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THE HARLEQUINESQUE MOTOROLA DECISION AND ITS IMPLICATIONS

IRVING KOVARSKY*

I. THE *Motorola* DECISION¹

Complainant Leon Myart, a Negro trained to service radio and television receivers, applied for a semi-skilled job at the Motorola plant in Chicago. Motorola refused to employ him because he failed a written test administered to him. Mr. Myart then complained to the Illinois FEP Commission which ordered an investigation. Satisfied that Motorola was discriminating, the commission scheduled a conciliation conference. Motorola refused to participate in the conciliation effort because the commission, at a prior unfair employment proceeding involving Motorola, would not permit the use of a stenographer.² Motorola contended that a stenographic report is desirable to prevent misquoting, and "secret meetings smack slightly of star chamber proceedings." Since this conciliatory effort failed, a public hearing became mandatory.³ The hearing officer, at the end of this proceeding, held that Motorola had discriminated against Mr. Myart and ordered it to hire him.⁴ On review, the Illinois FEP Commission felt that the evidence supported the charge made that Motorola had used discriminatory tactics "in the first step of the . . . hiring . . . process."⁵ The commission, however, overruled the hearing examiner's order to provide employment and ordered Motorola to pay the complainant \$1,000 in damages. On appeal, the Chicago Circuit Court ruled that the Illinois Commission acted without legislative authority to award damages but did not disturb the commission finding that there was discrimination.

Few decisions interpreting state administrative laws forbidding discriminatory employment have received the popular notoriety and controversial comment of the *Motorola* case. Much of the newspaper criticism, often unfairly arousing public antagonism without considering all of the facts and issues, has been leveled at the Illinois FEP Commission.⁶ Questions requiring greater technical competence than

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¹ Commission Decision on Review, Charge No. 63C-127, State of Illinois FEPC (Nov. 18, 1964).

² *Motorola, Inc. v. Illinois FEPC*, 58 L.R.R.M. 2573, 2576 (1965).

³ Ill. Ann. Stat. ch. 48, § 858(b) (Smith-Hurd 1961).

⁴ Commission Decision on Review, *supra* note 1.

⁵ *Id.* at 5.

⁶ Chicago Tribune, Nov. 21, 1964, p. 14, col. 1; Chicago American, Nov. 23, 1964, p. 8, col. 1; Chicago Daily News, Nov. 23, 1964, p. 14, cols. 1-2; Chicago Sun-Times,

normally exhibited by popular commentators—questions surpassing in importance those doused with public comment—have not been raised. This article is dedicated to a more thorough and technical review of the many issues fanned by *Motorola* and to the possible conflict added by the subsequently enacted Federal Civil Rights Act of 1964.⁷

There is a possibility that the complaint in *Motorola* was institutionally inspired. The complainant resided in southeast Chicago, while the Motorola plant was located in a suburb northwest of Chicago. Since the complainant was not compensated for his hours of travel, he could well have been a candidate chosen by an organization to break a real or illusory color barrier. If true, it is unfortunate, for reasons later disclosed, that the straw man chosen to carry the banner of equality was not selected more carefully.

II. RELEVANT ILLINOIS LEGISLATION

To understand *Motorola* and its ramifications, it is necessary to highlight portions of the Illinois FEP legislation which bear directly on the decision. The Illinois Legislature, in order to cope with employment discrimination, enacted legislation⁸ which is, for the most part, standard, although some provisions are unusual.

After a complaint is lodged with the Illinois Commission, an investigation follows, and conciliation, if warranted by the evidence, is undertaken.⁹ Developments at the conciliation meeting are kept confidential unless the respondent indicates otherwise. The Rules of Practice promulgated by the Illinois Commission provide that "its staff shall not disclose what has occurred in the conference and conciliation meeting unless the respondent requests in writing that such disclosure be made. No stenographic report or recording shall be taken at the proceedings during the conciliation conference."¹⁰ However, stenographic reporting is permitted during the course of a public hearing.¹¹ The rule prohibiting stenographic reporting at the conciliatory conference follows prevailing administrative technique; reports can be pilfered and publicized and the presence of a reporter places a damper on an otherwise wagging tongue. There is nothing to indicate that the rule prohibiting the presence of a secretary at the confidential hearing is unfair.

