-five years in promoting social change. But in order to do that, I think, we also—and he recognizes—[n]eed to transform; it's not simply enough to go back to 1999 or 2000 or 1982. That [is] because the nature of civil rights challenges are different than what they have been over time, because the nature of the tools that we have available has expanded exponentially, and because the complexity of some of the issues that we confront is really enhanced, [so] we need to think about new ways of doing business and using all of the tools at our disposal to make sure that we can be the most effective employment litigation law firm in the country. That takes people.

And I just want to reiterate something that Tom said at lunch, which is that we were extremely fortunate to receive a significant increase in our budget. We have many different job openings, including five in the [ELS]. So I urge you to consult our website to look at the job postings there [or] to refer them to your friends. We have—and I want to make [this] clear because this is part of the restoration component of our effort—[a] transparent and nonpartisan hiring

process in place, and we are really looking for the best and brightest candidates from all across the country and all different kinds of experiences, so please do spread the word. We need help, and this is an extraordinary opportunity for us to really make a difference.

But let me talk a little bit—and I know Bill had suggested that we each talk for between five and seven minutes, and I'm incapable of restraining myself, but I'll be quick—[about] some of the changes in processes that we have started to put into motion and that we are planning to expand on.

One is that we're determined to make better use of the federal government's enforcement resources writ large, because there are numerous agencies, the EEOC and [the Office of Federal Contract Compliance Programs ("OFCCP")] being the most significant of them, that also have responsibilities for combating employment discrimination across the country. We want to make sure that we leverage the—albeit growing—still limited resources that each of our agencies has and make [the] best use of them to ensure that we're operating at maximum efficiency and helping each other out where we can.

So, we've begun conversations with each of those agencies about ways that we can better collaborate. And that could potentially include joint training [and] joint investigations. As Tom said at lunch, it may mean getting involved earlier in certain cases to make sure that, as the investigations are conducted, they're set up well for ultimate litigation. We are absolutely open to expanding those relationships to the extent useful to ensure that we're making [the] best use of our enforcement dollars and resources.

We're not exclusively restricting that [to] EEOC and OFCCP [though]—Tom recently convened a meeting of all of the federal agencies that have civil rights enforcement responsibilities—because I think one of the things to recognize, in terms of understanding the complexity of issues that we face, is that there is overlap, potentially, between different forms of discrimination that previously have been too siloed.

So it may well be that housing discrimination is a significant component of education discrimination, and that disability discrimination, as we all know, permeates every aspect of whatever is going on—be it public accommodations, housing, education, or employment. So we want to make sure that we are coordinating in the most effective way, broadly, so that we can use our enforcement resources, not simply under Title VII and the ADA, but also under the Rehabilitation Act and Title VI and Title IX, so that we can, again, make the most effective judgments about how to promote equality of opportunity.

We also are looking to state fair employment practices agencies and trying to figure out whether there are ways that we can better collaborate with them to ensure that, again, we are using resources in the best way possible. So getting our own house in order is something that we are really attempting to do and put new energy into. But that's only the beginning.

Another thing that we really, really want to do is ensure that we have open lines of communication with all stakeholder communities. And I include everyone in this room in that. [W]e know that people who are on the ground have information about cases of discrimination; about situations that they think may be unfair or unlawful; about policy priorities that we ought to

pursue; about opportunities for us to come and do public education, technical assistance, or other kinds of work in local communities to ensure that we're getting the word out that we're in business and we intend to protect people's rights. So we welcome getting input from all of you, and from the coalitions and groups and communities of which you are a part, so that you can be our eyes and ears on the ground.

We're also trying to work with U.S. Attorneys, and particularly in the area of [Uniformed Services Employment and Reemployment Rights Act] cases, trying to promote enhanced partnerships so that we can, again, more effectively deploy our resources.

We also are interested in making use of new tools, and our website doesn't yet reflect that, but hopefully over the reasonably short term we will have a website that is more user-friendly and has lots of valuable information. But I think that as more social media tools have become available, as there continues to be a need for public education and technical assistance, we want to add those kinds of activities to the work that we do and to the core litigation that will always remain a key priority of the Section.

I guess the other category of things that I would say are about emerging issues. To the extent that there are discrimination issues that are presented in a new way, or issues as to new communities, or new legal questions that are emerging, on which you think the Justice Department could play a helpful role, we'd love to hear from you about that.

As Tom mentioned at lunch, he's very concerned about re-segregation of older work forces as people retire. There may well be issues related to immigrants that are things that we need to take a look at. There are obviously going to be all kinds of new issues under the ADA Amendments Act, and although that's not in the ELS bailiwick, it is something that the Division is quite committed to enforcing in a proactive way.

