Employment Discrimination Project Annual Report 2010

Introduction

The Employment Discrimination Project ("EDP") challenges all forms of racial, national origin, and sexual discrimination in the workplace, both private and governmental, including discrimination by federal, state, and local agencies. The Project litigates complex and often protracted class action lawsuits on behalf of women and minorities. With the crucial assistance of law firms that co-counsel cases with the Lawyers' Committee, the Project also works to dismantle systemic barriers faced by women and minorities in hiring and promotions. The Project collaborates with government officials and Congress to ensure strong government enforcement of fair employment laws and uses its relationships with the same to advocate on behalf of the minorities served by the EDP.

During 2010, the Project concentrated on four major areas of activities: (i) combating inappropriate use of background checks through The Access Campaign; (ii) working against the use of Mandatory Arbitration Clauses in employment contracts that limit recourse to anti-discrimination laws; (iii) enforcing long-standing remedial orders entered decades ago to redress discrimination; and (iv) combating efforts to weaken anti-discrimination protections through participation as *amicus curiae* in major cases argued before the United States Supreme Court.

The Access Campaign

Through The Access Campaign, the Employment Discrimination Project has attacked several aspects of the increasingly common employer practice of making offers of employment conditional on the results of background checks. Background checks can take various forms, including checks of both credit history and criminal history, which can range from arrest records to records of felony convictions only. Historical patterns of social discrimination have created large disparities in the strength of credit histories between ethnic groups: minority workers are often locked in lower paying jobs and have higher unemployment rates, factors which make it more difficult to maintain a good credit record. The growing use of credit history is particularly troubling because no evidence confirms the stereotypes of many employers that employees with poor credit records are more likely to commit fraud or to perform

more poorly on the job. In addition to the credit disparities, minority workers, particularly men, are more likely than white workers to have arrest records, misdemeanor convictions, or felony convictions.

As a result of these social patterns, barring job applicants on the basis of credit history or record of arrests or convictions results in the exclusion of many fully qualified workers of color from job opportunities. Title VII of the Civil Rights Act of 1964 prohibits the use of any eligibility criterion for hiring that has a substantial adverse impact on minority workers when compared with white workers, unless the employer can demonstrate, through concrete facts, that applicants who meet the criterion can be expected to perform better on the job than applicants who fail to meet the criterion.

The goal of The Access Campaign is to abolish the barriers that people of color face in gaining jobs with employers who are relying on credit and background checks to exclude applicants from employment opportunities. The consequences of these barriers are far reaching. As explained in pending litigation, "[the] discriminatory denial of employment affects not only the individuals who are rejected or terminated, but also their families and entire communities, replicating minority under-employment and compounding credit inequities in the process."

Initiated in 2009, The Access Campaign led in 2010 to the Project's filing three class-action cases attacking the misuse of background checks; to Project staff testifying on behalf of legislation and government regulations to ban inappropriate use of credit checks in employment; and to hosting a convening of experts on October 28, 2010, to discuss the use of credit histories in employment decision-making and to brainstorm strategies to combat the growing trend. The Project's leadership on this issue has leveraged other major resources by contributing significantly to a more active enforcement posture by the Equal Employment Opportunity Commission. The agency position was reflected in a suit filed against Kaplan Higher Education Corporation just before Christmas 2010. *Equal Employment Opportunity v. Kaplan Higher Education Corporation,* (N.D. Ohio Civil Action No. 1:10-cv-02882); *see "*EEOC Files Nationwide Hiring Discrimination Lawsuit Against Kaplan Higher Education Corp," available at http://eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm.

(a) Litigation

The Access Campaign provided the core of the Employment Discrimination Project's new litigation initiatives in 2010 as the Project filed three class-actions attacking the policies of three employers that had distinctive policies for using background checks. The Census Bureau created tremendous barriers in 2010 for any applicant who had appeared in an FBI criminal history database to gain consideration for certain positions. Accenture, one of the largest global consulting firms, disqualifies applicants who have had a conviction within the last ten years, even for a misdemeanor offense. The University of Miami has repeatedly rescinded conditional offers of employment after obtaining credit history information, even for positions that have no obvious connection with financial data or information.