Nov. 23, 1964 (editorial); Krock, Fair Employment Issue, Decision in Illinois Case Involving Aptitude Test Raises Questions, N.Y. Times, Nov. 22, 1964, § E, p. 9, col. 1.

⁷ 78 Stat. 241, 42 U.S.C. § 2000a (1964) [hereinafter cited by section only].

⁸ Illinois Fair Employment Practices Act, Ill. Ann. Stat. ch. 48, §§ 851-67 (Smith-Hurd 1961).

⁹ Ill. Ann. Stat. ch. 48, § 858 (Smith-Hurd 1961).

¹⁰ Ill. FEPC Rules of Practice II(B)(5), 6 BNA Lab. Policy & Prac., 451:333 (Dec. 15, 1962).

¹¹ Ill. FEPC Rules of Practice III D, id. at 451:335 (Dec. 15, 1962).

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Should the conciliatory effort fail,¹² section 8 of the Illinois act makes a public hearing mandatory after the respondent is duly notified of "the charge . . . substantially as alleged in the charge theretofore filed with the Commission. . . ."¹³ To this point, the Illinois law is similar to other state FEPC legislation.¹⁴

A feature distinguishing the Illinois legislation from most others is the authority delegated to its commission. Under sections 8(f) and 9(a), the commission is restricted to the gathering of evidence related exclusively to the complaint made by the aggrieved party; if the statute is taken at face value, fishing for evidence of other infringements is prohibited.¹⁵ In other states, the ability of state commissions to gather evidence is not so restricted; in some states, commissions can, while investigating a complaint, seek data and order remedies eliminating violations that are not stated in the complaint. For example, the California FEP Commission is empowered to prevent discriminatory employment practices.¹⁶ With such a mandate, that commission can order the discontinuance of a discriminatory test.¹⁷ Similarly, in Indiana the FEP commission can "initiate and investigate charges of discriminatory practices";¹⁸ future conduct can be regulated under the preventative heading of initiation and investigation.

This limiting aspect of the Illinois law appears unwise as well as unrealistic. Certainly the past practices of a firm are indicative of present policy and shed light upon the current "sin" and charge. The Illinois legislation raises the question of whether evidence of past violation is admissible to establish a current infringement. (This may to some extent explain the peculiar decision made by the Illinois Commission in *Motorola*, later reviewed.) Limiting the gathering of proof and shackling the commission's ability to introduce evidence of past practices hampers efficient operation. Furthermore, to best effectu-

¹² State commissions optimistically report that most attempts at conciliation are successful.

¹³ Ill. Ann. Stat. ch. 48, § 858(b) (Smith-Hurd 1961).

¹⁴ In contrast, under the Civil Rights Act, the EEOC cannot press for a public hearing. It is limited to "conference, conciliation, and persuasion." § 706(a). Further, while Illinois and other state commissions may present testimony and evidence gathered prior to or during the conciliatory effort when enforcing an administrative decision in court, the EEOC may not do so. *Ibid.*

¹⁵ Section 8(f) of the Illinois FEP legislation permits the commission "to take such further affirmative or other action with respect to the complainant as will eliminate the effect of the practice originally complained of" while § 9(a) allows the chairman "to issue subpoenas . . . requiring the attendance and testimony of witnesses and the production of any evidence which relates to the particular unfair employment practice charged. . . ."

¹⁶ Cal. Lab. Code § 1421.

¹⁷ The authority granted to the commission in California is broad.

