

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MARY MUEHLHAUSEN,)	
)	
Plaintiff)	
)	
v.)	Civil No. 92-34-P-C
)	
BATH IRON WORKS CORPORATION,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

The issue now before the court in this sexual discrimination case¹ is whether the plaintiff is entitled to seek compensatory damages and a jury trial by virtue of section 102 of the Civil Rights Act of 1991,² 42 U.S.C. ' 1981a ('`' 102"). For the reasons that follow, I conclude that she is not.

¹ The plaintiff asserts claims of intentional discrimination in employment under section 2000e-2 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. ' 2000e-1 to -17, and section 4572 of the Maine Human Rights Act, 5 M.R.S.A. ' ' 4551-4632.

² Pub. L. No. 102-166, 105 Stat. 1071.

The Civil Rights Act of 1991 ("Act") became effective on November 21, 1991. In addition to modifying the holdings of a number of recent Supreme Court decisions affecting employment discrimination law, with the partial effect of restoring certain pre-existing law, it also established certain new rights including ' 102 rights to recover compensatory and punitive damages in cases of intentional employment discrimination and to a jury trial in cases where either compensatory or punitive damages are sought thereunder.³ *See generally* Lex K. Larson, *Civil Rights Act of 1991* (1992).

The plaintiff complains about acts of discrimination which allegedly occurred in 1989 and 1990 while she was employed by the defendant as a shipfitter. These acts predate the effective date of the Act by almost two years. Following the exhaustion of her administrative remedies, she initiated this action in January 1992. The plaintiff is entitled to seek compensatory damages and a jury trial in this action only if the Act is to be applied "retroactively", that is, only if it governs the complained-of

³ Before ' 102 became law, Title VII authorized equitable relief but did not expressly provide a right to compensatory or punitive damages. The Supreme Court noted in *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), with apparent approval, that most federal courts had held "general or punitive damages" not to be permitted under Title VII. *See id.* at 374-76. Prior to November 1991, no right to a jury trial existed with respect to Title VII equitable claims. *Ramos v. Roche Prod., Inc.*, 936 F.2d 43, 49-50 (1st Cir.), *cert. denied*, 112 S. Ct. 379 (1991). Section 102 specifically provides that awards of compensatory damages shall not include back pay, interest on back pay or other relief authorized under Title VII. ' 102(b)(2). Thus, it is apparent that compensatory damages allowed under ' 102 cover other kinds of damages. Indeed, ' 102(b)(3) makes clear that allowable compensatory damages include future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses.

conduct which occurred before its effective date. *Aledo-Garcia v. Puerto Rico Nat. Guard Fund, Inc.*, 887 F.2d 354, 355 (1st Cir. 1989).

Although the Supreme Court has spoken to the general issue, it has done so inconsistently. In *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696 (1974), the Court held, arguably at odds with prior law,⁴ that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. In *Bennett v. New Jersey*, 470 U.S. 632 (1985), the Court engrafted onto the general rule stated in *Bradley* the limitation that "statutes affecting substantive rights and liabilities are presumed to have prospective effect." *Id.* at 639. Three years later, in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), the Court, without mentioning *Bradley* or *Bennett*, said this: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208. Although the Court has since acknowledged the "tension" between the rule articulated in *Bradley* and its "reaffirmation" in *Bowen* "of the generally accepted axiom that "[r]etroactivity is not favored in the law," it has thus far declined to reconcile the "two lines of precedents." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990).

Not surprisingly, First Circuit jurisprudence is itself somewhat unclear. In *Aledo-Garcia*, decided post-*Bowen*, the court applied *Bradley* without mentioning *Bowen* in deciding whether an amendment to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, removing the previously effective upper age limit should be applied in the case of an individual who was mandatorily

⁴ See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 840-55 (1990) (Scalia, J., concurring).

retired prior to the amendment's effective date. In *Demars v. First Serv. Bank for Sav.*, 907 F.2d 1237 (1st Cir. 1990), also decided after *Bowen*, the court indicated that an analysis of the retroactive application to pending actions of a statute enacted after the events in question took place depends initially on which of two differing legal presumptions controls, the *Bradley* presumption (court to apply law in effect at time it renders its decision unless manifesting justice would result) or the *Bennett* presumption (statutes affecting substantial rights and liabilities have only prospective effect). *Id.* at 1239-40. Again, *Bowen* was not mentioned. Concluding that the statutory provision at issue, enlarging federal jurisdiction where the FDIC is involved, does not in any way alter substantial rules of conduct, the court applied the *Bradley* presumption. *Id.* at 1240. In *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990), the court for the first time acknowledged *Bowen* and the apparent "tension" between *Bowen* and *Bradley*, and stated in dictum that:

We have recently suggested that the touchstone for deciding the question of retroactivity is whether retroactive application of a newly announced principle would alter substantive rules of conduct and disappoint private expectations.

