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THE GREATER GOOD: BROAD REMEDIES FOR THE CHOSEN FEW, OR MORE LIMITED, BUT ACCESSIBLE, REMEDIES FOR THE MASSES?

*Alfred G. Feliu**

Professor Burt Neuborne, in his fine and incisive essay,¹ wakes us from our retrospective look at the proud history of the New York City Commission on Human Rights (the "Commission") in its fortieth anniversary year. He challenges us to look over the horizon with the fresh eyes and perspective of children, tempered with the wisdom born of forty years of hard-earned experience.

Professor Neuborne is correct in doing so. While history is generally a great teacher, the current reality in which the Commission and all human rights agencies find themselves has no precedent. As Professor Neuborne correctly notes, the human rights issues of our generation are more subtle, complex, and morally ambivalent than those of prior generations. Today's more precise actions to cure discrimination appropriately replace the broad legal measures taken by prior generations. It is incumbent on human rights agencies to respond with subtlety and sophistication to the often ambiguous factual situations in which discrimination claims arise today if they are to retain the public's support for their efforts. As the Equal Employment Opportunities Commission (the "EEOC") has learned repeatedly in recent years, if it gets too far ahead of or out-of-step with public opinion on current issues, its appropriations will be cut in retaliation and its effectiveness will be diluted.

As Professor Neuborne also points out, whether or not the agencies incur the ire of the legislative and executive branches, "we live in an era of shrinking governmental resources."² The agencies must simply learn to do more with less. How is this to be accomplished?

Professor Neuborne sees, quite rightly I feel, two basic options available to the Commission and other agencies, as reflected in his question: "To what extent should the Commission focus on reme-

* Partner, Paul Hastings Janofsky & Walker. B.A., Columbia University, 1978. J.D., Columbia University, 1981.

1. Burt Neuborne, *Who's Afraid of the Human Rights Commission?*, 23 *FORDHAM URB. L. J.* 1139 (1996).

2. *Id.* at 1140.

dying past acts of discrimination, or concentrate on preventing future acts from occurring?" Professor Neuborne opts for the latter approach; I agree.

In my commentary, I will try to accomplish two goals. First, I will try to further buttress Professor Neuborne's arguments for rethinking the current enforcement paradigms employed by the human rights agencies in carrying out their mandates. Second, I will offer my own modest proposals for the shifting of existing enforcement paradigms.

The New, Old Paradigm

Professor Neuborne's analysis of the post-dispute approach now used in the administration of human rights laws needs no repeating. Certainly, there is nothing wrong or unjust in expending resources to "make whole" the victims of discrimination. The only question is one of proportion—what percentage of the agencies' resources should be expended on such efforts? Is society better served by fully remedying the wrongs suffered by the few who possess the knowledge, energy, and persistence to pursue their claims to the end, or should the agencies expend their limited resources on preventing those wrongs in the first place? Professor Neuborne posed the dilemma starkly, but accurately: "In a world of unlimited resources, perhaps the human rights enforcement community could pursue an aggressive post-event strategy, and couple it with powerful pre-event activity. In the real world, though, we must make painful choices about available resources."³

Neither these issues nor the paradigm suggested by Professor Neuborne (at least in the general sense) is new. Rather, history demonstrates that they are present whenever new rights are created in the workplace. Two conspicuous examples come to mind, namely, the workers' compensation system and collective bargaining under the National Labor Relations Act.

The workers' compensation system, created at the turn of the century, manifested a societal policy choice to provide a certain, albeit limited, recovery to those injured on the job. Without question, this policy choice leads to injustice in some individual cases. Surely, some employees seriously injured in the workplace receive only a fraction of what they could recover from a third party for the same injury. Similarly, others recover excessive, unwarranted awards. We, as a society, chose and continue to choose to provide

3. *Id.* at 1144.

a smaller recovery to more victims in recognition of the reality that full recovery for all on-the-job injuries comes at a societal cost we choose not to (or simply cannot) bear. We accept the tradeoff despite the abuses, excesses, and injustices that are inherent in the system.