If there are new legal issues, we hope that you will look to us and ask us to weigh in as appropriate. We have begun to file more amicus briefs. As many of you know, the *Lewis* case³ is going to be argued in the Supreme Court on Monday; that is potentially [the] son or daughter of *Ledbetter*⁴ and it concerns the statute of limitations that applies to disparate impact lawsuits. I think that's a very significant case, and it's one [in] which the Solicitor General filed a brief and will be arguing on behalf of the government that the statute of limitations runs from every occasion on which an employer uses a test that has disparate impact.

Those kinds of issues are obviously ones that pack a big wallop, and I think that one of the clear things that Tom means by "open for business" is that we intend to play a significant role in shaping interpretations of the law and [we] hope you'll engage in the continuing dialogue with us about how we can do that.

3. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).

4. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2006) (codified at 42 U.S.C. § 2000e-5).

So I think I'll stop, turn it over to John for discussion of some of the specific cases that we're involved in, and then I know that people on the panel have a lot of suggestions and are prepared to take me up on this invitation immediately for suggestions about ways we can proceed.

BILL YEOMANS: Thank you, Jocelyn. Go ahead, John.

JOHN GADZICHOWSKI: Thank you, Bill. Good afternoon folks. This past year, the first year of this administration, has been a banner year for the [ELS]. We filed a total of twenty-nine lawsuits, which is the largest number of lawsuits ever filed by ELS during any single year; ten of these suits were brought under Title VII, and nineteen were brought under USERRA.⁵ As to the ten Title VII lawsuits, four were pattern or practice suits, and the remainder were brought under Section 706.⁶

I know that Tom ha[s] shared with you some of the work we had done, referencing a couple of cases, *Fire Department of New York*⁷ and *Massachusetts Department of Corrections*.⁸ I'm not going to repeat what he had said, but rather turn to areas of priorities that we may want to address and in that context, [I will] discuss the recent lawsuits that we have filed.

Probably one of the significant priorities that we ought to be addressing is, obviously, increasing the number of pattern or practice suits, especially those which are large and complex. There are several reasons for this. [O]ne is to have . . . impact and impact cases. And I don't mean impact verses treatment; I'm talking about the large cases that have a lot of relief; in other words, a lot of impact on communities and on employers. They can be found only in large suits. Second of all, it's those types of suits, especially where you have complex testing cases, where I think the Section can lend its expertise, as well as its deeper pocket, to members of the plaintiffs' bar who otherwise wouldn't be able to take and fund cases of that type.

A case in point is *Fire Department of New York, [United States] v. Fire Department of New York*. There, we, the United States has—and plaintiff intervenors have—alleged that the city had used two written examinations for entry-level firefighter[s], which resulted in disparate impact and which were not job-related or consistent with business necessity. By definition, since it's a testing case, [the case] requires experts in the area of the first prong, disparate impact, as well as the second prong, which is job relatedness. These are very labor and cost intensive cases, and I think we've had a very good working relationship and a true partnership with the Vulcan Society, which is the plaintiff intervenor there.

5. Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4335 (2006 & Supp. II 2008).

6. 42 U.S.C. § 2000e-5 (2006 & Supp. III 2009).

7. *United States v. City of New York*, 683 F. Supp. 2d 225 (E.D.N.Y. 2010).

8. Complaint, *United States v. Massachusetts*, No. 1:09-cv-11623 (D. Mass. Sept. 28, 2009), available at <http://www.justice.gov/crt/about/emp/documents/massachusettscomplaint.pdf>.

Just last month Judge Garaufis entered an order on relief in which the court . . . determined that the City is responsible [for] provid[ing] 293 priority job offers to black and Hispanic victims of the two tests, as well as to award those folks retroactive seniority for all purposes. We heard from Frank Petramalo and Jerry George earlier today with regard to the real importance of retroactive seniority, and, obviously, the Supreme Court also thought so in *Franks v. Bowman Transportation*,⁹ where it held that (or instructed that) retroactive seniority is an integral part of remedial relief.

Another case that is large and complex is a current case that we're working on, *United States v. State of Massachusetts*. This case involves our challenge to the State's use of a physical abilities test for the entry-level position of corrections officer[s] statewide. The examination, or the test, that the State administers is not gender norm[alized], so, therefore, it has tremendous disparate impact on the basis of gender against women.

Jerry talked a little bit about police jobs, and I'm asked all the time, why do we concentrate on public safety jobs, and is that all we do? That is, and remains, a priority. Jerry had mentioned several reasons for it; let me add another one: and that is [that] especially in the economy that we find ourselves in, the employers on the state and local level are not only not hiring but, indeed, cutting back and letting folks go.

One thing we know about public safety positions . . . is that they're almost always going to be hiring cops and firefighters. So it's a very good job that's got great benefits, great pension benefits, and a lot of employment decisions, which—from a plaintiff's point of view—are crucial [in order] to make, for example, a statistical showing.

The type of job that we're looking at currently involves a police promotion exam. We want to focus; we want to continue our efforts in the area of public safety, but we want to expand those efforts in public safety to go after promotional practices. Heretofore, the Section has concentrated mostly on entry-level positions in public safety positions.

