

# Collective Bargaining and Fair Employment Practices

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### Repository Citation

Benjamin Aaron, *Collective Bargaining and Fair Employment Practices*, 27 La. L. Rev. (1966)  
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## COLLECTIVE BARGAINING AND FAIR EMPLOYMENT PRACTICES\*

*Benjamin Aaron\*\**

We meet today to honor the memory of a friend and colleague, Charles A. Reynard. Together with many of you, I shared the priceless gift of Charlie's friendship; in addition, I worked closely with him for over ten years in a loose but enduring association of scholars known as the Labor Law Group. Thus I came to know, and was deeply influenced by, those qualities of heart and mind that made Charlie Reynard so remarkable. He was unusually modest, and given to cheerful and humorous self-deprecation that was not in the least justified; at the same time, his natural generosity and fair-mindedness enabled him to appraise conflicting points of view calmly and without the distortions of passion or prejudice. Yet I hardly need remind this audience that there was nothing wishy-washy about Charlie's convictions. He had a number of well-articulated and strongly-held beliefs about the more important issues of our time; these he adhered to steadily, regardless of their popularity. He was, in short, one who observed Emerson's admonition to think as a man of action and to act as a man of thought; moreover, he believed that the deepest and truest loyalty is to one's own conscience.

I take pleasure in recalling that our lives were touched and influenced by a man who possessed those qualities and used them so well. Yet, true homage to Charlie Reynard's memory requires something more; we can honor him most appropriately on this occasion by examining—honestly, calmly, objectively, as he would have done—an important social problem for which solutions must be found. Nor would it be proper, I think, to choose a "safe" topic; for Charlie was never one to ignore an issue simply because, by tackling it, he might cause pain to his friends or arouse the wrath of his enemies. And so I have chosen, as my personal tribute to him, to speak briefly on a controversial subject about which I know he felt deeply and which still chal-

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\*Address delivered on the occasion of the presentation by his former students of an oil portrait of the late Professor Charles A. Reynard, March 12, 1966, Louisiana State University Law School.

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lenges the conscience and the ingenuity of employers and unions throughout the country: the establishment of fair employment practices through collective bargaining.

The term "fair employment practices" encompasses problems of discrimination based on race, color, religion, age, sex, or national origin. My remarks today are limited, however, to discrimination in employment against our nonwhite citizens. I use the term "nonwhite," not as a euphemism, but because it embraces others besides Negroes — orientals, Puerto Ricans, Mestizos — who are also discriminated against because of their color. It is obvious, however, that Negroes constitute the overwhelming proportion of the nonwhite group and bear the greatest burden of discrimination. As I shall attempt to show, legislation outlawing such discrimination is an essential, but not a sufficient, condition for its elimination, and the mere abstention from illegal conduct is not an acceptable standard of behavior if we are sincere in our professed belief in democracy.

Let me try first to suggest the dimensions of the problem. Throughout the past decade, according to a recent study made by the U.S. Bureau of Labor Statistics,<sup>1</sup> nonwhite workers have accounted for disproportionately large shares of both long-term and very long term unemployment. In 1965, nonwhites constituted 11 percent of the labor force, 21 percent of those out of work 15 weeks or longer, and 27 percent of those jobless more than 6 months. These proportions have remained fairly constant over the past 8 years.

One reason for the inordinately large proportion of nonwhite workers in the long-term jobless group is their concentration in jobs characterized by low skill and educational requirements and by high unemployment rates. The fact remains, however, that nonwhite unemployment rates are higher than white rates in *every* industry and occupation. Moreover, nonwhites with no previous full-time work experience take considerably longer than whites to find a job. Nonwhite workers also experience more frequent spells of joblessness than whites. It is all too apparent that, despite some improvement in the situation in recent years, nonwhites are still the last to be hired and the first to be fired.

To be sure, nonwhites have made some gains in the last

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1. Holland, *Long-Term Unemployment in the 1960's*, 88 MONTHLY LAB. REV. 1069, 1074 (1965).

decade in shifting to the higher-skilled and faster-growing occupations. In the white-collar occupations, for example, nonwhites increased their share of jobs from 3.1 percent in 1954 to 4.5 percent in 1964. In the blue-collar occupations the gain in the nonwhite share of jobs was more modest — from 10.9 percent in 1954 to 11.8 percent in 1964. This reflected a slight decline in their share of laborer jobs, a slight gain among operatives, and a substantial gain among craft jobs. In service occupations, where nonwhites have traditionally held a disproportionately large number of the jobs, their share decreased moderately, from 29 to 26 percent in the 1954-64 period.<sup>2</sup>

