RACE HARASSMENT: THE SUPREME COURT'S INITIAL CONSIDERATION

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The Supreme Court's decision to grant certiorari for the first time in a case involving racial harassment has intensified interest in a remedial doctrine which has been developing in the lower federal courts for the past seventeen years.

On October 5, 1987, when the Court elected to hear Patterson v. McLean Credit Union, eleven of the thirteen federal circuit courts of appeals had considered the issue of racial harassment.

The principle issue before the Court in Patterson is whether a claim for racial harassment is cognizable under 42 U.S.C. §1981 which grants to all persons within the United States, "the same right... to make and enforce contracts... as is enjoyed by white citizens."

Establishment of a Remedy

In Rogers v. Equal Employment Opportunity Commission, the issue

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2 All but the Ninth Circuit Court of Appeals and the Federal Circuit Court of Appeals have decided cases of racial harassment, Fair Employment Practice Cases, Vols. 4 through 45, Bureau of National Affairs, 1971-1987.

before the Fifth Circuit Court of Appeals in 1971, was whether Title VII covered factual situations which were to become known as harassment.

The pertinent aspect of the complaint in Rogers was the allegation that a Spanish surnamed American had been the victim of discrimination when she was only permitted to attend "to patients of a certain ethnic origin and not to others." The court below decided that the EEOC had failed to show the complainant was a person aggrieved by an unlawful employment practice within the meaning of Section 703(a).5

Section 703(a)(1) of Title VII provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex or national origin."

The majority on the fifth Circuit in reversing the lower court, maintained that this language evinced a Congressional intention to define discrimination in the broadest possible terms and that Congress chose neither to enumerate specific discriminatory practices, nor to elucidate extensively the parameter of "such nefarious activities."

The court opined that Congress had pursued the path of wisdom by being unconstrictive, knowing that constant change was the order of the day and that the seemingly reasonable practices of the present could easily become the injustices of the future.

The crux of judicial reasoning which in essence is the foundation of the cause of action for racial harassment was enunciated by Circuit Judge Goldberg:

Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself for example, in an employer's practices of hiring, firing and promoting. But today employment discrimination is a far more complex and pervasive

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