Id. at 357 n.7 (citing *Demars*, 907 F.2d at 1239-40). The concern about whether the application of a newly announced principle would alter substantive rules of conduct and disappoint private expectations expressed in *Demars*, however, reflected the court's regard for whether the statute in question fell within the *Bennett* limitation on the *Bradley* rule. It did not address the effect of *Bowen* on *Bradley*. In any event, the court's touchstone formulation was phrased as a suggestion only and was immediately followed by a seemingly approving reference to language in *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990), which states that when the Supreme Court decides not to apply a law-changing decision retroactively it "is usually based on its perception that such application would have

a harsh and disruptive effect on those who have relied on prior law." *Id.* at 191. *See C.E.K. Indus. Mechanical Contractors, Inc.*, 921 F.2d at 357 n.7.

Numerous district courts have addressed the retroactive applicability of the 1991 Act but with little consistency. I am aware of courts of appeals decisions from the Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits. *See, e.g., Landgraf v. USI Film Prod.*, 968 F.2d 427 (5th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Davis v. City and County of San Francisco*, No. 91-15113, 1992 U.S. App. LEXIS 24836 (9th Cir. Oct. 6, 1992); and *Gersman v. Group Health Ass'n, Inc.*, No. 89-5482, 1992 U.S. App. LEXIS 21615 (D.C. Cir. Sep. 15, 1992). All but the Ninth Circuit hold, albeit for a host of different reasons, that the 1991 Act is not to be applied retroactively.

I reach the same conclusion as have the majority of the courts of appeals whether I apply the *Bradley* or the *Bowen* presumption. Applying *Bowen*, the Act is not to be given retroactive effect unless its language requires that result. It does not. Although section 402(a) of the Act states that, "[e]xcept as otherwise specifically provided, this Act and the Amendments made by this Act shall take effect upon enactment," Pub. L. No. 102-166, Title IV, ' 402(a), Nov. 21, 1991, 105 Stat. 1099, the meaning of this language is at best ambiguous on the retroactivity question. *See, e.g., Luddington*, 966 F.2d at 227. Section 102 itself contains no language bearing on retroactivity.

Applying *Bradley*, as limited by *Bennett*, presents more of a challenge. It is apparent that neither the Act itself nor its legislative history evinces a clear congressional intent that it be applied only

to conduct occurring after its effective date.⁵ What is not so apparent is whether the Act affects substantive rights and liabilities for purposes of this case. Although the discrimination alleged by the plaintiff has always been actionable under Title VII, the nature and extent of the increase in damages exposure generated by the Act⁶ arguably affects substantive liabilities. The counter-argument, of course, is that the plaintiff's rights and the defendant's obligations remain unchanged and only the remedies available to the plaintiff have changed. Whatever the answer to this question, I am satisfied that application of ' 102 to conduct predating the Act's effectiveness would, in any event, result in manifest injustice.⁷ In this respect, I agree with and adopt the reasoning of the Fifth Circuit:

⁵ Both parties claim support for their respective positions from their reading of the Act and its legislative history. *See* Plaintiff's Memorandum of Law in Opposition to the Defendant's Motion to Strike Her Jury Demand at 2-4; Defendant Bath Iron Works Corporation's Memorandum of Law in Support of Its Motion for Judgment on the Pleadings at 3-8. However, as noted above, the Act itself is ambiguous, and detailed examination of the legislative history reveals disparate views and a lack of consensus on the retroactivity issue. The *Luddington* court put it best when it said, "As so often happens, the contenders could not agree, so they dumped the question into the judiciary's lap without guidance." *Luddington*, 966 F.2d at 227. On this issue, I disagree with the conclusion reached by the Eighth Circuit that the legislative history discloses a legislative intent that the Act be prospective only, *see Fray*, 960 F.2d at 1378, and the opposite conclusion reached by the Ninth Circuit, *see Davis*, No. 91-15113, 1992 U.S. App. LEXIS 24836 at *44-48. I also disagree with the Sixth Circuit's decision, in light of its own conclusion that the legislative history is unclear, to defer to the Equal Employment Opportunity Commission's construction of the Act as having prospective application only. *See Vogel*, 959 F.2d at 598. I find such deference on this occasion inappropriate in light of the fact that the EEOC has analyzed the retroactivity issue by reference to the same Supreme Court precedents considered here but without any greater expertise than a court to do so. *See EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235 (1991).