The system of collective bargaining in the Wagner Act of 1935⁴ reflects a similar set of tradeoffs. Post-dispute remediation, as denominated by Professor Neuborne, takes place within the confines of the grievance and arbitration system, a scaled-down due process vehicle. For the most part, remedies have been privatized in this setting because the government's monitoring of the system of industrial justice is minimal. Moreover, individual rights are subsumed in the greater good of the broad interests of the bargaining unit. This compromise, sixty years old and running, remains acceptable despite the injustices that may result in individual cases.

The time has come for us to consider acceptable compromises in the area of human rights that will provide more protection against discrimination to a greater portion of the population, but on a less encompassing scale. The time has come to move from the granting of large post-event monetary awards in a minuscule portion of cases with viable claims to a surer, quicker, and less resource-intensive system accessible to a broader portion of the affected population.

Ending the tendency of many in the human rights community to demonize employers is a necessary step in this process. As a representative of employers in all aspects of employment issues, I am constantly amazed at the striking naivete and disingenuousness of that segment of the human rights community, including the agencies, that is so quick to fault and place legal and moral blame on employers for all improper behavior in and around the workplace. This is accomplished principally through the application of strict and, at times, vicarious liability.

Despite our most fervent wishes to the contrary, discrimination in the workplace may not be eliminated simply by legal fiat, the way OSHA decrees the proper location of emergency exits in a manufacturing plant. Employers control buildings; they manage people. There is a difference. Employees are not hatched in the anteroom of their employers' human resources department. Rather, they are complex creatures with behaviors, expectations, and prejudices borne through decades of life experience. Employ-

4. 49 Stat. 449 (1935)(codified as amended at 29 U.S.C. §§ 151-69 (1994)).

ers should not be burdened with the responsibility of altering the beliefs of individuals that spring from life experiences the employer neither created nor can influence. Employers should be encouraged to educate and train employees in the expectations of the law, and to manage them properly. It is absurd to ask employers to guarantee behavior of the complex creatures we call employees. The manager of the Yankees can coach a hitter, but cannot guarantee a hit during each at bat. The hitter may still swing at a bad pitch and strike out despite all the coaching and counseling the team can provide. Similarly, in the workplace, employers manage; they do not control psyches, behaviors, and prejudices. Holding employers strictly or vicariously liable is simply society's cowardly way of seeking to transfer blame onto employers for its own failure to instill tolerance of diversity in its citizens.

A more "modern" and effective paradigm, would draw employers into the process and entice them into becoming partners in the eradication of discrimination in the workplace through the establishment of positive incentives. Professor Neuberne quite rightly points out that employers are often, though not always, also victims where discrimination occurs in their workplaces. Discrimination in the workplace is, after all, injurious to the victim's employer as a distortion of reasoned and cost-effective management. The team suffers along with the batter who strikes out. The goal of management is the efficient use of its available resources, human as well as material. A value system rooted in personal prejudice and applied by an individual manager or supervisor distorts that goal and interferes with the success of the enterprise.

It is clear to me that the human rights community is either insensitive to or unaware of the deep resentment with which employers view their treatment at the hands of the agencies following an accusation of discrimination or harassment. No matter how much effort is expended, no matter how many controls are in place, employers simply cannot mandate or guarantee fair treatment in the workplace in all instances as long as those complex instrumentalities known as human beings serve as its management and workforce. To hold a deep-pocketed employer liable in this circumstance demonstrates that employers are not viewed as participants in the process, but rather as the fall guys in the event unlawful behavior occurs despite their best efforts. Employers, in my experience, are as offended and saddened by acts of discrimination that occur in their workplaces, despite their good intentions, as are the victims. Like the parent called to the principal's office, employers feel the

shame of these failures. The punishment, however, should fall most heavily on the wayward child, not on the parent. As stated by Professor Neuborne: "From the dual standpoints of deterrence and moral responsibility, the guilty actor in a human rights drama should pay the financial price of restoring a sense of balance."⁵

Safe Harbors and ADR

Underlying Professor Neuborne's "modest" proposal is an unstated call for a return to an age when individuals actually bore responsibility for their actions. How revolutionary, how contrary is that notion to the dominant philosophy of our legal system that so often absolves individuals from the responsibility for their actions, and in the case of injuries in the workplace, substitutes employers for injury-inflicting individuals? Gone are the days, under emerging negligence principles, where an interceding unlawful act, such as a robbery or a homicide by an employee or intruder in the workplace, would absolve the employer from responsibility so long as the employer did not contribute to the injury in a meaningful way. Gone are the days where a sexual assault by a supervisor is a criminal act by an individual and not the violation of the rights of the victim by the employer.

