McAleer v. AT&T

By Tom Beauchamp

Daniel McAleer was a $ 10,500-per-year service representative who handled orders for telephone service in AT&T's Washington, DC, Long Lines Division. In 1974 he asked for a promotion that he did not receive. Instead, a staff assistant named Sharon Hulvey received the promotion. She was qualified for the job, but she was not as qualified as McAleer because she had less seniority and had scored slightly lower on the company's employee evaluation scale. The job was given to Hulvey because of an affirmative action program at AT&T. McAleer claimed that he had been discriminated against on the basis of sex. He then brought a lawsuit against AT&T asking for the promotion, differential back pay, and $ 100,000 damages (on grounds of lost opportunity for further promotion). Joined by his union (Communications Workers of America), he also claimed that AT&T had undermined the ability of the union to secure employment rights to jobs and fair promotions under the relevant collective bargaining agreement.

Some historical background is essential to understand how this situation arose, and why AT&T acted as it did.

HISTORICAL BACKGROUND

The U.S. Equal Employment Opportunity Commission (EEOC) had long been in pursuit of AT&T on grounds of discrimination. In 1970, the EEOC claimed that the firm engaged in "pervasive, system-wide, and blatantly unlawful discrimination in employment against women, blacks, Spanish-surnamed Americans, and other minorities.'" The EEOC argued that the employment practices of AT&T violated several laws, including the Civil Rights Acts of 1866 and 1964, the Equal Pay Act of 1963, and the Fair Employment Practices Acts of numerous states and cities. In hearings the EEOC maintained that AT&T suppressed women workers and that for the past 30 years "women as a class have been excluded from every job classification except low paying clerical and telephone-operator jobs." AT&T denied all charges brought against it, claiming that its record demonstrated equality of treatment for minorities and women. It produced supporting statistics about minorities in the workforce, but these statistics were all vigorously challenged by the EEOC.

In the spring of 1972 the Department of Labor intervened and assumed jurisdiction in the matter. Negotiations reached a final agreement on December 29, 1972. An out-of-court settlement was proposed and a Consent Decree was entered in and accepted by a Philadelphia court (January 18,

1973). This agreement resulted in AT&T's paying $ 15 million in back wages to 13,000 women and 2,000 minority-group men and giving $23 million in raises to 36,000 employees who had presumably suffered because of previous policies.

Out of this settlement came an extensive, companywide affirmative action recruitment and promotion program. AT&T set rigorous goals and intermediate targets in 15 job categories to meet first-year objectives. The goals were determined by statistics regarding representative numbers of workers in the relevant labor market. The agreement also stated that if, during this campaign, its progress were to fall short of deadlines, AT&T would then have to depart from normal selection and promotion standards by more vigorously pursuing affirmative action goals.

At the same time, AT&T had a union contract that established ability and merit as the primary qualifications for positions, but it also required that seniority be given full consideration. This contract stood in noticeable contrast to the Consent Decree, which called for an affirmative action override that would bypass union-contract promotion criteria if necessary to achieve the affirmative action goals. Therefore, the decree required that under conditions of a target failure, a *less* qualified (but *qualified*) person could take precedence over a more qualified person with greater seniority. This condition applied only to promotions, not to layoffs and rehiring, where seniority continued to prevail.

MCALEER AND THE COURTS

The McAleer case came before Judge Gerhard A. Gesell, who held on June 9, 1976, that McAleer was a faultless employee who became an innocent victim through an unfortunate but justifiable use of the affirmative action process. More specifically, Gesell ruled that McAleer was entitled to monetary compensation (as damages) but was not entitled to the promotion because the discrimination the Consent Decree had been designed to eliminate might be perpetuated if Hulvey were not given the promotion. The main lines of Gesell's ruling are as follows:

> After the filing of the Philadelphia complaint and AT&T's contemporaneous answer, and following an immediate hearing, the Court received from the parties and approved a Consent Decree and accompanying Memorandum of Agreement which had been entered into by the governmental plaintiffs and AT&T after protracted negotiation. This settlement was characterized by Judge Higginbotham as "the largest and most impressive civil rights settlement in the history of this nation."
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> ..."Affirmative action override" requires AT&T to disregard this standard [seniority] and choose from among basically qualified

female or minority applicants if necessary to meet the goals and timetables of the Consent Decree and if other affirmative efforts fail to provide sufficient female or minority candidates for promotion who are the best qualified or most senior....

This entire process occurred without the participation of Communication Workers of America (CWA), the certified collective bargaining representative of approximately 600,000 nonmanagement employees at AT&T and the parent union with which plaintiff Local #2350 is affiliated. Although it was consistently given notice in the Philadelphia case of the efforts to reach a settlement, and although it was "begged... to negotiate and litigate" in that proceeding, 365 F. Supp. at 1110, CWA persistently and repeatedly refused to become involved.

