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Memo from Carol A. Fields to Civil Rights Directors & Seminar Participants, March 26, 1990

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SUBJECT: Seminar on the Impact of Recent Supreme Court Decisions

TO: Civil Rights Directors & Seminar Participants

As promised, enclosed are copies of several handouts that were discussed during the recent seminar. I hope that you find the information helpful.

We received favorable responses from those in attendance and have been asked to continue this type of activity.

We appreciate your participation at the seminar. We look forward to an on-going exchange with all of you.

CAROL A. FIELDS
President

enclosure

II. Highlights of The Civil Rights Act of 1990

Restoring the Prohibition Against Racial Discrimination in the Making and Enforcement of Contracts. --

Last Term the Court held that 42 U.S.C. Sec. 1981 does not prohibit an employer from racially harassing its employees and that Section 1981 does not generally cover racial discrimination that arises after an employee is hired.[2] The Act amends Section 1981 to make clear that the right "to make and enforce contracts" includes the making, performance, modification, and termination of contracts, including the enjoyment of all benefits, terms and conditions of the contractual relationship. By reaffirming the broad scope of Section 1981, Congress ensures that individuals may not be harassed, fired, or otherwise discriminated against in their employment or other contracts because of their race.

Restoring the Burden of Proof of Unlawful Employment Practices in Disparate Impact Cases. --

Last Term the Court held that a showing by minorities that their employer maintained racially separate hiring pools, job categories, dormitories and cafeterias failed to prove discrimination and did not require the employer to justify its practices.[3] The act restores the effectiveness of the law which prohibits employment practices that disproportionately exclude or otherwise harm persons based on their race, color, religion, sex, or national origin by providing that once an individual shows this effect, the employer must then justify the practice by showing that the practice is based on business necessity.

Clarifying the Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex or National Origin in Employment Practices. --

Last Term the court held that employers who consider impermissible factors, such as racial, religious, sexual or ethnic stereotypes, when making employment decisions do not violate the law where their final action would not have differed

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[2]. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

[3]. Wards Cove Packing Co. v. Antonio, 109 S. Ct. 2115 (1989).

Summary of The Civil Rights Act of 1990

I. Introduction

During the 1988-1989 Term, the United States Supreme Court issued a series of decisions that have cut back on the scope and effectiveness of civil rights protections, particularly in the employment area.

The Court's decisions have had harsh results:

- Some of the most blatant and offensive examples of racial and ethnic discrimination are no longer prohibited by any federal anti-discrimination statute.

- According to a recent study,[1] claims involving racial and ethnic harassment, discharge, promotion, retaliation and other job discrimination brought under one of our oldest Federal civil rights laws have been dismissed at a rate of one per day since the Court's rulings last June.

- Even where plaintiffs prove that an employment practice has excluded hundreds or even thousands of minorities or women, employers are no longer required to justify the business necessity of that practice.

- No wrong and therefore no remedy exists where an employer has improperly considered racial, ethnic, sexual or religious stereotypes in its decision-making if the employer can show it would have made the same decision in the absence of the improper motive.

- Challenges to remedies for discrimination previously approved by courts have been filed in localities ranging from Birmingham to Boston to San Francisco.

These rulings abruptly and substantially reduced the protections afforded by Federal law against discrimination in the work place. Both employers and civil rights groups agree that because of these rulings fewer discrimination claims will be brought and more will be lost. Members of Congress, reflecting the concern of many American, have been drafting legislation to correct the problems created by the Court's decisions.

The following paragraphs describe legislation soon to be introduced to remedy the harsh effects of the Court's decisions and to strengthen existing protections and remedies available under Federal civil rights laws.

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[1]. "The Impact of Patterson v. McLean Credit Union," A Report by the NAACP Legal Defense and Education Fund, Inc. Nov. 20, 1989.

absent the improper consideration.[4] The Act amends the law to provide that as a general rule an employer may not use race, religion, gender, or ethnicity as a motivating factor in employment decisions. In considering the appropriate relief for such discrimination the Act provides that a court shall not order the promotion or hiring of a person not qualified for the position.

Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders. --

Last Term the Court in a case involving a plan adopted by the City of Birmingham and approved by the court to remedy past discrimination against African Americans in its fire department held that white firefighters who had sat on the sidelines with knowledge of the action could later challenge the result in a new law suit.[5] The Act provides that challenges to employment practices that implement court-approved plans resolving employment discrimination claims should generally be brought in the same case as the underlying discrimination claim.

Granting All Protected Classes the Same Rights to Recover Damages for Intentional Employment Discrimination. --

The Act amends Title VII to add a damages remedy for intentional discrimination. By adding damages, this section conforms remedies available under Title VII for discrimination based on race, color, religion, sex, and national origin with remedies available under other federal law for race discrimination.

Restoring Strong Civil Rights Enforcement. --

The Act also includes a number of accessory provisions that are needed to support the principal substantive amendments discussed above and to restore the vigorous enforcement of civil rights statutes. These provisions strengthen federal law which reimburses victims for their legal fees to protect the ability of job bias victims to secure legal assistance and to incur

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[4]. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

[5]. Martin v. Wilks, 109 S. Ct. 2180 (1989).

necessary litigation expenses. They restore the traditional rule of broad construction of federal civil rights laws.

III. Conclusion

After 25 years of progress towards realizing our nation's goal of equal employment opportunity for all, the Supreme Court's decisions have resulted in a sudden and substantial erosion of the legal protections congress and the courts have previously afforded to guarantee that goal. From start to finish victims of employment discrimination will find it more difficult, more time consuming and more expensive to vindicate their rights. Many, daunted by these Court-created obstacles, will choose not to seek vindication, while others have no federal remedy at all.

Congressional leaders will propose legislation to correct the effect of these decisions and to provide more effective deterrence and adequate compensation for victims of discrimination. Now is the time to begin to work for the successful passage of this historic Act.