One of the reasons for having done that was because there weren't blacks or there weren't women or Latinos in even the entry-level jobs, much less the promotional positions. Now we're seeing more and more . . . integration of our police and fire departments but only at the entry-level, and we want to take the next step to look at discrimination in promotions in both police and fire.

An example of this is our State of New Jersey suit,¹⁰ which was filed just last month. In this suit, we challenged the State's use of a written examination for promotion to the position of police sergeant. [That] examination is used by all local jurisdictions throughout the State that are part of the State's civil service system; so that's, I would say, about three-quarters of the local jurisdictions throughout the State utilizing this exam. We're in the early stages of discovery at this juncture.

9. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

10. Complaint, *United States v. New Jersey*, No. 2:33-av-00001 (D.N.J. Jan. 7, 2010), available at <http://www.justice.gov/crt/about/emp/documents/newjerseycomp.pdf>.

Jocelyn raised the point, and it's my third point in terms of priorities.

JOCELYN SAMUELS: I didn't mean to steal your talking point.

JOHN GADZICHOWSKI: Not a problem, no—[on] suits to address re-segregation: we actually have two suits already that are on point here, one is *Fire Department of New York*. Remember, I think Tom had mentioned at luncheon that blacks made up approximately only three-and-a-half percent of the firefighters in the Fire Department of New York. There was a time, folks, when blacks made up about seven or eight percent of firefighters, so we've actually had a retrenchment with respect to the Fire Department of New York.

Second of all, in our Massachusetts suit, we're challenging this physical abilities test, which is used without gender norms. But I've got to tell you something; at one point and up to 2004, the State actually used a physical abilities test that was gender norm[alized]. So I don't know how one defines the term "re-segregation," but certainly we have employers that are, shall we say, regressing. I think those are the types of employers that need special attention, because we certainly don't want to sacrifice and give up the gains that we've made. A fourth point is that we want to look very hard at employment discrimination in our schools and universities. Fifth, we expect that there is going to be a very substantial increase in the amount of defensive litigation.

As most of you know—I know Mary Beth in particular, because she worked [with] Ann Richard, because they worked on so many of these set-aside cases—they're under attack, and we have the [Associated General Contractors] ("AGC") and other plaintiffs looking to knock out the programs state by state, one by one. We're not going to let that happen. We are going to actively defend the set-aside programs that are in place.

Lastly, I see that there is going to be an increase in pregnancy discrimination suits. Two of our pattern or practice suits this past year have dealt with pregnancy discrimination; one in terms of assignment restriction, and the other one in terms of a termination. We've also seen it in one of our Section 706¹¹ suits, *United States v. City of Chicago Board of Education*¹² I think this is an issue that we thought some time ago was going to be taken care of and we weren't going to be seeing again, but it seems like we're revisiting this very issue that we thought we had settled and resolved some years ago.

Those are the bold-letter priorities. I'm sure that there are going to be suggestions from my colleagues with regard to more. But in working on these priorities, we're going to keep, as a process matter, [doing] three things.

First, as Jocelyn has indicated, we're going to develop and maintain a very close and constructive relationship with the EEOC with the respect to the enforcement of Title VII, and with the OFCCP with respect to the enforcement of the executive order. [Second], we're going to develop and maintain effective, constructive working relationships with stakeholder organizations and their

11. 42 U.S.C. § 2000e-5 (2006 & Supp. III 2009).

12. Complaint, *United States v. Bd. of Educ. of City of Chicago*, No. 09-cv-1092 (N.D. Ill. 2009), available at <http://www.justice.gov/crt/about/emp/documents/chicagoboecomp.pdf>.

counsel, as we've already started doing in the fire department case[s]. And [third], we're going to be putting more reliance upon the U.S. Attorney offices for litigating our USERRA suits, thereby freeing up valuable resources, both personnel and money resources, to further our enforcement program under Title VII. Thank you.

BILL YEOMANS: Thank you, John. That's a very heartening agenda, and I think . . . the part about bringing more complex pattern or practice cases . . . raises . . . one of the Section's biggest challenges. As most of us know, the Section has lost some of its most senior [and] most experienced attorneys in the last few years; it's lost an enormous amount of intellectual capital. So it's going to be a challenge, and at some point we'd like to hear what your plans are for restocking that capital. I know you're hiring.

But, our next speaker, Bob Libman, is a classic example of the kind of resource that the Section lost, and really tragically, and I want to ask him to speak next. Bob?

BOB LIBMAN: Thank you. And as the only member of the panel who lives outside the beltway, I think I have perhaps a different perspective; also, [I am] the only panel member currently in private practice. But I wanted to start first by also thanking Richard. Whether by design or otherwise, I think what Richard has done here is really develop and lay out the first oral history of the [ELS], and that, in and of itself, is quite an accomplishment, so thank you, Richard, for that. [W]e could applaud Richard for that.