¹⁸ Ind. Acts 1961, ch. 208, § 6, at 500. This section was amended in 1963 to read, "To receive and make preliminary investigation of charges of" Ind. Ann. Stat. § 40-2312(e) (1965).

ate public policy prohibiting racial discrimination, an attempt to cure past and prevent future wrong seems to be in order, if only to ease the burden of future enforcement. Because of this limitation, the Illinois Legislature has failed to come to grips with the extent of the problem and the immediate needs of the Negro.¹⁹

III. BEFORE THE HEARING EXAMINER

Regulations in Illinois require hearing examiners conducting public meetings to be licensed attorneys.²⁰ This follows the philosophy enunciated by the Illinois Legislature favoring a more formalistic, legal-like approach to discrimination than is found in other states and under the federal law.²¹ The Illinois Commission appointed a Negro attorney as examiner,²² who decided, on February 26, 1964, that Motorola violated the state law.²³

The test taken by the complainant was not produced in evidence, a factor tending to discredit the firm because:

Of the greater number of witnesses testifying in Respondent's behalf, only witness Hoelscher attempted to place himself within the area of having direct knowledge of Complainant's score on test No. 10 Inasmuch as Mr. Hoelscher was not the person who administered the test . . . his opportunity for knowing the fact about which he testified falls short of legal requirements. [Section 8(e) of the Illinois law requires "the testimony taken at the hearing shall be subject to the same rules of evidence which apply in courts of record."] No testimony was offered from the administrator who administered the test and graded it. *In the absence of the test which Complainant took, his answers thereto, and the overlay key for checking the Complainant's answers, the Hearing Examiner is denied sufficient means for holding with the Respondent that Complainant was accorded equal opportunity with all other applicants without regard to the Complainant's race.* Moreover, the complaint alleges that Complainant passed the company test, the Commission Investigator testified that when he administered test No. 10 to Complainant as part of the investigation about two months later, Complainant passed²⁴ (Emphasis added.)

¹⁹ H.R. Rep. No. 1370, 87th Cong., 2d Sess. 1 (1962); Negroes in Apprenticeship, New York State, 83 Monthly Lab. Rev. 952 (1960).

²⁰ Ill. FEPC Rules of Practice VIII A, 6 BNA Lab. Policy & Prac., 451:342 (Dec. 15, 1962).

²¹ See Ill. Ann. Stat. ch. 48, §§ 851, 867 (Smith-Hurd 1961).

²² Krock, *supra* note 6.

²³ Commission Decision on Review, *supra* note 1.

²⁴ Decision and Order of Hearing Examiner, Charge No. 63C-127, at 7-8.

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An investigator for the Illinois Commission testified that test No. 10 was subsequently orally administered and passed by the complainant. A queasy feeling immediately engulfs critics concerned with fair employment; certainly an investigator for an FEP commission is aware of the need for proof and the desirability of producing the most substantial evidence. This need is even more important in Illinois where the commission must follow court-established rules of evidence.²⁵ While Motorola could not claim that discrimination was not practiced if the written test was produced and successfully completed by Mr. Myart, it could allege, without fear of substantial contrary proof, that Mr. Myart did not pass the oral test. Inability to produce a written test subjects the decision of the hearing examiner to the same "eyebrow raising" as the failure of Motorola to introduce the initial written test. In fact, the explanation advanced by Motorola for the destruction of the test is plausible, whereas the failure of the investigator to administer a written test has not been explained. Motorola claimed that written tests are destroyed as soon as the final results are recorded on an IBM card; since 20,000 tests are given each year, destruction is a necessity to ease record-keeping.²⁶

Ignoring the question whether the complainant passed the test, another issue raised is the propriety of testing culturally deprived people. The hearing examiner felt that the test used in *Motorola* was inherently discriminatory; *i.e.*, testing generally, even without intent, injures the Negro job-seeker.²⁷ As recognized by the hearing examiner, controversy abounds on the question of whether tests discriminate against the underprivileged.²⁸ Since the hearing examiner decided that Mr. Myart passed the examination, it is unfortunate that the validity of all testing was made an issue by a comment tantamount to dictum; unnecessarily stirring a "hornet's nest" is not "good politics" in the ticklish area of race relations.

Considering the discriminatory nature of testing generally was unfortunate for another reason, particularly in light of the examiner's terminology. Certain of its future use, the examiner in *Motorola* may have exceeded his authority by banning the Motorola test. As was noted previously, the Illinois legislation prohibits fishing expeditions and searches relating to past and future violations.²⁹ It requires an examiner to restrict his findings and decision to the complaint at hand; other violations are not punishable. The examiner's decision could be

²⁵ Ill. Ann. Stat. ch. 48, § 585(e) (Smith-Hurd 1961).