Unfortunately, these small improvements in the employment status of nonwhites are more than offset by the predicted manpower requirements in 1975. According to a study made by the B.L.S.,<sup>3</sup> the greatest increase in employment requirements will be for professional and technical workers. White-collar jobs as a whole are expected to expand by nearly two-fifths, and to constitute 48 percent of all manpower requirements. The blue-collar occupations, on the other hand, are expected to expand at less than half this rate, and will make up only 34 percent of all requirements. Thus, if nonwhites continue to hold the same proportion of jobs in each occupation as in 1964, the nonwhite unemployment rate in 1975 will be more than 5 times that for the labor force as a whole; and even if the 1954-64 trends in upgrading the jobs of nonwhites continue at a constant rate, the non-white unemployment rate in 1975 will still be about 2 1/2 times that for the labor force as a whole. Therefore, nonwhites must gain access to the rapidly-growing, higher-skilled, and white-collar occupations at a faster rate than in the past decade if their unemployment rate is to be brought down to the common level.

Many people argue that the best way to deal with this problem is to maintain an economic growth rate sufficient to provide jobs for all those able and willing to work, and to outlaw discriminatory employment practices. But these policies, despite their undoubted importance, are not enough. Unemployment is now down to 3.7 percent and will probably decline to at least 3.5 percent by the end of 1966. More than ever, the unemployed

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2. STUDY ON MANPOWER REQUIREMENTS IN 1975 (unpublished), prepared by U.S. Dep't of Labor, Bureau of Labor Statistics, for the National Commission on Technology, Automation, and Economic Progress.

3. *Ibid.*

are made up of the unskilled and the uneducated. Indeed, as Secretary of Labor Wirtz observed last year, the correlation between unemployment and lack of education is closer than any correlation between unemployment and race. In his words, "Most of the truth is that *most* of the unemployed . . . lack the education or skill to fill *most* of the jobs that are vacant."<sup>4</sup> Unless the federal government, acting as an employer of last resort, subsidizes the employment of these people in useful community enterprises, as recently recommended by the National Commission on Technology, Automation, and Economic Progress, those comprising the hard-core unemployed are unlikely to find employment. Therefore, especially in the private sector of our economy, mere willingness to hire *qualified* applicants, regardless of color, will not do much for either white or nonwhite persons still looking for work.

But the problem has even deeper roots. To be counted among the unemployed, one must be in the labor force, which means that one must be actively seeking employment. Nobody knows, however, how many persons, especially in the nonwhite group, have become so frustrated and embittered by their failure to secure work that they have withdrawn from the labor force and have ceased to be even a statistic. When Secretary Wirtz asked a young unemployed Negro he met in Harlem whether he was looking for work, the hostile response to his question was "Why?" Why, indeed, if to his lack of skill and education is added the almost insurmountable handicap of his own alienation from a society that treats him as an unwanted immigrant?

I joined in the recommendation of the National Automation Commission to which I referred a moment ago because I believe that the society as a whole, as well as the persons directly involved, would benefit from the useful employment, subsidized by government funds if necessary, of all persons willing and able to work. It is apparent, however, both for the reasons I have already mentioned and for other, perhaps more important reasons, stemming from universal human cravings for a sense of dignity and of self-fulfillment, that our society must strive to do more than simply provide gainful employment for all those willing and able to work. The only aim consistent with the democratic ideal is to permit every person to develop his abilities and

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4. White House Conference on Civil Rights, Nov. 17-18, 1965, quoted in 89 MONTHLY LAB. REV. 14 (1966).

to secure employment at the highest level of his capacity. As a nation we have thus far failed — and what is worse, we have only just begun to try — to attain this goal in the employment of our nonwhite citizens.

Those who should be taking the lead in this endeavor are the organized employers and the unions representing their employees. The institution of collective bargaining is the rock upon which our national labor policy is founded. Through establishment of appropriate bargaining units and negotiation of collective agreements, unions and employers have achieved a widespread system of industrial jurisprudence which, despite its defects, has democratized the world of work in this country. It is perfectly reasonable, therefore, to look to labor and management for leadership in the task of employing, training, and upgrading nonwhites so that they, too, will come to regard the promise of America as a reality and not a myth.

How well have these two important groups met their mutual responsibilities in this regard? Taking the record as a whole, and with due regard for the numerous exceptions among both employers and unions, I would say that the past treatment of nonwhite workers in the organized sector of the economy, though better overall than in the unorganized sector, has been deplorable; that present practices show considerable improvement; but that much, much more must be done by both management and labor.

