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State Board Against Discrimination: Order to Hire as an Authorized Remedy

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RECENT DEVELOPMENTS

STATE BOARD AGAINST DISCRIMINATION: ORDER TO HIRE AS AN AUTHORIZED REMEDY

The Washington State Board Against Discrimination processed a complaint filed by Mrs. Geraldine Arnett charging defendant hospital with refusing to accept her application for employment as tray girl because of her Negro race. Investigation by the board substantiated Mrs. Arnett's charge of racial discrimination, but informal negotiation between the board and defendant failed to yield a satisfactory solution. The board then held a formal hearing, found defendant in violation of the Law Against Discrimination,[1] and ordered it to accept Mrs. Arnett's application and offer her employment in the first vacant position for tray girl, providing she met the standard qualification for that position. Defendant petitioned the superior court for review. The court modified the board's order by retaining the provision requiring acceptance of Mrs. Arnett's application but deleting the provision requiring an offer of employment. Seeking to reinstate its order in full, the board appealed to the Washington Supreme Court, which reversed and remanded. *Held:* The Washington State Board Against Discrimination can order an employer of unskilled labor to hire an applicant, against whom the employer has discriminated on the basis of race, when the position subsequently becomes vacant, provided the applicant meets the normal qualifications for the position. *Arnett v. Seattle General Hospital*, 65 Wash. Dec. 2d 1, 395 P.2d 503 (1964).

The Washington Law Against Discrimination is an exercise of the state's police power designed to eliminate discrimination in employment and public accommodations. The statute establishes a Board Against Discrimination with authority to receive and investigate complaints, and to dispose of them by dismissal, "conciliation," or formal order pursuant to hearing.[2] The board may order a party in violation of the act to "cease and desist from such unfair practice and to take such affirmation action, including, (but not limited to) hiring . . . or . . . such

[1] WASH. REV. CODE ch. 49.60 (1958).

[2] Board hearings are conducted before three-man hearing tribunals composed of board members and members of a hearing panel selected by the board. The tribunal issues orders without board review. WASH. ADMIN. CODE §§ 162-08-005 (1)-(2), 007; WASH. REV. CODE § 49.60.250 (1958).

other action, as, in the judgment of the tribunal, will effectuate the purposes of this Chapter . . . ."[3] The limits of this broad statutory power are unclear, as is the question whether a hiring order constitutes reverse discrimination, thereby violating the equal protection provisions of the Constitution.

The court in the principal case noted that the board issued its order after having reasonably inferred that, if defendant were required only to accept complainant's application for employment, discrimination would persist. The court reserved the question whether power would have existed were "unusual talents" required for the position.[4] In stating the scope of judicial review, the court said:

> It is the well-established law in this state, as well as in other jurisdictions, that modifications of administrative orders by a court of review are limited to acts that are arbitrary or capricious, or where the tribunal proceeded on a fundamentally wrong basis, or beyond its power under the statute.[5]

The court found that the superior court had violated these principles by substituting its judgment for the board's as to what remedial action was appropriate. The majority declined to consider constitutional issues, holding that they had not been properly raised. Chief Justice Ott, dissenting, argued that to order the hospital to hire complainant upon condition she met "standard qualifications," without regard to whether other applicants might be more qualified, is in itself discriminatory, and violates equal protection.

Arnett gave the Washington Supreme Court an opportunity to define the power of the Board Against Discrimination, and to clarify the court's responsibility in reviewing board action. The court's analysis, however, leaves in doubt the meaning of review principles by failure to recognize the Washington Administrative Procedure Act as the statutory basis for judicial review of board action.[6] The court did point out the proper standard for review of discretionary board action to be whether it is "arbitrary or capricious," but failed to delimit the area in which the board may exercise its discretion.

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[3] WASH. REV. CODE § 49.60.250 (1958).
[4] 65 Wash. Dec. 2d at 5, 395 P.2d at 505.
[5] *Id.* at 8, 395 P.2d at 507.
[6] The court drew its review standards from 2 AM. JUR. (SECOND) *Administrative Law* § 672 (1962). Although the APA includes essentially these same standards, it does not empower the superior court to modify board orders. WASH. REV. CODE § 34.04.130 (1959). The applicability of the APA is settled by WASH. REV. CODE § 34.04.910 (1959); Herrett Trucking Co. v. Washington Pub. Serv. Comm'n, 58 Wn. 2d 542, 364 P.2d 505 (1961).

A great amount of the difficulty facing the court in *Arnett* came from the language of the Law Against Discrimination permitting the board "to take other such action as, in the judgment of the tribunal, will effectuate the purposes of this chapter."[7] This delegation of power is so unconstrained by standards that it would not have been inappropriate had the court declared it unconstitutionally vague. But the court did not handle the power question effectively. In finding that the statutory provision empowering the board to effectuate the purpose of the act made a hiring order appropriate when complainant's application had not been accepted, it is unclear whether the court reasoned that the act was being effectuated by eliminating discrimination against complainant, or by using complainant to break down defendant's pattern of discrimination.[8] Either securing employment for complainant or eliminating a pattern of discrimination could be construed as the effectuation of a policy of preventing discrimination, but the significance of each in terms of board power differs. Further, consideration of other possible uses of the board power to take action which, in the board's judgment, "effectuates the purpose of the [act]" raises such questions as whether the board could have, (a) ordered the defendant to hire a Negro, other than complainant, chosen by the board, or, (b) ordered complainant hired without an existing vacancy, or, (c) required defendant to retain complainant had she been hired and subsequently discharged in favor of a more qualified candidate.