Judge Higginbotham presently has before him and has taken under advisement the question of modification of the Consent Decree because it conflicts with the collective bargaining agreement....

It is disputed that plaintiff McAleer would have been promoted but for his gender. This is a classic case of sex discrimination within the meaning of the Act, 42 U.S.C. § 2000e-2(a)(2). That much is clear. What is more difficult is the issue of defenses or justifications available to AT&T and the question of appropriate relief under the circumstances revealed by this record. McAleer seeks both promotion and damages. The Court holds that he is entitled only to the latter.

General principles of law also support plaintiff McAleer's right to damages. It is true that AT&T was following the terms of the Consent Decree, and ordinarily one who acts pursuant to a judicial order or other lawful process is protected from liability arising from the act.... But such protection does not exist where the judicial order was necessitated by the wrongful conduct of the party sought to be held liable....

Here, the Consent Decree on which the defendant relies *was necessary only because of AT&T s prior sex discrimination*. Under these circumstances the Decree provides *no defense against the claims of a faultless employee such as McAleer.* ... [Italics added]

Since McAleer had no responsibility for AT&T's past sex discrimination, it is AT&T rather than McAleer who should bear the principal burden of rectifying the company's previous failure to comply with the Civil Rights Act of 1964. An affirmative award of some damages on a "rough justice" basis is therefore required and will constitute an added cost which the stockholders of AT&T must bear.

In the year that Judge Gesell's decision was reached, the same Judge (A. Leon) Higginbotham mentioned by Gesell rejected the new union petition to

eliminate the affirmative action override from the Consent Decree—a petition that Gesell noted as pending. Higginbotham went out of his way to disagree with Gesell, saying Gesell's findings wrongly decided the case. He found AT&T to have immunity as an employer because of its history with and commitments to a valid affirmative action plan. However, because he was hearing a union case, Higginbotham's ruling did not directly overturn or otherwise affect Gesell's ruling. AT&T's lawyers—Mr. Robert Jeffrey, in particular—felt strongly that Judge Gesell's arguments were misguided and that Judge Higginbotham did the best that he could at the time to set matters right.

AT&T and McAleer settled out of court for $14,000; $6,500 of it went to legal fees for McAleer's attorney. Both McAleer and Hulvey continued their employment by AT&T. Mr. Jeffrey, AT&T's lawyer, maintained that this case was an aberration and that subsequent legal developments vindicated his point of view. From the moral point of view, Mr. Jeffrey believed that both Judge Gesell's ruling and the law being promulgated at the time in the White House deserved the most serious ethical scrutiny and criticism.

REVERSE DISCRIMINATION IN 1996

Numerous large firms have continued to adopt voluntary affirmative action plans for promoting and hiring women and minorities. Whenever such plans are adopted, questions inevitably arise about the practice of substituting one type of discrimination for another. Decided by the U.S. Supreme Court in March 1987 was a case involving reverse discrimination that many believe set a strong precedent for the future of affirmative action plans. In this case, *Johnson v. Transportation Agency*, the majority held the affirmative action plan to be proper because it

1. Was intended to *attain*, not *maintain*, a balanced workforce
2. Did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement
3. Expressly directed that numerous factors be taken into account, including qualifications of female applicants for particular jobs

Justice Brennan stated in the Court's opinion that "[o]ur decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace and that Title VII should not be read to thwart such efforts." Many firms view this and some related Supreme Court decisions as encouraging affirmative action plans already in place and adoption of new plans where they have not previously been in place. However, corporate America and American courts continue to be divided over both the morality and legality of affirmative action plans such as the one that generated the McAleer case. Many firms continue to adopt plans almost

identical to the one that led to the promotion of Hulvey rather than McAleer, whereas other firms insist that these policies involve immoral forms of discrimination.

In March 1988 AT&T's shareholders were in sharp disagreement over the company's employment history and affirmative action program. One set of share-holders fought for a stronger affirmative action program, whereas another set recommended phasing it out.

AT&T's policy as of 1992 uses annual affirmative action plans to identify underutilized groups at particular locations. Hiring and promotional targets (stated as percentage goals) are relative to the geographic location of the establishment and the normal hiring pool within AT&T from which the establishment hires its employees. Because these targets are location-specific, there are no companywide targets at any level. The affirmative action plans also contain a component that focuses on good faith policies to protect certain groups of workers from discrimination. This portion of the plan applies particularly to veterans and disabled employees.

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