Fortunately, the worst period of hostile discrimination against and neglect of nonwhites lies behind us. Let us not forget, however, that until relatively recent times some 30 unions, mostly comprised of skilled workers, either excluded nonwhites from membership or accorded them only segregated auxiliary status; that many employers, with the open or tacit support of unions with which they dealt, or with only token opposition, refused to hire nonwhites except for the most menial jobs; and that by written agreement many employers and unions, concentrated in but not confined to the South, provided for separate and restricted seniority and lower wage rates for nonwhites, or even, as on the railroads, deliberately and collusively deprived Negro workmen of jobs which they had long held in order to replace them with white employees.

Nothing can erase the shame of these past events; the most

we can do is to make sure that they are not repeated. Unfortunately, some of the ugliest of these practices still endure, notably in those industries in which job entry is largely through an apprentice system. Here we encounter, even today, a collusive effort on the part of employers and unions to frustrate the efforts of nonwhites to gain admission, as well as refusals of whites to work by the side of qualified nonwhites. We still find, though happily to a diminishing extent, blatant appeals to racial prejudice by employers and unions in campaigns preceding representation elections. In time all of this will disappear, not only, or even chiefly, because our state and federal antidiscrimination laws forbid such practices, but because these practices are so subversive of our system of collective bargaining that the survival of the institution depends upon their elimination.

Reform, however, is not instantaneous; it proceeds sporadically in time and unevenly in scope. It does not write on a clean slate, but must cope with a host of difficulties inherited from the earlier period. Let us consider seniority as an example. No one who accepts the principles of collective bargaining would deny that seniority — a system of employment preference based on length of service — has proved to be a fair and efficient means of protecting job security. But in some industries in which closed-shop conditions formerly prevailed, and in which the dominant unions used to exclude nonwhites from membership on equal terms, continued reliance upon seniority works severe hardship against nonwhites whose status as employees and union members has been only recently acquired. In some of these industries job opportunities for all workers are gradually declining; thus the nonwhites now at the bottom of the seniority list have little or no hope of employment. Whether or not some steps can be taken to redress them for past decades of discrimination without destroying the seniority system is problematical. It is to be regretted, however, that employers and unions have thus far not directed their considerable inventiveness to possible solutions of this admittedly difficult problem.

In both labor and management circles there is also too much complacency at the top. Even in those international unions whose dedicated opposition to discrimination in employment is well known, adherence to that principle is not always as steadfast at local levels, where regional and cultural influences some-

times outweigh organizational commitments. National multi-plant corporations encounter similar problems with some of their local plant managers. And "tokenism" is too often substituted for full acceptance of nonwhites in the industry, firm, or union.

Title VII of the Civil Rights Act of 1964 represents the successful effort of many good men to resolve, by compromise, fundamental differences on both substantive and procedural issues. It is a landmark in our history — the first direct and specific prohibition in a federal law against unfair discrimination in employment based on race, color, religion, or national origin, the first faltering step at the national level along the one-way road toward social justice in employment. I use the expression "one-way road" deliberately, because this forward progress is irreversible; having finally admitted that this form of discrimination is a national evil that must be attacked by a national law, we have irrevocably committed ourselves, as a nation, to its ultimate extirpation.

Technically, however, Title VII is something of a horror: its language is imprecise and redundant; a number of its provisions are vague and ambiguous; some of its exemptions and exceptions are difficult to justify; and its enforcement procedures may very well prove ineffective in many cases. In time, doubtless, the present law will be improved. But regardless of whether or when that happens, we surely have a right to expect more from labor and management than literal compliance with the law. Nonwhites in this country have been so conditioned to patterns of discrimination in employment that many will not take the law at its face value and risk the humiliation of being rejected for employment or union membership because of their color. They need and are entitled to an affirmative assurance.

What forms should this affirmative assurance take? In addition to adopting and advertising policies of nondiscrimination, employers should go into nonwhite communities and actively recruit employees there. Unions should take similar steps to assure nonwhites that full and equal membership is open to them. Employers and unions jointly should cooperate in eliminating unnecessarily high entrance requirements which now bar many of the unemployed from jobs they can perform, and in providing on-the-job training to upgrade the skills of those who are hired.

To many persons here and in other lands, the American system of collective bargaining stands as a shining example of democracy in action. Despite my great disappointment with past failures of collective bargaining to deal fairly and forthrightly with the evil of racial discrimination in employment, I still believe that the institution is one of the most effective instruments we have to remove this ugly stain from the fabric of our society. Let the leaders of labor and management demonstrate by precept and example how we can translate our noble principles into effective action; in doing so they will serve their own enlightened self-interest and give leadership to a willing nation.