²⁶ Motorola Co., Motorola FEPC Case (brochure).

²⁷ Decision and Order of Hearing Examiner, *supra* note 24, at 8.

²⁸ See Allison, Social-Class Influences Upon Learning 2-3, 40-41 (1948); Cronbach, Essentials of Psychological Testing 222 (1949); Thompson & Hughes, Race Individual and Collective Behavior 223 (1958); Tiffin, Industrial Psychology 30, 75 (1943).

²⁹ See note 15 *supra* and accompanying text.

considered a usurpation of authority, *i.e.*, an attempt to curb future discrimination.

Cases from other jurisdictions indicate that the failure to test or hire a Negro passing a test has been taken as evidence of discrimination. None, however, considered the possibility that testing could be inherently discriminatory. In a controversy ruled upon by the New Jersey Commission, it was decided that a failure on the part of the employer to test two Negroes constituted evidence of discrimination where the job standard called for testing.³⁰ The Ohio Civil Rights Commission reports that a Negro applicant for employment successfully completed an aptitude test, but was not hired.³¹ Because the test was passed and the employer employed few Negroes in a community where many sought employment, the Ohio law was violated.

Examples of cases where no discrimination has been found include *Cooks v. Carmen's Local*³² where the Fifth Circuit dealt with a situation in which promotion was by examination. Because of the shortage of labor, several Negroes were promoted without an examination. Later, a simple literacy test was used. According to the court, there was no evidence of discrimination. Similarly, where a Minnesota Multiphasic Personality Inventory Test was used by an employer to determine whether a religiously oriented person was psychologically maladjusted,³³ the New York Commission approved the test because it was not designed to separate desirable from undesirable applicants seeking employment but rather to help maladjusted people. The opinion, however, points to the possibility that the New York Commission could find some tests inherently discriminatory.

Of course, where the test can be used to help the Negro, there is no need to raise the question of the possibility of a test tending to discriminate against a large group of people. Thus a New York court, under circumstances differing from that reviewed in *Motorola*, ordered the application of a test to select the most suitable Negro candidates for apprenticeship appointments.³⁴ Ending the lily-white membership policy of the Sheet Metal Workers Union, the court said:

The court approaches this matter not simply as litigation between private parties, but rather views the instant proceedings as raising vital matters filled with greatest public concern. The issue herein, involving the development of non-discriminatory shop training programs cannot be approached

³⁰ *Thompson v. Erie R.R.*, 2 Race Rel. L. Rep. 237 (1956).

³¹ Third Annual Report of the Ohio Civil Rights Commission at 21-22 (1962).

³² 338 F.2d 59 (5th Cir. 1964), cert. denied, 380 U.S. 975 (1965). See also *City of Pittsburgh v. Plumbers Union*, 59 L.R.R.M. 2553 (1965).

³³ N.Y. SCAD, 1950 Report of Progress 66-67.

³⁴ Commission For Human Rights, 57 L.R.R.M. 2005 (N.Y. Sup. Ct. 1964).

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strictly within the conventional confines of an adversary proceeding³⁵

The court stipulated, as part of an ultimate agreement:

Aptitude tests are to be given by the New York City Testing Center or equivalent testing center. Two hundred per cent of the number of apprentices ultimately to be appointed who have achieved the highest rating in an independently conducted aptitude test will be interviewed³⁶

The New York court advocated testing as a means of selecting Negroes exhibiting the most industrial promise. The situation differs from *Motorola* because an impartial agency, the New York City Testing Center, administered the test to select the most promising candidates, all of whom faced discrimination.³⁷

The influence of the hearing examiner's decision upon Congress can be seen in the Federal Civil Rights Act. Because of the publicity generated by the testing ban aspect of the *Motorola* decision, a provision was added in the federal law which protects from charges of discrimination employers who require tests.³⁸ Section 703(h) of the Civil Rights Act permits the use of the "professionally developed ability test." The federal law may be fair, particularly in light of the professional controversy centering about the validity of testing people who are culturally deprived. But even under this federal law a firm can be held responsible for knowingly using a professionally developed test if it is inherently discriminatory.

