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Legal Restraints on Racial Discrimination in Employment, by Michael I. Sovern (1966)

F. Ray Marshall

LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT. By Michael I. Sovern. New York: The Twentieth Century Fund, Inc., 1966. Pp. 270. $6.00.

This book deals with a variety of legal measures which have been adopted to restrain discrimination in employment. Chapter I outlines the basic problem by discussing the vicious circle of unemployment, poverty, and inadequate opportunity which has trapped Negroes in inferior economic positions. Chapter II discusses the Fair Employment Practices Commissions (FEPC's) created by President Roosevelt, under pressure from Negroes, during World War II. Sovern concludes that "the five years of federal fair employment practices regulation saw Negroes make enormous gains in the labor market." He concedes, however, (in what is surely an understatement) that "some of these gains were undoubtedly attributable to the wartime manpower shortage."[1]

Chapter III deals with state fair employment practices laws. Sovern concludes that the evidence is inconclusive concerning the impact of the state FEPC's on employment, but notes that "discrimination in employment remains common . . . in the very states that have outlawed it."[2] He attributes the limited impact of the FEPC's to: the agencies' inadequate powers of initiation; inadequate budgets and heavy responsibilities; difficulties in proving discrimination; inadequate remedies for those found guilty; the commissions' fear of adverse reaction from businessmen and union leaders; and the commissions' excessive timidity. Excessive timidity manifests itself in the rarity of probable cause findings, protracted conciliation efforts, and soft settlements. The author notes, moreover, that other government agencies fail to help the commissions as much as they might. He concludes:[3]

> While the performance of the commissions seems disappointing when measured against either their potential performance or the job to be done, their accomplishments become impressive when it is remembered that they were wholly without precedent as recently as twenty-five years ago. If this discussion has tended to emphasize the shortcomings to the exclusion of the gains, it is because the time for laurel-resting is not yet at hand, because the gains are quickly digested leaving only the indigestible shortcomings, and because we must be concerned now with the next twenty-five years, not the last.

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[1] P. 15.
[2] P. 31.
[3] P. 60.

Sovern offers a number of suggestions for overcoming the shortcomings listed above.

Chapter IV deals with the Civil Rights Act of 1964.[4] The author wrote this chapter before the Equal Employment Opportunity Commission (EEOC), which administers the employment sections of the act, had issued some of its interpretations and his analysis therefore depends mainly on the statuatory text and the act's legislative history. This is nevertheless one of the best chapters in the book; it contains a thorough discussion of the provisions of Title VII, deals realistically with the act's limitations, and makes imaginative suggestions for improvement. Sovern points out very clearly that Title VII has very weak enforcement procedures because, if the EEOC is unable to resolve a case after "conference, conciliation, and persuasion," the complainant must file a suit in federal district court. Such suits are likely to be expensive, time-consuming, and uncertain as to their outcome. The author points out, however, that the complainant might get effective relief by turning to the Justice Department, because Title VII provides that "upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies the case is of general public importance." Title VII also permits the Attorney General to sue on his own whenever he "has reasonable cause to believe that any person or group is engaged in a pattern or practice of resistance to the full exercise of the rights herein described." Because of the EEOC's inadequate enforcement powers, Sovern believes that the intransigent respondent could successfully resist the Commission: If the respondent "is polite but firm, it [the Commission] must eventually go away. At that point, the employer may be sued by the person harmed but the odds are against it, and if he does sue, one can always settle with him instead of the Commission."[5] The author notes, however, that vigorous cooperation by the Attorney General, if sustained by the courts, could strengthen the EEOC's conciliation efforts.

Chapter V discusses the use of executive orders issued by various presidents to curtail discrimination by government contractors. Sovern emphasizes that government contract compliance provisions could be powerful weapons against discrimination because employers who might resist the feeble efforts of the EEOC will be reluctant to risk

[4] 78 Stat. 255, 42 U.S.C. § 2000. Section 2000e contains Title VII on Equal Employment Opportunities.
[5] P. 80.

losing lucrative federal contracts. However, the contract compliance machinery is weakened because labor organizations have not been parties to the contracts. Another weakness of this procedure, not given adequate attention by Sovern, is the fact that contracts, because of their importance to the contracting agencies, might be very difficult to cancel.

Nevertheless, the requirement of affirmative action by government contractors is very important because it requires contractors to do things to improve Negro job opportunities which they could not be compelled to do by law. The so-called voluntary "Plans for Progress" also are important, as Sovern stresses, because they too encourage employers and unions to take measures which reach beyond the law. All the evidence suggests that the contract compliance programs have been the most effective legal measures to increase Negro employment.

