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Mengelkoch v. Industrial Welfare Commission;
Conference with Thomas Harris and Doris Gibson
of the AFL-CIO

Mr. Thomas Harris is Associate General Counsel of the AFL-CIO, and Miss Doris Gibson is on the civil rights staff of the Federation. I met with them on Friday, February 10, 1967, for the purpose of discussing the Mengelkoch case. Mr. Harris had previously made an appointment with Mr. Pollak, and, as you requested, I scheduled another appointment with him upon Mr. Pollak's leaving the Division.

1. Mengelkoch case. On October 10, 1966, a suit was filed in the central district of California to obtain declaratory and injunctive relief against the enforcement of a California law prohibiting women from working more than eight hours a day or 48 hours in any week. The principal plaintiff, Velma Mengelkoch, is an "Electric Assembler" for North American Aviation, Inc., and she brought the suit on behalf of herself and "all other female employees engaged in similar employment throughout the State." 1/ She claims that the 8-hour statute has prevented her, only because of her sex, from earning premium pay for overtime and from obtaining promotions to positions that would require overtime, and that

1/ At other points in the complaint the class is defined as "all other female citizens employed by" North American Aviation, and "all other females similarly situated."

cc: Norman
G. Jones
✓ Fiss

as so applied is discriminatory and violative of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The defendants are North American Aviation and the State Industrial Welfare Commission.

Plaintiffs requested that a three-judge court be convened, and apparently a three-judge court has taken jurisdiction. The State has challenged the jurisdiction of the three-judge court on the grounds that the claim based on the equal protection clause is ^{not} substantial, and that the claim based on the pre-emptive effect of Title VII does not entitle the plaintiffs to a three-judge court. 2/ The State also moved to dismiss on the grounds that "the suit is one against the State of California instituted without its consent" and that "the federal court should abstain from hearing this case on equitable grounds until such time as the courts of the State of California have had an opportunity to rule." I understand that the three-judge court will have a hearing on that motion on April 18, 1967. 3/

This case has already been before the EEOC. Initially it should be noted that in November 1965, EEOC issued certain guidelines relating to discrimination

2/ Title VII does authorize the Attorney General to request that a three-judge be convened to hear and determine a case under that Title. 42 U.S.C. §2000e-6(a). But there is no comparable grant of authority for private parties.

3/ It is quite conceivable North American Aviation has moved to dismiss or has answered, and that the hearing on April 18 will not be restricted to the issues raised by the State's motion.

based on sex, and addressed itself to the general problem of state protective laws:

"The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as basis for application for the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination."

On February 27, 1966, a charge was filed by the plaintiff before the EEOC covering the same matter in suit. On August 19, 1966, the EEOC adopted a statement which made some general comments about the "processing of cases involving state protective laws" and made specific reference to the Mengelkoch charges. In this connection the Commission explicitly found "that the employer's overtime requirements for the jobs sought by the charging parties are legitimate and bona fide"; and it added, "there is no suggestion in the facts before us that the health or welfare of the charging parties would be adversely affected by permitting them to work in excess of 48 hours a week." But instead of applying the test of the guidelines, whether the clear effect of the law is protective or discriminatory, the Commission then proceeded to announce a "hands-off" policy:

While we have a duty to interpret Title VII, we have no authority by such an interpretation to insulate employers

against possible liability under state law, nor do we have authority to institute in the name of the Commission suits to challenge or restrain the enforcement of state laws.

Therefore, in the instant case and in cases which pose the same issues, the Commission is not prepared to make a determination with respect to the merits of the case, but shall advise the charging parties of their right to bring suit within 30 days under section 706(e) of Title VII to secure a judicial determination as to the validity of the state law or regulation.

The Commission also added that litigation seems "desirable and necessary," and it explicitly reserved the right to appear as amicus curiae in such litigation "to present its views as to the proper construction of Title VII." 4/ It was only after the EEOC issued this statement that this suit was commenced.

2. Preliminary Analysis of the Merits. At this time, I feel confident about several propositions:

First, there can be non-discriminatory, truly protective applications of this 8-hour statute. For example, for unorganized agricultural female workers, usually a member of the lower economic class and a racial or ethnic minority, this law may effectively prevent the unscrupulous employer from insisting upon overtime that would not be compensated for at a premium rate.

4/ Superficially, I would find it somewhat strange to have the Commission participate in a suit "to present its views as to the proper construction of Title VII" as it bears on such an application of a protective law, when the Commission expressly declines to exercise its power to interpret Title VII on the same issue in proceedings before it.

The legislature could have reasonably decided that only a prohibition against working overtime could have effectively protected the employees from being "forced" to work overtime. Perhaps, females are no more a prey to such employer pressure, but the state legislature is entitled to make the judgment that this would be an even greater hardship for the generality of females because of their family responsibilities, and in any event, the legislature could "settle for half," deal with one part of the problem at a time. See generally Katzenbach v. Morgan, letting Congress deal with the disenfranchisement of those literate in another language who were educated in American-flag schools without having to afford similar protection to those equally literate in another language but who were educated in schools beyond the territorial limits of the United States.