Another interesting facet of the hearing examiner's decision was the view that management personnel

have a supreme responsibility to move positively to eradicate unfair employment practices in every department The task is one of adapting procedures within a policy framework to fit the requirements of finding and employing workers heretofore deprived because of race, color The employer may have to establish in-plant training programs and employ the heretofore culturally deprived and disadvantaged persons as learners, placing them under such supervision that will enable them to achieve job success.³⁹

³⁵ Id. at 2006. This seems to be a more humane approach to the entire problem of racial discrimination, but would contradict the mandate of the Illinois legislation.

³⁶ Id. at 2010.

³⁷ The New York court order was issued to correct an imbalance and is, apparently, contrary to the Federal Civil Rights Act.

³⁸ The author does not claim that Motorola intended to use the test in a discriminatory manner.

³⁹ Decision and Order of Hearing Examiner, *supra* note 24, at 10.

When the Civil Rights Act was deliberated in Congress, however, the notion was expressed that employment and training priorities for Negroes was unwarranted and undesirable.⁴⁰ Ignoring the needs of the Negro, section 703(j) was incorporated into the Civil Rights Act to protect the employer, employment agency, and union unwilling to extend immediate help to correct past injustices.⁴¹ This in theory was a necessary protection for the white job-seeker. If a white person, clearly superior to a Negro candidate, seeks promotion or employment, the employer preferring the white person must be protected. Where Negro and white applicants are equal or approximately equal in ability, section 703(j), apparently, protects the employer who prefers the white employee. Based upon centuries of slavery and denials of opportunity, this is an element in the federal law injurious to Negro interests.

IV. THE COMMISSION RULING

Complying with procedure, the decision of the hearing examiner was reviewed by the Illinois FEP Commission⁴² which felt that evidence supported the charge made and the complainant's questionable background did not alter the firm's discrimination "in the first step of the . . . hiring process. . . ."⁴³

The commission, contrary to the hearing examiner, was unwilling to declare the test inherently discriminatory; the issue, it was felt, was unimportant because Mr. Myart passed the test. There is, according to the commission, "the possibility that in a future case . . . the use of a low level screening test . . . might become a relevant factor in a Commission determination as to whether or not an unfair employment practice in violation of this statute was committed."⁴⁴ This statement, essentially dictum, was unfortunate for two reasons. First, the federal law protects the use of tests compiled by professionals in spite of considerable educated feeling that many tests discriminate against the culturally and economically deprived. Second, does a finding that a test is discriminatory, in the absence of more conclusive evidence, satisfy the Illinois mandate requiring the commission to follow legal rules of evidence? In a nutshell, can there be sufficient legal evidence to support an examiner who finds a test inherently discriminatory? Possible inability to meet the evidentiary requirements could

⁴⁰ 110 Cong. Rec. 12383 (1964) (remarks of Senator Thurmond).

⁴¹ Section 703(j) provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group because of . . . race, color, religion. . . .

⁴² Ill. Ann. Stat. ch. 48, § 858(g)(1) (Smith-Hurd 1961).

⁴³ Commission Decision on Review, *supra* note 1, at 5.

⁴⁴ *Id.* at 6.

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explain the commission's unwillingness to back completely the hearing examiner.