Chapter VI deals with the National Labor relations[6] and Railway Labor Acts.[7] It contains a discussion of the duty of fair representation imposed upon unions acting as bargaining agents under these laws. Sovern notes that judicial enforcement of this duty has been inadequate because of uncertainties as to the outcome and the expenses to which the aggrieved individual is put. The author therefore notes the importance of recent National Labor Relations Board rulings which promise to give some administrative relief for discrimination. The Board traditionally had limited enforcement of the duty of fair representation to the rarely used remedy of revoking certification from a union guilty of discrimination against members of the bargaining unit. Because a majority of unions do not have certification, and because many of those currently certified would not be significantly damaged by decertification, this penalty has been almost meaningless. However, in a series of recent decisions, the Board has ruled that discriminatory agreements will not bar challenges by which other unions seek to displace discriminating unions as bargaining agents.

But the Board's most significant ruling has been to declare that failure of the duty of fair representation is an unfair labor practice.[8] This ruling in effect makes it possible for a person who has been discriminated against to get administrative relief without having to incur the expenses of court action. The Board has ruled that discrimination

[6] 49 Stat. 449 (1935), 29 U.S.C. § 151 (1964), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964) (Taft-Hartley Act).
[7] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-62 (1964).
[8] Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

violates several sections of the National Labor Relations Act, including section 8(b)(1), which makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of their rights to bargain collectively through representatives of their own choosing. The Board has interpreted this provision to mean that a union, when acting as bargaining agent, cannot take "action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[9] The Board has ruled, for example, that this section is violated when a union refuses, for racial reasons, to process the grievances of Negro members of the bargaining unit.

Section 8(b)(2) of the NLRA makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of section (a)(3)." Section (a)(3) provides that employers shall not be justified in discriminating against an employee for non-membership in a labor organization if they have reason to believe that membership was not available to that employee on the same terms and conditions as other members or if membership was denied for some reason other than the failure to tender dues and initiation fees uniformly required as a condition of acquiring or retaining membership. The NLRB has ruled that the unfair treatment of a worker because of his race violates this section because it is designed to encourage membership in a labor organization. Sovern supports the Board's ruling, because "whatever the reason given, whenever a union causes an employer to treat a nonmember arbitrarily, membership in the union is encouraged."[10] This seems to be rather strained logic in those cases where the union has segregated locals or will not admit Negroes. Section 8(b)(2) clearly gives relief in cases where a labor organization tries to enforce closed shop conditions, but it is more difficult to extend this doctrine to cases where members of the bargaining unit are unfairly treated because of their race and not because of their union membership.

The NLRB also has ruled that a union violates section 8(b)(3) when it fails to represent workers fairly. This section makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees."

Although the NLRB's ruling that failure of the duty of fair representation is an unfair labor practice has important implications for dealing with racial discrimination by unions, it remains to be seen if the

[9] Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962).
[10] P. 166.

Board's rulings will be upheld. Doubt arises because of the *Miranda*[11] decision (which was not a racial case) in which the Second Circuit Court of Appeals refused to enforce an order against a union which the Board found to have violated its duty of fair representation. Doubt also arises because of Congress' refusal in the past to explicitly make racial discrimination an unfair labor practice. Sovern gives little weight to this objection on the ground that Congress implicitly accepted the *Steele*[12] case (in which the Supreme Court applied the duty of fair representation to a railway labor organization) when it passed the 1947 Taft-Hartley Act and did nothing to overturn that ruling. Sovern's argument is not convincing because at the time of Taft-Hartley the NLRB had limited its rulings to threats to revoke certification, a power which it clearly possessed. In the absence of certification, the union's bargaining rights are protected by its economic power and not by the NLRB unless the employer commits unfair labor practices specified in section 8. Sometimes, of course, actions taken against Negroes—such as discharging them for union membership or the lack of it—is clearly an unfair labor practice, not because of the racial discrimination, but because such actions would be illegal if taken against any worker.

Chapter VII deals with the remedies for discrimination in apprenticeship programs. Sovern's treatment of this subject is centered around the case of *Lefkowitz v. Farrell*[13] in which the New York Commission for Human Rights found a sheet metal workers joint apprenticeship committee and Sheet Metal Workers Local 28 guilty of discrimination. The Commission was compelled to go to court to enforce its ruling, and, in 1965, three years after this case started, the first Negro apprentice entered the New York sheet metal workers program. Sovern feels that *Lefkowitz* demonstrates: the need for commissions to have the power of initiation; the dangers involved in delaying public hearings; the need for objective standards in the selection of apprentices; and the need to disseminate apprenticeship information.