(i) Johnson v. Locke, Secretary of Commerce

On April 13, 2010, the EDP filed a class-action challenge to the misuse of arrest histories by the U.S. Census Bureau during its massive hiring campaign for the 2010 decennial Census. In *Eugene Johnson, et al., v. Gary Locke, Secretary, U.S. Department of Commerce*, Plaintiffs allege that the Census Bureau's unlawful policy of screening out applicants with arrest records, regardless of whether the arrest led to an actual conviction, has erected barriers to hundreds of thousands of minority applicants who sought positions as Census enumerators. Because disqualifications for criminal history have a significant, disproportionate impact on people of color and because the Census rejected otherwise qualified workers without any showing of job relatedness for the criminal history data set the Census used, the Complaint alleges that the use of an arrest history in its hiring process violates the disparate impact provision of Title VII of the Civil Rights Act of 1964.

Eugene Johnson and Evelyn Houser are the initial named plaintiffs, subsequently joined by several others, who seek to represent a class of minority persons who have arrest records, records that the Census Bureau used to erect special barriers for members of this class. Mr. Johnson, from New York City, has only a 15-year-old misdemeanor conviction. Since his conviction, Mr. Johnson has experience working with the public, both in conducting market research and in working for the Coalition for the Homeless. Ms. Houser, from Philadelphia, completed a diversionary program related to her only arrest more than 30 years ago, after which she had a productive career that included security and office positions, as well as counseling, and home health-aide positions. Ms. Houser also worked for the Census Bureau in 1990, when she had the same arrest record that derailed her application in 2010.

The Department of Commerce screened out applicants for temporary positions if their names were located in a Federal Bureau of Investigation (FBI) database, which indicates a match with an arrest record. If a name returned a match when compared to the FBI database, each "matched" applicant was given 30 days to produce "official court records" of any criminal case that appeared as a match to his name. In this process, the Census Bureau failed to specify in which court or courts the incidents allegedly occurred; even specifying the court and date would have been of little use to many job applicants, since many courts that hear misdemeanor arrest charges are not "courts of record," and therefore maintain little or no readily available documentation of dispositions.

In July 2009, the U.S. Equal Employment Opportunity Commission (EEOC) sent a letter to the Bureau warning that its screening process is "overbroad and may run afoul" of the law. Then-Acting Chair of the EEOC Stuart Ishimaru went on to say that "[u]nless there is a record that an arrest resulted in a conviction, an arrest in itself is not evidence that a person engaged in the conduct alleged. Therefore, without confirmation, the Census Bureau should not disqualify people based on an arrest record." The Bureau disregarded this warning from the EEOC. As a result, the hiring protocol prevented up to 300,000 minority workers from having an opportunity to receive a job with the agency. Among workers who received the 30-day letter, the Census Bureau ultimately deemed less than five percent (5%) eligible for hire.

(ii) Arroyo v. Accenture

On April 8, 2010, the EDP filed a class-action challenge to the misuse of criminal background checks by one of the largest management-consulting firms in the world. The Complaint in *Arroyo v. Accenture* alleges that the employer violated Title VII of the Civil Rights Act of 1964 through its policy of rejecting or firing any qualified individual who has a record of any criminal conviction (including many vehicle-use offenses) in the last ten years. The bar to employment by Accenture is absolute, even where the criminal conviction has no bearing on the individual's fitness or ability to perform the job. The alleged discrimination arises because the policy has a marked disparate impact on minority workers.

Roberto Arroyo holds a bachelor's degree in computer science and served with distinction in the U.S. Navy during Operation Desert Storm. Mr. Arroyo worked as a contract technical support employee for Accenture for 17 months. Due to his excellent performance, he was encouraged to apply for a permanent position with Accenture. In April 2007, Accenture offered Mr. Arroyo permanent employment subject to the results of a background check. The criminal background check revealed a 1997 conviction for vehicular homicide stemming from a car accident that occurred while Mr. Arroyo was driving while intoxicated. On April 17, 2007, Accenture withdrew its offer for the permanent position and terminated Mr. Arroyo from his contractor position.