A curious turn of events was the commission's claim that it "has no way to gauge the merit and qualification of the Complainant. The Commission is unable in this case to apply its general remedial policy of placing the Complainant in the same position in regard to the Respondent as if no act of discrimination had been committed. . . ." ⁴⁵ Why the commission could not "gauge the merit and qualification of the Complainant" was not shown. Since Mr. Myart was properly schooled and the commission accepted the finding of the hearing examiner that the complainant passed the test, evidence was available to "gauge the merit and qualification of the Complainant." Thus, the commission overruled the hearing examiner's order to provide employment and ordered the Motorola Company to pay Mr. Myart \$1,000 in damages. If unable to conclude that the complainant was qualified, how could the commission award \$1,000 in damages? In fact, how could the commission decide that the employer discriminated "in the first step of the . . . hiring process"? ⁴⁶

What prompted this quixotic opinion is speculative; the possibility that it was prompted by an insufficiency of evidence and the complainant's background has already been advanced. There is newspaper speculation that the award was deliberately withheld while an election for state office was underway, ⁴⁶ suggesting the possibility that the decision was politically motivated. Another newspaper editorial suggested "that the FEPC tried to avoid offending anyone . . ." ⁴⁷ This "insight" is plausible because the commission refused to order the hiring of Mr. Myart while permitting a damage award. We live in a society presently dedicated to the middle road, and the commission decision smacks of compromise. Certainly members of administrative agencies reflect thought prevailing within their community and only with reluctance adopt an extreme position. But the commission, while deliberating *Motorola*, should have been aware that their solution was in many ways more controversial than that of the hearing examiner. Furthermore, because of the background of Mr. Myart, a decision completely favoring the company would not lead to adverse criticism of the commission. Finally, many commissioners accept appointments as a civic duty and not for political reward: Would commission members concern themselves with "throwing a bone" to all of the contestants under such circumstances?

Other explanations for the position taken by the commission in *Motorola* can be conjured up. Mr. Myart, previously convicted of a

⁴⁵ Id. at 6-7.

⁴⁶ Chicago Tribune, supra note 6; Krock, supra note 6.

⁴⁷ Chicago Daily News, supra note 6.

crime involving moral turpitude, was a candidate for employment whom many employers would turn down. Employers often refuse to operate their business in a humanitarian fashion, rightly or wrongly feeling that financial damage would follow. It is difficult to conclude with conviction that an employer refusing to hire Mr. Myart intended to circumvent the law.⁴⁸ However, the commission on review found employer discrimination. Convinced that the Motorola Company practices discrimination and yet unwilling to order the employment of Mr. Myart, an award of \$1,000 was a convenient compromise.

The Illinois Commission may have been "gunning" for the firm because of past practices and an interest in preventing future discrimination. Whether past and future infringements can be punished by the commission is questionable. As previously indicated, section 8(f) of the Illinois legislation authorizes the commission "to take such affirmative action . . . with respect to the complainant as will eliminate the effect of the practice originally complained of," while sections 8(f) and 9(a) prohibit fishing expeditions into the past and future.⁴⁹ If the decision was predicated on past unsavory employment practices which promised to continue, the commission exceeded authority as spelled out by the Illinois Legislature. But the suggested motivating force behind the commission's decision, although plausible, is shadowed by doubt because "a monetary award [was made] in behalf of the Complainant for the act of discrimination suffered by him . . ." ⁵⁰ A commission, it would seem, should be able to look to past practices, where feasible and necessary, to establish intent in the controversy under consideration.

V. THE CHICAGO TRIAL COURT

On appeal, the Chicago Circuit Court ruled that the Illinois Commission was without legislative authority to award damages, but did not disturb the commission finding that there was discrimination. The judge noted that "both sides are guilty of some actions that perhaps would not be condoned . . . in a courtroom . . ." ⁵¹ He went on to say:

Arriving at a decision in this case has been particularly difficult . . . because I am frank to say that had this been a trial de novo, my judgment . . . might . . . have been different than that arrived at by the Commission. . . .⁵²

⁴⁸ Thus, the commission concludes that the discrimination came in the initial phase of the hiring process.

⁴⁹ See *supra* note 15.

⁵⁰ Commission Decision on Review, *supra* note 1, at 7.

⁵¹ *Motorola, Inc. v. Illinois FEPC*, *supra* note 2, at 2574.

⁵² *Ibid.*

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It should be noted that the Chicago court, without expressly reversing the state commission, actually voided its decision. Since the commission did not order the firm to hire the complainant, the court, for all practical purposes, reversed the decision by the commission by canceling the \$1,000 award. Mr. Myart has the "satisfaction" of knowing that his complaint was justified, but nothing tangible was granted as a balm. The commission and court decisions represent a curious bit of "justice." Is it helpful to be supported morally while denied any form of legal aid?