Although the reviewer agrees that all of the foregoing are important needs in the apprenticeship area, they clearly are not sufficient conditions to get more Negroes into these programs. Since the Attorney General of New York filed charges in this case, a complaint clearly

[11] Miranda Fuel Co., 140 N.L.R.B. 181 (1962).
[12] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).
[13] Race Rel. L. Rep. 393 (Spring, 1964), *modified sub nom* State Comm'n for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. 1964).

was not necessary for the commission's action. Indeed, there is no evidence that those commissions which have the power to initiate action against joint apprenticeship committees have had any greater success than the New York commission in getting Negroes into apprentice programs. Similarly, the Secretary of Labor has imposed objective standards for the selection of apprentices but these have not caused many Negroes to be admitted; indeed, it can be shown that objective standards often cause fewer Negroes to enter programs. Negroes usually have inferior education to whites and do not do as well on so-called "objective" tests. Experience also demonstrates that anti-discrimination measures alone will have very little effect on getting Negroes into apprenticeship programs. This is due in large measure to the difficulties involved in implementing legal remedies against these largely voluntary programs. Anti-discrimination measures focus only on part of the problem. The absence of Negroes from apprentice programs is due to many factors other than discrimination. Laws which focus only on discrimination are therefore likely to produce limited results. Moreover, anti-discrimination laws focus only on the demand side of the problem; unless measures are taken to increase the supply of qualified Negro applicants simultaneously, not many Negroes will enter apprentice programs. The reviewer concludes, therefore, that anti-discrimination laws are necessary but not sufficient conditions for increasing the number of Negro apprentices. The laws are important because they can be used by those who want to accept Negroes as excuses for doing so where there is opposition from white workers or customers. But in the case of apprenticeship, we are dealing with a situation where there often are strong resistances to accepting Negroes or whites.

Chapter VIII contains a few of the author's perspectives on the problem of legal remedies for discrimination in employment. He observes that Title VII of the Civil Rights Act is a "poor, enfeebled thing" which has "the power to conciliate but not to compel." The state commissions are "robust in constitution" but "weak in action." The federal contracting programs are powerful "but can reach no farther than the presidential orders creating it allow." Sovern points out, however, that all of these instruments are complemented by powers given to the Attorney General of the United States, the NLRB and the Department of Labor.

Sovern also outlines the provisions of a model fair employment

practices law which would be comprehensive in its proscriptions and coverage and would empower and direct its enforcement agency to initiate investigations, receive and act on complaints, and enter into settlement agreements. The model law also would provide for judicial enforcement and would empower the agency to require appropriate remedies, conduct reviews to ensure compliance with agreements and orders, and engage in educational activities. Finally, the model law would provide for judicial review of the agency's orders.

Sovern argues for the retention of a variety of anti-discrimination agencies on the grounds that "the realities of politics and the limits of human capabilities require a multi-front assault on employment discrimination."[14] He feels, however, that efforts should be made to coordinate the activities of the variegated agencies now working in the anti-discrimination field.

This book would be very useful to legislators, civil rights organizations, human rights agencies, and others concerned with the problem of discrimination in employment. It is clearly written in language readily understandable by those without legal training. It also contains thorough interpretations of the variety of anti-discrimination laws which have been adopted since the Second World War and makes imaginative suggestions for improving those laws. The book also contains some excellent suggestions for improving the legal restraints on discrimination in employment. These measures would prove valuable parts of an overall program—which would include effective manpower and training measures—to improve Negro employment patterns.

F. Ray Marshall*

[14] P. 207.

* Professor of Economics, University of Texas. B.A., 1949, Millsaps College; M.A., 1950, Louisiana State University; Ph.d., 1954, University of California. Author, THE NEGRO WORKER AND ORGANIZED LABOR (1965), THE NEGRO WORKER (1967). Co-author, LABOR ECONOMICS: WAGES, EMPLOYMENT AND TRADE UNIONISM (1967); TOWARD FAIR EMPLOYMENT (1964). Professor Marshall has also written LABOR IN THE SOUTH, which will be published by Harvard this year; in addition, he co-authored THE NEGRO AND APPRENTICESHIP, which will be published by Johns Hopkins this year.