The lawsuit seeks to require that Accenture stop using criminal history as a screen to preclude consideration for employment regardless of the age or relevance of the conviction, to adopt policies to make class members eligible for hire in appropriate circumstances, and to pay lost wages to Mr. Arroyo.

(iii) Appolon v. University of Miami

The third class-action arising out of The Access Campaign targets the use of credit checks and was filed on November 22, 2010. Plaintiff Loudy Appolon interviewed for a senior medical collector position with the University of Miami in June 2009. The University of Miami offered Ms. Appolon the position, but after she had already resigned from her previous job, the University withdrew the offer the day before she was due to start the new job because of her credit history. The lawsuit alleges that the University of Miami violates Title VII of the Civil Rights Act by rejecting or firing qualified individuals because of their credit background, even though reliance on negative credit history has an adverse, disparate impact on minority applicants and does not predict employment performance.

The lawsuit seeks to require that the University stop using credit history as a screen for employment, that it make Ms. Appolon and other class members eligible for hire, and that the University pay lost wages.

(b) Policy and Advocacy

In addition to its litigation efforts to combat the use of background checks in employment, Project staff met with administration officials to advocate for changes in government use of background checks for employment and for increased guidance and enforcement of civil rights violations. Throughout the

year, Audrey Wiggins, Sarah Crawford, Policy Director Tanya Clay House, and Board Member Adam Klein met with members of the Office of Personnel Management, the Equal Employment Opportunity Commission, the White House Domestic Policy Council, and Director Patricia Shiu of the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

In addition to meeting with administration officials, the Lawyers' Committee has also appeared at formal hearings to provide testimony advocating for stronger legislation and enforcement guidelines to restrict the use and misuse of background checks. Sarah Crawford and board member Adam Klein testified before the House Subcommittee on Financial Services and Consumer Credit in support of the Equal Employment for All Act, which would prohibit the use of credit histories as an employment screening device, with certain exceptions. Sarah Crawford also testified before the Equal Employment Opportunity Commission about employer use of credit history as a screening tool for employees and applicants.

Finally, on October 28, 2010, the Lawyers' Committee hosted a convening of experts to discuss the use of credit histories in employment decision-making and strategies to combat the growing trend. The experts present represented government agencies, including the Equal Employment Opportunity Commission, Department of Labor, Department of Justice, and the Federal Trade Commission, as well as nonprofit organizations including to the National Employment Lawyers Association, NAACP LDF, Demos, American Association of People with Disabilities, AARP, and UNITE HERE. The convening also identified the following next steps for the advocacy community to continue the fight against inappropriate use of credit checks for employment decisions: (i) Conducting additional research on how employers are using credit check information, the impact of credit checks on minority groups and women, and determining whether the assertions of a connection between adverse credit check information and job performance have any basis in fact; (ii) Identifying through job notice postings employers who are significant offenders misusing credit report information and finding a few target cases; (iii) Identifying less discriminatory alternatives and educate employers regarding best practices; (iv) Advocating for legislative changes and improved EEOC guidelines; and (v) Better organization of advocacy groups on this issue.

In addition to the specific work on The Access Campaign described in these paragraphs, throughout 2010, the Project was consistently engaged with national fair employment coalitions, members of the Obama Administration, and Congressional staff to advocate for several policy initiatives regarding The Access Campaign and other important initiatives to improve the protection of workers from employment discrimination.