(Applause)

BOB LIBMAN: And I can tell you that I've learned many things here today that I didn't know before. I was in the Section from 1991 until 2004—actually about 2002, [when] I was sent elsewhere, but that's another story. And I do also want to just publicly acknowledge and thank those who came before me and built the foundation upon which I hopefully did something during my thirteen years in the Section.

I did want to reiterate what John said about the importance—maybe the why—why the [ELS] and its work in Title VII enforcement is so important. Again, given my perspective in the private sector, at least for the last six years now—I'm in a small, primarily plaintiffs' public interest law firm, where we can brag that Barack Obama used to be in our office, actually, he worked there—and it is very difficult for the private sector to bring the kinds of cases that the [ELS] has historically brought and is uniquely qualified to bring because of the expertise. Historically, the Section has had the resources, as John mentioned, both intellectual and dollars wise; and the horizon, if you will, the time horizon for resolution of these cases, which can take decades, as many people know.

The *Lewis* case¹³ is a perfect example. Our firm actually filed the EEOC charge that is at issue in the *Lewis* appeal, and that charge, I believe, was filed

13. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).

in [1997], so that's thirteen years ago. Along the way, the resources necessary to litigate that case were tremendous; it's not only our firm working on that case. But the [ELS], from my time there, served the critical role of bringing the large pattern or practice cases against the public employers in a way that the private bar can't do.

The private bar has other challenges as well in bringing these cases, including class certification under Rule 23,¹⁴ which the [ELS] thankfully doesn't have to worry about. So the point there simply [that] is there is a real need for aggressive enforcement of Title VII from the [ELS]. I'm very encouraged and have reason for great optimism in light of what we've heard already.

I do also want to just, for those law students here or Section attorneys who are of the more junior in terms of experience, [give] you a few words to have hope as well, even [regarding], what somebody called, the "dark days" that [preceded] us. And it really touches on a case I worked on while I was there, the *SEPTA* case,¹⁵ [during] which I was fortunate to have Richard Ugelow as my supervisor; I was lead attorney.

The brief background—this is the case against the Southeastern Pennsylvania Transportation Authority, essentially the Transit Police in Philadelphia, [h]ad a physical examination [used to screen] transit cop[s]; you had to run a mile and a half, I think it was in twelve minutes; never mind the fact that incumbent police officers were failing this repeatedly and being promoted and commended and doing heroic things. The test was developed by a test developer, Paul Davis, who was the expert for the *Virginia Military Institute* [case].¹⁶ [H]is testimony in that case, which we tried to offer—I think we did in the *SEPTA* trial, trial number one—[t]hat the only area of physical performance in which women outperform men was in having babies and making milk. He did a validation study to justify the need to run fast as a transit cop by conducting a study at the University of Maryland.¹⁷

[I] believe Aaron went out there actually and talked to folks at the track where he had folks running to show how fast you needed to run to be a cop, and he put together a class of folks he called the perpetrator class, simulating the perpetrators that had to be tracked down by the police.

And I think Aaron talked to the Maryland track coach, [who] just happened to be on the track that day, and Aaron asked them if they knew anything about this study that had been done. He said, "Sure. In fact, some of my track team members were in that study." And it turned out that all the track team members were the perpetrators . . .

(Laughter)

BOB LIBMAN: . . . who ran as fast as the typical criminal in the Philadelphia transit system, I'm sure.

14. FED. R. CIV. P. 23.

15. *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478 (3d Cir. 1999).

16. *See United States v. Virginia*, 518 U.S. 515 (1996).

17. *See Se. Pa. Transp. Auth.*, 181 F.3d at 491–92 n.18 (describing Dr. Davis's Maryland study).

(Laughter)

BOB LIBMAN: The trial judge did not like our case, and said to me on the first day of trial with three attorneys and our counsel, “Who is running the country today now that you’ve left Washington?” We lost that case at trial. We appealed and established a very important principle about the use of a cutoff, or actually the meaning of the “consistent with business” assessing language of the Civil Rights Act of [19]91 in the context of a cutoff score; it was a tremendous victory in the Third Circuit.

The case went down for a second trial and eventually it became a casualty of the last administration; we were asked to withdraw from the case, strangely enough without any consultation of any person who worked on the trial team. And the case actually was—eventually—the test was found to be not unlawful, so it persisted.

That’s a long intro, but the coda to it—which is the reason I started the story—is that just last year, within the last six months, SEPTA abandoned the test—the very same test that we challenged—and replaced it.

(Applause and laughter)

BOB LIBMAN: And [SEPTA] replaced it with essentially what we had been arguing should’ve been done all along. So the theme of incremental change and waiting to see the results, I think, certainly rang true for me there.