Professor Neuborne calls for a return to a world of personal responsibility where supervisors are held individually liable for their actions in the first instance. How can there be a credible argument against such an obviously correct goal? Professor Neuborne would not fully absolve the employer, but rather would hold the employer liable where the guilty supervisor lacks the financial resources to satisfy the judgment or where the guilty parties are unknown. He would also hold the employer liable if the employer is "morally culpable." This is a good beginning, although only that.

Professor Neuborne goes on to propose a safe harbor for employers who enact policies and enforce practices that conform with the expectations of the law. He suggests that such employers and their policies receive certification from the City Commission and, where such certifications are in place, the employer would be absolved from derivative liability. In the absence of a Commission-certified plan, an employer would be liable automatically for any derivative liability. Professor Neuborne writes: "By narrowing its remedial focus to the guilty individuals, and providing an incentive for employers to adopt effective preventive plans, the Commission

5. Neuborne, *supra* note 1, at 1146.

would increase deterrent impact and amplify its ability to induce employers to prevent discrimination before it occurs.”⁶

The notion of “safe harbors” for employers with proper policies in place already exists under the City Human Rights Law.⁷ This “pre-event” approach to enforcement of the City Law should be expanded in the manner suggested by Professor Neuborne, and beyond. Only in this manner can the Commission truly impact the lives of all employees in New York City in a tangible, broad-based way. By deputizing employers, with the Commission’s supervision and oversight, the Commission will expand its reach and impact beyond what its increasingly limited resources would otherwise permit.

An instructive example of the “safe harbor” approach in a related area can be found in the enactment of the Older Workers Benefit Protection Act of 1990,⁸ in which Congress sought to address the problem of waivers by older workers of their legal rights. Congress could have permitted the EEOC to litigate the issue in countless cases until a legal resolution on the issue was reached. Instead, Congress laid out in the statute a series of specific requirements that employers were required to include in releases if they were to be enforceable. The statute worked, and few releases are offered today—even in settings beyond those impacting older workers—by knowledgeable employers without the required provisions. Once employers were informed of the requirements, they complied, and the rights of countless employees were enhanced as a result.

How might the Commission constructively expand on the notion of safe harbors? I offer my own modest proposal. For nearly a decade, the Commission has been a leader in the area of alternative dispute resolution (“ADR”). The Commission’s mediation program is a model from which all human rights agencies, including the EEOC, could learn. The program’s effectiveness in reducing the agency’s caseload and providing an avenue for prompt resolution of human rights claims is indisputable. By employing professionals to mediate pending complaints, the Commission has been able to resolve many disputes quickly, freeing up resources to be applied to the remaining cases on its docket.

ADR is not a passing fad, as many had predicted, but rather is an essential tool in the arsenal of dispute resolution for an increasing

6. *Id.* at 1163.

7. See NEW YORK, N.Y., ADMIN. CODE § 8-107(13)(d) (1996).

8. Pub. L. 101-433 § 1, 104 Stat. 978 (1990).

number of employers. Programs vary and are often still in the experimental stages but the trend in favor of ADR is undeniable. Whether programs emphasize mediation, arbitration, peer review, or other forms of binding or non-binding ADR, the goal is to resolve employment disputes at the level best suited to resolving such disputes—in a non-adversarial workplace setting.