Mandatory Arbitration Clauses

Employers are increasingly including provisions in employment contracts that require dispute resolution through private, individual arbitration proceedings and that ban class actions or class-wide arbitration. These employers claim that requiring the parties to resolve disputes through individual

proceedings provides an adequate remedy for an injured party and benefits both the employee and the employer because private dispute resolution is less burdensome, less expensive, and less time consuming than litigation. Some states have chosen not to enforce provisions that ban class actions because they deem these provisions unconscionable and invalid under state law. The Lawyers' Committee has opposed such mandatory arbitration provisions where employees assert their rights to enforce anti-discrimination laws, contending that a class action provides the only avenue for injured parties to vindicate their rights in many instances, particularly where discovery on a class basis is necessary to provide statistical data demonstrating discriminatory patterns and practices or where the costs of litigating on an individual basis precludes adequate redress.

(a) Moua v. Supply Technologies LLC

On October 26, 2010, the warehouse workforce of Supply Technologies LLC in St. Paul, Minnesota, was fifty per cent (50%) minority workers, most of them from the immigrant Hmong community in the Twin Cities. By October 27, 2010, no Hmong and virtually no minority workers were employed at that warehouse; seventeen Hmong and two Hispanics had been fired. Within a week, staff of the Lawyers' Committee was en route from Washington, D.C., to the Twin Cities to meet with Supply Technologies' former employees, many of whom had worked for the company and its predecessors for over twenty years.

The Hmong workers and two Hispanic co-workers were among the latest victims of the twenty-year campaign of major corporations and their allies in the federal courts to close the doors of the federal courthouse to workers who have been discriminated against in violation of rights guaranteed by federal statutes. The workers had been complaining for three years about incidents of discrimination against the Hmong workers in hiring, discipline, pay, and other aspects of their employment conditions. Shortly after they contacted the Equal Employment Opportunity Commission to file formal Charges of Discrimination against their employer, the company presented each and every one of them with an ultimatum: Sign a mandatory arbitration agreement ceding your right to go to court and present your case to a jury and instead allow a private arbitrator to rule on the validity of any complaints against the company or you cannot work here any longer.

But unlike many victims of these policies, these workers were not willing to go quietly. They filed complaints with the EEOC and contacted the Lawyers' Committee for representation. With the assistance of employment law specialists at the firm of Nichols Kaster LLP in Minneapolis, the Lawyers' Committee team has guided the Hmong workers and the other clients through a maze of administrative proceedings. First, the employer maneuvered to try to avoid paying unemployment benefits by claiming that the employees has resigned by refusing to sign the mandatory agreement, but an administrative judge in Minnesota ruled that the employees had been terminated. Then the National Labor Relations Board issued a Complaint alleging that firing the workers was an unfair labor practice. The Lawyers' Committee will now engage with investigators from the EEOC to assist in developing a thorough investigation to serve as the basis for a strong Title VII suit that can establish firmly that it is

unlawful retaliation for an employer to require that an employee who has existing complaints of discrimination to either give up the right to go to court or lose his job.

(b) Amicus Briefs

In addition to its own litigation, the Lawyers' Committee participated as amicus curiae in two cases before the Supreme Court that attacked the use of arbitration agreements. In *AT&T Mobility, LLC v. Concepcion*, the Project filed an *amicus curiae* brief addressing whether the Federal Arbitration Act preempts states from determining whether a class waiver provision in an arbitration agreement is unconscionable and thus unenforceable. The U.S. Court of Appeals for the Ninth Circuit held that the specific class waiver in the consumer arbitration agreement at issue was unconscionable under the State of California's contract law principles. The Lawyers' Committee's *amicus* brief argues that the Ninth Circuit's decision should be upheld. The brief focuses on the implications of this issue in employment cases where class waivers in arbitration agreements are becoming increasingly common and stresses the importance of class treatment for the protection of workers' rights under various employment statutes.

On June 21, 2010, in *Rent-A-Center v. Jackson*, the Court extended its precedents favoring arbitration over federal courts by holding that an arbitrator should decide whether a pre-dispute agreement to arbitrate claims under federal statutes that prohibit employment discrimination is unconscionable and thus unenforceable. Rent-A-Center moved to dismiss Antonio Jackson's employment discrimination complaint in federal court on the ground that the claim was subject to mandatory arbitration. Jackson asserted that the arbitration agreement was unconscionable and that the Ninth Circuit ruled that the court should decide that threshold issue. The Project's *amicus curiae* brief urged the Supreme Court to uphold the Ninth Circuit's decision limiting the scope of arbitration, but the Supreme Court reversed.