Second, given the findings of the EEOC that neither the "health" nor "welfare" of plaintiff (and presumably the class she represents) would not be adversely affected by working overtime, and given the findings that the female employees of North American Aviation are tightly organized and protected by collective agreements, 5/ the application of the 8-hour to plaintiff and the class she represents is discriminatory. No valid governmental purpose is served by prohibiting these persons, simply because of their sex, from working more than 8 hours a day. This prohibition has an adverse impact on them; it prevents them from earning the premium rate for overtime work and bars them from certain positions of employment without serving a valid social function. Even as applied the prohibition does have the effect of enlarging the labor force, creating employment for more people,

5/ These collective agreements, require premium pay for overtime, and might even have a provision prohibiting the employer from "forcing" the employer to work overtime.

and that is surely a valid social function. But I doubt whether that was the purpose underlying this statute, or whether the facts would justify the statute on this theory. Most likely, this is a high demand industry, and there is probably an adequate demand for workers without this prohibition on overtime work.

Third, the class discriminated against, unlike a racial or ethnic minority, does have an effective voice in the political processes. These protective laws have been the subject of frequent legislative revisions; significant pressure has been brought to bear on the legislatures, and these pressure groups, such as these unionized females and all the employers, do not work at any particular disadvantage. This is true with respect to the 8-hour law in California. There is, for example, a statutory exemption for certain supervisory personnel and the salary level used in part to define this class has been recently altered; and from the Korean War to about 1961, these employees (referred to as aerospace workers) were statutorily exempted from the prohibition of the 8-hour law in question.

Perhaps a few tentative conclusions could be distilled from these propositions. I would be most reluctant to urge that the 8-hour law be held invalid on its face, i.e., in all possible applications. There are legitimate applications of the law. One could urge that the law should be invalidated on its face, and then leave to the legislature to write a more narrow statute, restricted to legitimate applications. The difficulty with that argument is that the group which most needs this statute, the poorly paid unorganized worker, does not have enough power to activate the legislature in its behalf. However, a sound argument could be for invalidating the 8-hour law as applied to these plaintiffs and the class ~~they~~ represents. Conceptually, the position would be that Title VII pre-empts only the discriminatory applications of the 8-hour law, and the application challenged in this law suit is discriminatory. My difficulty

in whole-heartedly adopting this approach arises from this question: Is this the type of line-drawing that should best be done by the legislature and that could be left to the legislature with the realistic expectation that in due course it will be done? The irony is that the group needs the protection against the statute probably does not have the political power to have it re-enacted, but the group discriminated against might have the political power to have it revised. The advantage of a judicial revision arises from the certainty and guidance it would provide employees and employers. A great deal of the protection provided by the 8-hour law would be undermined if the doctrine were developed that Title VII precluded the "discriminatory" applications of the 8-hour law. This is an issue that would require constant litigation, and, until that litigation occurred, would leave any employee free to insist that, as applied to him and his employees, the 8-hour law is "discriminatory."

3. Mr. Harris' Mission. Mr. Harris urged the Department either to remain out of the case altogether or to intervene on the side of the defendants, to urge that the 8-hour law be validated. He admitted that non-participation by the Department would have a significant impact on the case, lessening plaintiff's chance of success. The California Labor Federation, AFL-CIO, has filed a motion to intervene on the side of the defendants, which motion will be heard in the April 18th hearing. He felt his visit was necessary because of Mr. Clark's meeting with the representatives of NOW, and said that he also wanted to speak to Mr. Clark directly to advise him of "extra legal" considerations. I said that the Division has not formulated any position on this case, but that we would study it in some depth and eventually advise Mr. Clark. I suggested that a meeting with Mr. Clark would be more profitable after we had submitted a memorandum to him advising him of the nature of the case and the Division's position. Mr. Harris said that he would call me again at the end of this month.

4. Recommendations. I believe we should have a closer look at this case for the purpose of determining whether the Department should intervene under Title VII. I would be extremely reluctant to recommend that the Department commence this case. I have not yet been convinced that plaintiff, even if she is being discriminated against, makes out an appealing case for judicial intervention. But the fact of the matter is it has been commenced, and at stake in the case is a novel 6/ question as to the interpretation of Title VII, which could have far reaching impact on our enforcement activities. It was not our idea to put "sex" into Title VII, but now that it is there, we have to learn to live with it.

The question as to whether the Department should intervene needs further study, and that question in part turns on what position the Department should take, ^{on the merits.} I recommend that both questions be further analyzed by either someone in Appeals and Research or in the Western Section. This analysis would have both evidentiary and legal aspects: What is the pertinent legislative history of Title VII, and the California statute? What are the relevant constitutional decisions in this area? What is the position on this question of other federal agencies, such as EEOC or the Women's Bureau of the Department of Labor? What is the composition of the female labor force

6/ The only decision on this issue comes from the Arizona Civil Rights Commission, which in December 1966, in Reynolds v. Mountain State Telephone and Telegraph Co., held a similar 8-hour invalid on its face under Title VII. I am not sure whether judicial review is being sought of that decision; we should keep our eyes on that case as well in the interest of obtaining some nationwide uniformity.

in the State, in terms of income level, marital status, race, types of employment and union organization? What States have similar statutes, and how have other States made adjustments to meet similar needs?

Since Mr. Harris wishes to speak with Mr. Clark about this case in the beginning of March, we should plan on having our position formulated by the end of this month and at that time advise Mr. Clark.