I want to speak just briefly also on this issue of the resource—the new attorneys that will be hired. The challenge I see for the [ELS] is not just bringing in new attorneys, but training them. As I viewed the work in the [ELS] when I was there, the day-to-day work of the line attorneys, with whom I have particular affection, is about gathering facts. That’s what it’s about; it’s about gathering facts and presenting the facts.

We’re not typically, on a day-to-day basis, making new law. We know what the legal standard is; we need facts that can meet that standard; and so the new attorneys coming in need to be trained. They need to be trained by senior people who have experience, who know how to develop Title VII cases, know how to take depositions. It’s not enough just to get them in the door; they have to be trained.

One story I’d like to share with you, and it also recognizes Bill Fenton, who is here today, who is, again, one of my mentors, a Deputy Chief who retired last year, quietly, as we expected, but who[m] I think should be publicly recognized. He was one of my mentors and [a] mentor [to] many people I think who are here today.

(Applause)

BOB LIBMAN: And on the question of training—and on the theme of immersion—I wanted to share a story which I believe is true, Bill, and if not, it should be. The first case I was handed to work on, when I got to the Section

in 1991, was against Hancock County Board of Education;¹⁸ and I was on the road within a few weeks doing an investigation, and found myself suing them and taking depositions within a few months.

I went in and talked to Bill about my first deposition, and as I recall it, Bill said, “Well you haven’t taken depositions before?” And I said, “No.” And he said, “Have you attended any depositions?” “Uh, no.” “Have you read deposition transcripts?” “No.” “Have you read any of the practice guides on how to take depositions?” I said, “No.” He said, “Have you ordered the court reporter?” I said, “Yes.” He said, “You’re going to be just fine!”

(Applause and laughter)

BOB LIBMAN: And in closing, I want to say that I do think the line attorneys are the real treasure of the [ELS], certainly during my time there, and for that reason I just want to reiterate that getting new folks in the door is not going to be enough; they have to be trained. And there’s been a real loss of, as Bill says, intellectual capital. I think the challenge against this, facing the Section, is very large; not one that’s insurmountable, but I do believe that it’s going to take time to get the line attorneys to a place where they can effectively and vigorously enforce the law as the political appointees and the Section management want them to do. Thank you.

BILL YEOMANS: Thank you, Bob. Aaron, time to put your track shoes on.

AARON SCHUHAM: Okay. Well, thank you, Bill; I mean it’s a really great honor to be on this panel. And this has been bothering me all day; can I actually ask, who are the current line attorneys in the Section? We want to know who you are, can you tell us?

BILL YEOMANS: Current.

AARON SCHUHAM: Thank you, current, yeah. I want to spend my time advancing a few ideas and raise actually a few questions about how ELS, I think, could help to sharpen its focus in the months and the years to come.

When I worked at ELS, some of my friends in the civil rights community would often kind of chide us and tell us that we were sort of DOJ’s Title VII shop or the government’s Title VII shop, and that always really irritated me. I don’t think that ELS is just another Title VII shop or even just another Title VII shop with a lot of resources. That really, as we have learned today, is not what ELS has been in the past and I don’t think—and my guess is that many of you don’t think—that that’s what it should be in the future either.

The Section has vast power as an arm of the federal government; it has vast prestige, credibility, and resources. And I think that it should be using these resources and these assets strategically to provide the most vigorous and aggressive Title VII coverage as possible.

18. *United States v. Hancock Cnty. Bd. of Educ.*, No. 91-0149-W(S), 1993 WL 436490 (N.D.W. Va. Sept. 1, 1993).

And basically what I think this means is that ELS should really continue its past practice, to develop its past practice about being self-critical about what it uniquely brings to the civil rights table when it's deciding how to set priorities and deploy its resources. The mission really should not just center around investigations or cases that have merit, rather I really think that ELS should think carefully about putting in additional screens on top of these pipelines in order to prioritize work in a way so as to maximize its future impact.

And I want to note that in my view, there is no doubt that disparate impact cases are incredibly important for all the reasons that have already been described. But I am someone that really believes that the [Section] 706 docket—the individual discrimination docket that Bill used to manage—is part of this whole thing; that the development of that docket strategically would allow the [ELS] to develop its impact even more. [I]'ll try to describe a few ways very quickly.

So the first kind of broad point that I wanted to make, in raising some considerations for you all to think about who are in the Section for the future, is basically that ELS should address important enforcement gaps where the private bar may lack resources; as Bob and I guess John noted earlier, [w]here resources basically aren't available. So let me ask some questions.

Will ELS continue to deploy major resources towards Title VII investigations and cases that are simply too complex or expensive for private attorneys to develop? We really have already talked about that, and I think it's wonderful to hear about all the great work that you're leading the Section in doing on that. Private civil rights law firms—many of them, most of them—don't have the resources or even the organizational resources, or even, frankly, the sheer attorney power that ELS has to investigate these cases, carry them on for a long time, as Bob said, and move them forward.