⁶ *See supra* n.2. The sum of the amount of compensatory and punitive damages recoverable is limited to \$50,000, \$100,000, \$200,000 or \$300,000 depending on the number of individuals employed by the defendant.

⁷ Manifest injustice is evaluated in light of three factors: (i) the nature and identity of the parties, (ii) the nature of their rights, and (iii) the nature of the impact of the change in the law upon those rights. *Bradley*, 416 U.S. at 717; *Aledo-Garcia*, 887 F.2d at 355-56. Under the first factor, a private individual or organization against whom or which a statute is to be applied is afforded a greater protection from retroactivity than is a public entity. *Aledo-Garcia*, 887 F.2d at 356. The defendant in this case is a private organization. So far as the second factor is concerned, the plaintiff, while employed at BIW, was entitled to work in an environment free of gender-related discrimination. For its part, the

[T]he amended damage provisions of the Act are a seachange in employer liability for Title VII violations. For large employers, the total of compensatory and punitive damage [for] which they are potentially liable can reach \$300,000 per claim. . . . The measure of manifest injustice under *Bradley* is not controlled by formal labels of substantive or remedial changes. Instead, we focus on the practical effects the amendments would have upon the settled expectations of the parties. There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself. It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. Unlike *Bradley*, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose "an additional or unforeseeable obligation" contrary to the well-settled law before the amendments.

Landgraf, 968 F.2d at 433. See also *Luddington*, 966 F.2d at 229 ("Such changes [in remedies, procedures and evidence] can have as profound an impact on behavior outside the courtroom as avowedly substantive changes. . . . [M]any of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment.").

I am satisfied that this analysis comports with First Circuit law. See *C.E.K. Indus. Mechanical Contractors, Inc.*, 921 F.2d at 357 n.7. Although the kind of prohibited discrimination at issue in this case was not changed by the Act, the attendant damages exposure has been altered dramatically. No

defendant had a right to terminate the plaintiff for legitimate, non-discriminatory reasons. Those rights were not affected by the Act. The third factor involves a balancing of "the disappointment of private expectations that results from the implementation of a new rule . . . against public interest in the enforcement of that rule." *Id.* at 357 (quoting *New England Power Co. v. United States*, 693 F.2d 239, 245 (1st Cir. 1982)). For the reasons noted above, I am satisfied that the balance tilts in favor of the defendant which, at the time of the alleged discriminatory conduct, was not liable for the compensatory damages to which it is now exposed under the Act.

longer is an employer at risk only for reinstatement and back pay with interest; now an aggrieved employee may seek additional compensation totalling, in some cases, as much as \$300,000. As a result, I would expect employers to become increasingly more vigilant in adopting and policing anti-discrimination policies. At the least, retroactive application of ' 102 certainly can be expected to disappoint private expectations that pre-Act conduct would not carry with it exposure to substantial compensatory and punitive damages. Stated otherwise, application of ' 102 to pre-Act conduct would likely have a harsh and disruptive effect on employers who have relied on the prior law.

Having concluded that the right to compensatory and punitive damages conferred by the Act applies only to claims of employment discrimination arising from conduct postdating November 21, 1991, and therefore not to the plaintiff's claims here, I also conclude that the plaintiff is not entitled to a jury trial since, under the Act, that right is derivative. *See* 42 U.S.C. ' 1981a(c)(1).

For the foregoing reasons, I recommend that the defendant's motion for judgment on the pleadings, insofar as it seeks a determination that the plaintiff is not entitled to assert a claim for compensatory damages or to a jury trial, be *GRANTED*.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 15th day of October, 1992.

David M. Cohen

United States Magistrate Judge