Monitoring, Updating, and Enforcing Long-Standing Remedial Orders

During the last decade, particularly throughout the Bush administration, the EDP has devoted its resources to monitoring, updating, and enforcing remedial orders in employment discrimination cases. Many of these cases were initially brought in the 1970s and resulted in consent decrees that radically transformed the hiring and/or promotion practices of local and state governments with respect to public safety officers and other public employers. Typically, decrees entered in the 1970s were modified in the 1980s, but hiring and/or promotions continued under the terms of the decrees into the twenty-first century. Circumstances varied widely by locale, but in a number of jurisdictions public employers have taken steps since 2000 to seek modification or dismissal of the original proceedings, and the Lawyers' Committee has played a key role in assuring that cases were not dismissed if discriminatory practices were still continuing.

Six of these monitoring cases had revived or continuing activity in 2010 and four others were dormant throughout the year. Following are some examples of continuing enforcement achievements in the cases where staff was actively engaged in 2010:

- *Wade v. Mississippi Cooperative Extension Service*: On September 14, 2010, the District Court approved a settlement agreement between the parties in a class action challenging discriminatory hiring practices**.** The original remedial order in 1974 substantially increased the representation of minority professionals in the workforce. The settlement agreement requires, *inter alia,* that defendant Mississippi Cooperative Extension Service use the selection practices of Mississippi State University to ensure continued diversity.

- *U.S. v. City of Buffalo:* A decree in this case in the 1970s reformed the hiring of firefighters by the city of Buffalo, New York, When the City hired a new class of firefighters in 2010, EDP staff assured that the City was continuing to comply with the decree.

- *Gonzales v. Galvin:* In 2010, the City of Toledo administered a test to qualify candidates for the police cadet training academy. A decree initially entered in the 1970s reformed hiring by The City of Toledo, Ohio, police department. The latest settlement agreement, entered in October 2003, provided for participation of both an expert retained by the Lawyers' Committee and a court-appointed testing expert in the City's development of a new testing protocol in 2004-2005. The 2003 agreement provided for monitoring of two test administrations. The City did not administer the test a second time until 2010. The Project and its consultant will continue monitoring the test scoring and the eligibility list constructed from the results of this round of testing in 2010.

- *E.E.O.C. v. Local 28 of the Sheet Metal Workers' Int'l Association:* the EDP and pro bono counsel from Debevoise & Plimpton have engaged in ongoing settlement discussions regarding the pending discrimination claims of more than 380 minority sheet metal workers who lost work opportunities between 1991 and 2006. The year 2010 ended with settlement negotiations proceeding on a more promising basis than in earlier years.

As the year closed, the Project was preparing to conduct a thorough examination and evaluation of the cases where consent decrees are outstanding. Ray McClain, Project Director, is also seeking to cooperate or collaborate, as appropriate, with the Employment Litigation Section in the Civil Rights Division of the U.S. Department of Justice to prepare a comprehensive inventory of similar outstanding decrees throughout the country and to ascertain the extent to which the beneficial results of the original decrees have been retained or the extent to which those results have been diluted. Mr. McClain plans to utilize any findings of these inquiries to explore whether new initiatives may potentially be useful to create a more durable system for monitoring the continuing effectiveness of the remedial orders that once revolutionized hiring and promotions in so many state and local public safety agencies.

Other Amicus Briefs

(a) Construction of employment statutes by the Supreme Court

In 2010, the Project was active in seeking to influence decisions of the Supreme Court by participating as *amicus curiae* in all the major cases that the Supreme Court heard this past year addressing the application of federal laws protecting workers' rights.

