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CIVIL RIGHTS ACT OF 1991: FOR WOMEN, A DOUBLE-EDGED SWORD

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Congress and President Bush finally reached a compromise on November 21, 1991, when the President signed the Civil Rights Act of 1991 ("the Act").¹ The Act allows, for the first time, recovery of damages by women, religious minorities, and disabled persons who can prove they were victims of intentional job discrimination. The Act also expands a woman's right to sue and collect damages for sexual discrimination, sexual harassment, or bias because of pregnancy. Before the enactment of the 1991 Act, sexual discrimination laws allowed plaintiffs to recover only back pay and attorney's fees;² under the Act, women may now collect damages as high as \$300,000.

As part of the compromise, however, the Act limits damages available to female victims of job discrimination. Under this provision, damage awards vary depending on the size of the employer. This component of the Act has aroused great controversy, since the remedies cap does not apply to victims of race discrimination under the Civil Rights Act of 1866.³ Senator Ted Kennedy (D-Mass.) criticized the damages caps: "There is no justification for this double standard. Intentional discrimination against women . . . is no less reprehensible than intentional race or national origin discrimination, and our laws should not perpetuate this injustice."⁴

To abolish these limitations, Senator Kennedy and Representative Barbara Connelly (D-Conn.) introduced the Equal Remedies

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1. Pub. L. No. 102-166, 105 Stat. 1071.

2. 42 U.S.C. §§ 2000e-2000h-6 (1992).

3. 42 U.S.C. § 1983 (1992).

4. *Legislation Removing Damage Caps from Civil Rights Law Introduced*, DAILY REP. FOR EXECUTIVES (BNA) No. 229, at A13 (Nov. 27, 1991).

Act of 1991,⁵ but the bill's likelihood of passage is unclear. Given the expected strong opposition from business groups, Representative Don Edwards (D-Cal.) and Representative Patricia Schroeder (D-Colo.) predict a "huge fight" to get Congress to pass this legislation.⁶ The full Congress will consider the Equal Remedies Act during 1992. In the meantime, women in states like California or Texas, where no limitations on damages exist, may simply ignore the new law and use state courts to press their discrimination claims.⁷

Despite the above limitations, women obtained an important victory under the 1991 Act, since it places on the employer the burden of demonstrating that a challenged employment practice is essential. When an employee can show that a particular employment practice causes a disparate impact, the employer must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."⁸ Critics emphasize, however, that the White House openly endorsed, in the so-called "Dole memorandum," the interpretation of certain provisions of the Act to give employers broad discretion in demonstrating "business necessity" to defend policies that exclude women and other minority groups from employment.⁹

Nonetheless, representatives of organizations like the NAACP and the National Urban League urge that the new Act is fair and embraces a strong and clear version of the impact test:

If an employment practice has a disparate impact on minorities or women, exacerbating their historical disadvantages, then the

5. 1991 S. 2062, 102d Cong., 1st Sess. (1991).

6. *Coalition Pushes to Rescind Damage Caps*, GANNETT NEWS SERVICE, Nov. 26, 1991.

7. See Unruh Civil Rights Act, CAL. CIV. CODE §§ 51, 52(A) (Deering 1991); TEX. REV. CIV. STAT. ANN. art. 5221K (West 1991).

8. William T. Coleman, Jr. & Vernon E. Jordan, Jr., *How the Civil Rights Bill was Really Passed; The Administration Did Compromise*, WASH. POST, Nov. 18, 1991, at A21.

9. *Bush Backs Away from Controversial Interpretation of New Civil Rights Law*, Daily Lab. Rep. (BNA) No. 226, at A20 (Nov. 22, 1991). President Bush endorsed the Dole memorandum as part of the Act's legislative history. The memorandum is to be "treated as authoritative interpretive guidance by all officials in the executive branch," President Bush declared. *President Bush's Statement on Signing the Civil Rights Act of 1991*, Daily Lab. Rep. (BNA) No. 226, at D1 (Nov. 22, 1991). The memorandum offers a broad interpretation of what constitutes "business necessity" in job discrimination cases. The Dole standard is whether the discrimination serves a legitimate business purpose. Senator John Danforth (R-Mo.) and others maintain that the Dole interpretation favors business interests and that, by endorsing it, the Bush Administration has thwarted the intent of the drafters. *Bush Backs Away from Controversial Interpretation of New Civil Rights Law*, *supra*.

employer must demonstrate that using that employment practice is significantly related to improving actual job performance.¹⁰

Even if the Act is interpreted to give employers more flexibility in proving the business necessity of employment practices which have a disparate impact, this new legislation still gives women and minorities a powerful weapon to fight discrimination in the workplace.¹¹

However, until lower courts begin interpreting the Act's disparate impact provisions, it remains to be seen whether the "compromise" between President Bush and Congress does little more than compromise a woman's ability to seek legal redress for job discrimination. Moreover, in providing for damage caps for women but not for victims of race discrimination, the new Act, like many other areas of the law, succeeds in creating a difference — where there should be none.

10. See Coleman & Jordan, *supra* note 8.

11. *A Rights Act at Last*, CHRISTIAN SCI. MONITOR, Oct. 29, 1991, at 20.