I urge the Commission to avoid the mistake which the EEOC has made in this matter. Rather than trying to embrace this rapidly developing area, the EEOC has decided to tilt at windmills by making its opposition to mandatory pre-dispute arbitration a key component of its national enforcement plan. Employers can only stand on the sidelines and shake their heads at the irony of the EEOC lecturing them about due process and the rights of employees, knowing the grievous injuries that the EEOC has inflicted on parties before the agency (employers included) over the years through its interminable delays: justice delayed is, in fact, justice denied. Is it just to have a charging party wait three or more years for the resolution of a charge of discrimination? Is it fair to an innocent supervisor to stand accused for that period of time with no means to clear his or her name? The EEOC's concession to political pressure, imposed mainly by the self-interested plaintiffs' bar, to take on the cause of mandatory pre-dispute arbitration, has prevented it from playing a constructive role in the ADR revolution.

Certain basic facts and trends cannot be contested. First, employers will adopt ADR in greater numbers in the coming years. Second, as the courts, including the Supreme Court, have consistently found, employment disputes may be resolved by arbitration, even where the arbitration program is made a condition of employment.⁹ The issues that the courts have not fully resolved, and will be addressing in the years to come, have to do with the fairness of the arbitration procedures actually implemented. It is here that the Commission can have the greatest impact. It can create a safe harbor for employers who ensure due process in the context of their internal ADR programs. The Commission could define the parameters of due process and agree to defer pending complaints to any employer program that satisfies the established due process requirements. As a model, the Commission could look to the "Pro-

9. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tocol" recently published by a special committee of the American Bar Association.¹⁰

This approach is not novel, although it would be new to the human rights area. The Commission could look to the National Labor Relations Board and its long-standing policy of deferring to arbitration under collective bargaining agreements (known as the *Collyer* doctrine)¹¹ for guidance and support. Under this approach, the Commission would not abdicate its enforcement responsibilities (as some might suggest), as it would have two opportunities to influence and ensure the fairness of the system and the results in a particular case. First, it could define the essential terms of a duly sanctioned program (and pre-certify it if the Commission is prepared to expend the necessary resources to do so). Second, it could review the results of the actual arbitration (or other ADR vehicle such as a peer review panel) upon completion of the process to ensure compliance with the mandates of the program. By adopting this approach, the Commission could play a dynamic role in the process that could become the principal means of resolving employment disputes for decades to come.

On a more modest level, the Commission could require that an employer's internal remedies be exhausted before the complaint process begins. After a matter has been addressed internally, the Commission could review the record and accord the employer's internal proceedings the weight they deserve. Of course, if the internal program includes the increasingly popular mediation of employment disputes, the Commission's deferral to the system will merely be giving the parties an opportunity to resolve the dispute voluntarily, as a mediator is without authority to mandate a result. If the internal program results in a binding result, the Commission could always reject the result if the employee was not afforded due process, or for other sound reasons.

Certainly, many issues remain to be resolved. For example, unlike in the union setting, where the employee may be unrepresented, must the employee be represented by counsel for the

10. *Task Force on Alternative Dispute Resolution In Employment, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, reprinted in *Daily Labor Report* (BNA) No. 91, at D-34 (May 11, 1995). This Protocol has been endorsed by the National Academy of Arbitrators, the ABA Labor & Employment Law Section, and the National Employment Lawyers Association.

11. In *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), the National Labor Relations Board required that arbitration remedies be exhausted before it would consider an unfair labor practice claim.

decision to be binding? By addressing such questions, the Commission can exert a constructive and powerful influence on one of the most important trends in the area of human rights and employment law—the privatization of dispute resolution related to workplace claims. The long-established and respected role of arbitration in the labor-management setting demonstrates that the most fundamental questions regarding employment relations can be resolved privately—so long as the system developed is fair and just.

What is required, however, is creativity and compromise from all interested parties, and an acceptance of the basic, inevitable truth that human rights claims, like workers' compensation and labor-management claims before them, are not well suited for litigation or even prolonged administrative proceedings. Rather, we must adapt the current system to make the guarantee of human and civil rights in the workplace a reality for a greater number of individuals, rather than for the lucky or persistent few who successfully navigate the system as it exists today. We must accept that the greater good lies not in keeping human rights encased in a picture window to be admired from afar. Instead, that good is achieved by making human rights more accessible to the general population through more streamlined, less costly procedures that actively and constructively involve employers in, rather than making them the target of, the process.