- *Lewis v. City of Chicago*: On May 24, 2010, the Supreme Court issued a unanimous ruling that courts can hold employers liable each time they use the results of a test that has a disparate impact on African American candidates. The Lawyers' Committee joined other civil rights groups in filing an *amicus curiae* brief in support of Petitioners' argument that the employer's actual use of the results of the examination for firefighters triggered the statute of limitations. Justice Scalia delivered the opinion of the Court, rejecting the city's argument and finding that the plaintiffs' claims were timely.

- *Thompson v. North American Stainless LP*: On January 24, 2011, The Supreme Court unanimously ruled that Thompson, who claimed he was fired because his fiancée filed a sex discrimination charge against their mutual employer, has the right to pursue a retaliation claim under Title VII of the 1964 Civil Rights Act. The Lawyers' Committee had joined five other advocacy groups in filing an *amicus curiae* brief in the Supreme Court in support of authorizing a suit for retaliation as to "any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (internal quotes omitted).

- *Kasten v. Saint-Gobain Performance Plastics Corp.*: On June 23, 2010, the Lawyers' Committee filed an *amicus curiae* brief in the Supreme Court arguing that, contrary to the ruling below in the Eighth Circuit Court of Appeals, protecting verbal objections to violations of the Fair Labor Standards Act (Minimum Wage and Overtime) is necessary to fulfill the statutory intent, is required by the realities of the workplace, and would give proper deference to the longstanding interpretation of the U.S. Department of Labor that verbal complaints are protected under the FLSA.

- *Staub v. Proctor Hospital*: On July 9, 2010, the Lawyers' Committee filed an *amicus curiae* brief arguing that employers should be liable for biased actions of employees who act as agents of the employer and that, contrary to the ruling below in the Seventh Circuit Court of Appeals, the imputation of bias is not properly limited to only situations where the final decision-maker demonstrates bias.

- *Chamber of Commerce v. Whiting,* On September 8, 2010, the Lawyers' Committee joined twelve prominent civil rights organizations in filing an *amicus curiae* brief in the Supreme Court arguing that mandatory participation in the voluntary E-Verify program created by Congress will encourage employers to engage in unlawful discrimination against workers. A 2007 evaluation

of E-Verify found that the data base used is still not sufficiently up to date for accurate verification and noted the discriminatory effects of the system on naturalized citizens, who are more likely to be victims of erroneous reports concerning non-eligibility to work.

(b) Construction of Class Action Rule 23(b)(2) by U.S. Supreme Court

On April 26, 2010, the U.S. Court of Appeals for the Ninth Circuit (en banc) affirmed class certification in a landmark case, and on December 6, 2010, the Supreme Court granted Wal-Mart's petition for review of that decision. The Supreme Court will decide whether current female employees of Wal-Mart may proceed with claims of sex discrimination in pay and promotion under Title VII of the 1964 Civil Rights Act in a nationwide class action on behalf of half a million women as potential class members, the largest employment discrimination class action in history. The class alleges that Wal-Mart pays women less than it pays men for performing the same jobs and that female employees receive fewer promotions and have to wait longer for those promotions than their male counterparts.

In *Wal-Mart*, the Supreme Court granted review of two questions: "1) Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances;" and "2) Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." The First Question invites the Supreme Court virtually to eviscerate the relief that has been routinely available in employment discrimination class actions under Rule 23(b)(2) for 45 years, ever since the Court's decision in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Any reduction of the scope of back pay relief that has been recognized as appropriate since the 1970s would greatly decrease the effectiveness both of employment discrimination class actions in general and of the Lawyers' Committee's many disparate impact class-action cases, including the cases brought in furtherance of the Access Campaign. The Second Question also presents high stakes by inviting the Supreme Court to develop restrictive criteria for finding the elements of commonality (Rule 23(a)(2)) and typicality (Rule 23(a)(3)) needed for any employment discrimination class action.

The Lawyers' Committee played a leading role filing a brief in the case in the Ninth Circuit on behalf of many *amicus curiae* in support of class certification and will join an amicus brief in the Supreme Court for this purpose.