Second, how can ELS work to eradicate forms of discrimination that seem most important now in this time of severe unemployment, which we all know has had even a greater impact on minority communities? Let me give you a couple of ideas. Can the Section expand its past work? And I think it's really amazing work that the Section did in the past to protect women's rights to full equal employment opportunity after pregnancy, or even adoptive parents, when they return to work.

A lot has been written—go and Google some Law Review articles—[a]bout whether Title VII could ever be used, [t]hrough the antidiscrimination principle, to get at childcare; to get at the fact that many people, in order to walk into a place of employment [in] the first place, must have childcare. It's a really interesting area of law; DOJ could look at that.

Third, will ELS then continue to make an impact in geographic areas, where access to private attorneys is very limited, even including . . . cases that seem to be very routine, straight-out violations of existing Title VII law? Here, the Section could continue what I really view to be a past critical role in: (a) providing relief for victims of discrimination in these areas who can't access local representation, and (b) in educating the public and employees and employers in specific geographic areas about their obligations [under] Title VII.

Let me give you one super-quick example right here; and I think someone in an earlier panel, and I apologize if I'm duplicating them, talked about the first set of firefighter cases. I worked on a firefighter case in southern Georgia; you remember that we pluralized and found multiple victims.

Well, I never realized, when I worked on this in the early [19]90s, that the origin of this whole thing really was 1972. Do you know that before 1972, when Title VII was amended to apply to public employers, in 1972 there was not a single woman paid firefighter in the United States?¹⁹ I truly think that's a remarkable fact; that's an amazing fact. And it really was through the first iterations of disparate impact litigation then, that you all then carried out, that those kinds of barriers were broken down. ELS should do that in the future; looking at these geographic areas where people are totally disenfranchised from work, and especially for government jobs, which, as John said, are very high paid jobs and often come with very good benefits.

Second, then I will move it along, ELS really should not just fill gaps. I mean, that's sort of what I've talked about thus far, at least in my mind. I think that ELS really should continue to make a very conscious, focused, deliberate decision to lead in the development of Title VII law, as Jocelyn referenced, in a way that would really provide for the most robust protection of American civil rights in employment as possible.

I know there are institutional impediments in this process. I experienced them and I think many people in this room, at different times, did. It is hard sometimes to cleanly work with EEOC and OFCCP. I think what you all talked about today and what Tom talked about earlier, about improving your relationships with these agencies, is amazingly hopeful and amazing[ly] important.

Private attorneys may not take up cases that really result in the development of the law. They're risky cases to bring, they require tremendous investment, even in individual discriminations, to develop that kind of law, and I think that ELS is very capable of doing that. So here is, very quickly, by no means a comprehensive list of objectives, but some good examples.

First, we've talked about the disparate impact theory all day today and cases and *Ricci*;²⁰ can DOJ look not only at its own docket, but at private litigation involving disparate impact and get involved there, even at the District Court level, to weigh in on the constitutionality of disparate impact for the future? The [DOJ] has a role in defending the constitutionality of all federal statutes, we all know this; this is a very good example of where ELS, even at the District Court level, could do that.

Second, working to strengthen Title VII's sex discrimination and sexual harassment protections; if DOJ wants stronger protections in this area, and it certainly should and I'm sure it does, then the Section should look at developing some areas of Title VII law that really would do that. Here are three quick examples.

Pushing back on sex stereotyping and gender rules in the workplace;

19. Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2006)).

20. *Ricci v. DeStafano*, 129 S. Ct. 2658 (2009).

could ELS work with the EEOC to look at specific potential cases, potential investigations, that involve sex stereotyping under the *Price Waterhouse*²¹ theory? Or even, aside from the *Price Waterhouse* theory, could ELS work to address other minority communities that the Section could impact through Title VII straight-out sex discrimination provisions?

Here's a great example. Do people here know about the recent *Schroer* case?²² This involved a transgender employee, a colonel, in fact, who used to brief Vice President Cheney on national security issues, and then applied as a male to the Library of Congress for employment for a [Statistical Reporting Service] job—a congressional research service job—obtained employment and then, after telling the supervisor at issue that this person was going to change genders, that offer of employment was then retracted.

And I would assume that the Civil Division of DOJ played a role in defending that litigation, the case, ultimately before a District Court Judge here in D.C. [T]hat the court there determined that, even though Title VII doesn't cover transgender people—there's a specific exclusion for it—that there was nevertheless a straight-out sex discrimination violation; not even a *Price Waterhouse* sex stereotyping violation there, but the fact of the change of gender was a literal violation of the statute.

You all could go and look at those kinds of cases. You could look at cases, of course, that don't involve sexual minorities but that get to traditional gender roles, just as *Price Waterhouse* did. You could look at cases that were really under-enforced on same-sex harassment, which was established as totally viable in the *Oncale* decision;²³ that's something that we did in the past.