The court is now faced with judicially defining the implied limits of the board's power to take any action effectuating the purposes of the Law Against Discrimination. Three considerations are relevant to this process—first, the forms of relief available to the board; second, the purposes of the Law Against Discrimination for which remedial measures are to be taken; third, the degree to which the board may investigate and take remedial action beyond the limits of the complaint which initiates board action. The problem of available forms of relief will probably be answered by finding the board limited to use of those forms which are available to a court of equity; there seems no more appropriate standard. The court in *Arnett* reserved the question whether the board would have power to issue a hiring order were unusual talents required for the position, suggesting reliance upon a standard of

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[7] WASH. REV. CODE § 49.60.250 (1958).

[8] Complainant's personal interests and the public interest are distinct, and frequently in conflict. See Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961).

equitable remedies. The problem of fulfillment of the purposes of the Law Against Discrimination, for which board action is to be taken, mainly concerns the degree to which the board—asserting remedial relief after processing a complaint—may be guided by what benefits the overriding *public* interest in non-discrimination rather than what satisfies the complainant. *Arnett* leaves this uncertain, for, while the complainant may have secured a cease and desist order in a civil action,[9] it is not shown how the purpose of the Law Against Discrimination was effectuated by allowing the board to take the additional step of ordering complainant hired. The problem of the scope of board action upon receipt of a complaint is partially answered in the Law Against Discrimination. The board's extensive power to investigate complaints,[10] to amend complaints,[11] to issue its own complaints,[12] and to argue complaints before the tribunal,[13] and the tribunal's responsibility to find *any* unfair practice and take remedial action to effectuate the act's purpose,[14] authorizes board action much broader than vindication of complainant's personal rights. It is unclear, though, how far the board's investigation and action may go in uncovering and litigating unfair practices unrelated to filed complaints.

The constitutionality of employment provisions in the Law Against Discrimination, and of hiring orders issued pursuant to it, was not considered by the majority in *Arnett* because the issue had not been properly raised. The dissent, contending that constitutionality of the law should have been reviewed before the act was enforced, argued that the board order violated equal protection.[15] The argument in dissent accepts anti-discrimination legislation as a valid police power measure,[16] and hiring orders as valid remedial actions,[17] but reasons that hiring orders used to benefit the public welfare, rather than protect private rights, discriminate in reverse by requiring employment of particular persons identifiable by unreasonable classifications. The dissent implied that the order to hire in *Arnett* was no different than if the board had ordered defendant to hire a Negro. While the reverse discrimination argument usually deals with legislative provision or gov-

[9] For an example of a civil action for discrimination see Browning v. Slenderella Systems of Seattle, 54 Wn. 2d 440, 341 P.2d 859 (1959).
[10] WASH. REV. CODE §§ 49.60.120, .140, and .240 (1958)
[11] WASH. REV. CODE § 49.60.250 (1958).
[12] WASH. REV. CODE § 49.60.230(2) (1958).
[13] WASH. REV. CODE § 49.60.250 (1958)
[14] *Ibid*
[15] 65 Wash. Dec. 2d at 10, 395 P.2d at 508 (Ott, C. J., dissenting).
[16] See Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).
[17] See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

ernmental action which gives operative effective to a classification of persons defined by race or color, the Law Against Discrimination uses the classification of "persons discriminated against." The difference is evident, for the latter classification—dealing with persons whose rights have been violated—is arguably a more valid object of governmental action in light of equal protection requirements than is a classification based upon race or color. This suggests the corollary argument implied in the *Arnett* dissent that, although the Law Against Discrimination meets substantive equal protection requirements, board action pursuant to the act, if motivated by consideration of complainant's race or color, would violate procedural equal protection.[18] While it is incumbent upon the court to determine the basis of board action, there was no evidence in *Arnett* that the board issued its affirmative hiring order because complainant was a Negro.[19]

Arnett is the third case to reach the Washington Supreme Court under the Law Against Discrimination,[20] and is only an early effort to formulate a framework for judicial review of board action. Most constitutional issues under the act have been settled; future cases will present problems in board authority and the scope of judicial review. The fair employment provisions of the Civil Rights Act of 1964[21] will undoubtedly promote application to similar state commissions by inducing a higher consciousness of discriminatory practices and by attracting to the federal Equal Employment Opportunity Commission complaints which, under the provisions of the act, must be turned over to state commissions for initial processing.[22] Cases from other jurisdictions, like *Arnett,* have shown judicial inclination to favor broad discretion in human rights commissions.[23] Such deference must continue if commissions are to maintain effective administrative flexibility.

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[18] *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[19] Note, however, that this analysis requires an understanding of how the board comprehends the purposes of the Law Against Discrimination. If the board in *Arnett* had ordered defendant to hire complainant as a measure to end a pattern of discrimination against Negroes, it would be arguable whether the governmental action was taken to benefit Negroes or to benefit persons discriminated against.

[20] O'Meara v. Washington State Bd. Against Discrimination, 58 Wn. 2d 793, 365 P.2d 1 (1961), held unconstitutional the fair housing provision, WASH. REV. CODE § 49.60.030(3) (1958); Washington State Bd. Against Discrimination v. Interlake Realty, Inc., 62 Wn. 2d 928, 385 P.2d 37 (1963), affirmed an order to appear before the board.

[21] 78 Stat. 253-266, 42 U.S.C. §§ 2000(e)—2000e-15 (1964).

[22] 78 Stat. 259, 42 U.S.C. 2000e-5(c) (1964).

[23] *E.g.*, International Bhd. of Electrical Workers v. Commission on Civil Rights, 140 Conn. 537, 102 A.2d 366 (1953); Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (Ct. App. 1954).