A couple of more quick points, or do you want me to stop? Do you want one more?

BILL YEOMANS: One more.

AARON SCHUHAM: One more, okay. Can I mention something about the amicus [brief] role that Jocelyn brought up? Some of you who were involved in the Section back in the [19]90s and early in 2000 know that we got involved in a case there that looked at, really for the first time, having the Justice Department weigh in on the constitutionality of state and local anti-discrimination laws.

When Congress passed Title VII [in 1964] and extend[ed] that in 1972, Congress explicitly recognized that Title VII, as important as it is, really is meant to set a floor and not a ceiling to employment anti-discrimination principles; that it expected, specifically, that States and localities would provide for more expansive employment protection than Title VII itself does.²⁴

21. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

22. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

23. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

24. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48–49 (1974) (“Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination.” (footnote omitted)).

A lot of those provisions have been under attack in recent years. There are people raising free exercise claims and other First Amendment claims to the constitutionality of these kinds of laws. And I think that DOJ could play a very specific role—in its broader role of protecting the civil rights régime of providing equal employment opportunity—[c]oming in and weighing in on the constitutionality of those kinds of laws, just as we did in a very specific context in Kentucky and in Louisville back in 2000.

So I will stop with my ideas. But I really think what it comes down to is the fact that ELS has a very unique role. It may not feel like that to you every day. You have tremendous power and resources. You have access to other lawyers in the [DOJ], in other discipline areas, that allow you to really solve problems holistically, in a way that I truly don't think any other private attorney could, and so I hope you use it.

BILL YEOMANS: Thank you, Aaron, for a lot to chew on. Michael, you get the last word.

MICHAEL SELMI: Thank you, and I am, I guess, literally the last thing between you and your drinks at this point.

(Laughter)

MICHAEL SELMI: And I have to start by saying that it is just an absolute pleasure to be here and I really appreciate Richard having invited me. I was only at the Department for two years, from 1989 to 1991, and it was a great experience that, in some ways, has never left me, because I still use my anecdotes from those two years in class all the time. And as many of you probably know, whenever a professor starts off by saying, “I had a case once,” they usually mean, “I had one case.”

(Laughter)

MICHAEL SELMI: I actually had lots of cases at the [DOJ], and I had just a fabulous experience. And I later went to the Lawyers' Committee [for Civil Rights Under Law] and I never really felt like I had changed much; it did feel a little bit different in terms of the side that we were on.

There was one case that I was doing when I was at the [DOJ], with the City of Birmingham,²⁵ [where] I went to do a hearing and because of the past history of the [DOJ], having switched sides a couple of times, it wasn't at all clear where I was supposed to sit; and I ended up sitting behind everyone in the middle. And then when I went to the Lawyers Committee, it was different in that respect; we always did know what side we were on, but the work was the same for the most part. And I think that it's an important aspect to emphasize; that the work in the Civil Rights Department is important and it needs to be civil rights work again, I think.

25. *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir. 1990).

And I did want to just share one quick anecdote, sort of everybody else who has had, and one of the things that being here reminded me of was, just the wonderful experience I had at the [DOJ]. And the very first case I'd got when I arrived there was *Bazemore v. Friday*,²⁶ on remand from the Supreme Court, and within two weeks I was down in North Carolina arguing a summary judgment motion about the regression analyses that were present in that case.

And my favorite experience in that is, when I was making an argument in that case, one of the defense counsel tried to cut me off, and the judge stopped him and said, "Wait, wait, wait! Mr. Selmi,"—I was going to say professor—"he's the expert on this." And I was just thrilled. I'd been there all of two weeks and I was already the expert. I never quite knew whether the judge was being sarcastic or not and I didn't bother to ask him. And I've kept that transcript, highlighted, to this day; in large part, because it was the last time anyone referred to me as an expert on anything.

(Laughter)

MICHAEL SELMI: But it really was a terrific experience, and I hope that comes back to you. I'm not going to have too many comments, because a lot of what the [DOJ] can do has already been discussed, but I'm going to have a few suggestions. One of my very first articles that I wrote suggested that we ought to abolish the EEOC, and I'm not going to go that far with respect to the [DOJ], and I actually don't think the EEOC should be abolished, but I do think it's important for the [DOJ] and the EEOC to have a plan and to make sure that they're doing something distinctive and different.

From what I've heard—I wasn't here this morning—but from what I've heard this afternoon, it seems that there's a lot of emphasis on how the last eight years changed the [ELS] dramatically. My sense was this began before that, from the outside at least, and from my watching and writing about the [DOJ] and the enforcement of these statutes. During the Clinton administration, enforcement also declined—not nearly like it did with the Bush administration—but it didn't seem to be the priority that it should have been [f]or a variety of political reasons; and I hope that doesn't happen this go [a]round.

The rhetoric was very much the same at the beginning, although I think that the experience with Lani Guinier may have changed things significantly. And it is wonderful to have an Assistant Attorney General who has civil rights experience and knows that Title VII is an anti-discrimination statute and not a tax statute or something, and I think that should make a difference. But the rhetoric won't carry you through; we've heard the rhetoric before and we need to see, not just a budget, but I think we need to see actual results.

And that's one thing I want to say . . . the work of the [ELS] needs to be publicized. There are no longer annual reports. It is very hard to find out what the [DOJ] is doing. You do list complaints, but it needs to be public, and I think that's true for the EEOC too; so that we can, those of us on the outside, [h]ave better oversight of what the [DOJ] is doing. And we should be able to see the kinds of cases you're bringing.

26. *Bazemore v. Friday*, 478 U.S. 385 (1986).

And I think the other thing, in terms of a plan for the [DOJ] to be doing something distinctive, I think it should think about how it can contribute to the law. There is very little case law on the business necessity test after the Civil Rights Act of 1999; the *SEPTA* case is really it, and that's just one case and we could use more case law.

Now that doesn't mean you don't settle cases in order to develop law, but it does mean more amicus briefs; it means you want to look for cases that could have an impact. The fire department case in New York seems like a perfect example of what the [DOJ] ought to be doing, and it's getting publicity. And the fact that it occurred—it's actually not a post *Ricci* case, it was filed before—and the first decision, if I remember, came just on the heels of *Ricci* and is being pushed forward; that is a great example of what the [DOJ] should be doing. But it's still that old testing case, police and fire department[s], which has been going on since the 1970s, and that correctional officers case that you mentioned, with the physical agility test—the same thing—and it seems that there should be something different.

When I was at the [DOJ,] one of the initiatives was the suburbs cases. So that you had done the police and fire department cases before in the cities, and then we moved out to the suburbs and started doing all the Los Angeles suburbs, the Detroit suburbs, Chicago [suburbs] . . . and that made sense. That was a good plan, I think, and a lot of good work was done on those cases. And they were easy cases, for the most part, because so little had been done in them; they were really just a second generation of those initial cases.

The ones today are less easy; [t]here were the prison cases, too, and those turned out—you know when we were doing the prison cases with respect to women, some of which are still going on, it sounds like; with the women, some of us thought these were sort of silly cases because we were just suing about prison jobs—and they didn't sound like very good cases until we went out and did them. And I did a number of those cases involving women correctional officers in prisons, and you realize pretty fast, those are the best jobs around; they're not glamorous jobs, but they were the best jobs in those rural areas, and it made sense to be trying to get women access to those jobs; and . . . I think something along those lines.

And you've had lots of suggestions today . . . [o]ne of the things that's different from academia and practice [is that] in academia we focus on how much discrimination has changed, how it's more subtle, harder to prove, implicit, and these structural components; but the cases that people are bringing really don't involve those issues. And I think one area where you might be able to find them is in the schools; schools are still overwhelming[ly] female in terms of teachers [and] overwhelming[ly] male at the principal levels. Those might sound like individual cases, but you might be able to do them structurally and think about going out and searching for cases and trying to make a difference in some of these.

When you look at areas that are growing—and it's hard to [know] what areas are growing, where there is job growth today—[w]e used to look at North Carolina. You know, we would go and look at the data where it was a growing area and see if African-Americans—and now Latinos—were getting the jobs in those growth areas, too. Trying to find the big cities, sometimes some of the

rural areas might make sense, too, but really trying to look, with all the data the [DOJ] has, going out and trying to find cases to integrate the Latinos in the areas or African-Americans, trying to get them into the higher-level jobs; as opposed to doing the cases that come forward, and making it more like sort of a branch office of the U.S. Attorney's Office in some ways, which it doesn't sound like they're doing anymore; it sounds like [they]'re starting to go out and do those pattern or practice cases.

I don't think the [DOJ] should be doing individual cases or should be putting resources into them, and I've written about that, but that's also just a statutory issue; but I think the pattern or practice should be the focus. I think the publicity—and I think the other thing, and this I'm saying to the two people to my left, and then I'll stop—[and] the leadership has to support the attorneys. The attorneys want to do the civil rights work, but Bob's experience, when you have a case that's taken out from under you, you know you don't want to spend four or five years working on a case and then find out you're on the other side

BOB LIBMAN: Yeah.

MICHAEL SELMI: And you won't have the incentive to do those cases if that might happen, and the only way you're not going to have that is if you have support from the front office, which I always had. Jim Magnus hasn't been mentioned—from when I was here, he was my chief. He supported me, and Richard did, too, and Bill, and it made huge difference to the work that we did. [I] think that it's easy to forget the importance of that, because the attorneys want to do the work and hopefully they will be able to do so. And I think we're all looking forward to a new day, but we'll be watching, too.

(Applause)

END TRANSCRIPT