VI. THE CONFLICT ADDED BY THE CIVIL RIGHTS ACT

The fair employment provisions of the Civil Rights Act did not take effect until July 2, 1965; and, consequently, Illinois law was the exclusive regulator in *Motorola*. But a future conflict is suggested by the facts in *Motorola* which will require adjudication. A savings clause in the federal law protects state jurisdiction and prevents federal pre-emption,⁵³ but the question raised in *Motorola* is not fully resolved by the federal legislation. Section 708 of the Civil Rights Act, ostensibly protecting the decision and penalty imposed by the Illinois commission, provides:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, *penalty*, or punishment provided by any State . . . other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title. (Emphasis added.)

States in the past have issued orders to rectify racial imbalance,⁵⁴

⁵³ Section 706(b) states:

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief . . . or to institute criminal proceedings . . . no charge may be filed [under federal law] . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . . .

Sec. 706(c) further provides:

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings . . . the [federal] Commission shall, before taking any action . . . notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days . . . to act under such State or local law. . . .

⁵⁴ *Thompson v. Erie R.R.*, supra note 30.

and *Motorola* can be read as an attempt to correct past imbalance and/or penalize the employer.

Section 708 permits state commissions to punish violators of a state law, without any question of federal intervention. But Section 703(j) of the Civil Rights Act protects employers unwilling to correct *existing* imbalances "in any community, State, section, or other area, or in the available work force in any community, State, section or other area." Succinctly, section 703(j) does not necessitate the immediate correction of employment imbalance, while section 708 safeguards, without exception, the penalty imposed by a state commission. Should section 703(j) and 708 be read together so that a state commission making a decision in a controversy affecting interstate commerce cannot require the correction of an existing imbalance? An affirmative answer is possible because the language in section 708 is unequivocal: "*Nothing* shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment. . . ." inflicted by a state commission. (Emphasis added.)

Executive Order No. 10925 further complicates the problem posed. This order requires an employer holding a government contract to take positive and remedial action to correct racial imbalance in employment.⁵⁵ Although Executive Order No. 10925 does not push a benign quota system,⁵⁶ employers must recognize past injustices and support the Negro by providing job opportunities. The *Motorola* Company holds contracts with the federal government and must abide by the order. Mr. Myart complained to the President's Committee on Equal Employment Opportunity,⁵⁷ which is charged with the task of enforcing the order. The problem raised is whether Executive Order No. 10925 conflicts with the Civil Rights Act, which does not require preferential treatment for the Negro. In fact, if an employer was to grant preferential treatment to a Negro, following the spirit of Executive Order No. 10925, he runs the risk of being charged with discrimination by a white person under the Civil Rights Act. The question posed is not one of pre-emption, because two branches of the federal government claim jurisdiction; the issue is whether an order by the executive branch of the government, contrary to congressional expression, can override controlling legislation. Because the executive branch of government lets contracts, can conditions be imposed that are not demanded by Congress?

⁵⁵ 26 Fed. Reg. 1977 (1961).

⁵⁶ There seems to be little question that favoring the Negro over the white by using a quota system is unconstitutional.

⁵⁷ A letter from the Director of Information for The President's Committee On Equal Employment Opportunity, January 27, 1965, indicates that the Air Force is currently investigating the charge made by Mr. Myart.

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*Perkins v. Lukens*⁵⁸ may supply the answer. In *Lukens*, the Supreme Court supported the Secretary of Labor when she laid down conditions, possibly conflicting with federal legislation, imposing contractual terms on private employers. Even if Executive Order No. 10925 contradicts rather than supports legislative policy expressed in the Civil Rights Act, *Lukens* lends support to the notion that the executive branch of government can dictate terms when letting a contract.⁵⁹

It is possible to interpret section 703(j) in a manner to avoid conflict between the federal law and Executive Order No. 10925. Section 703(j) protects the employer unwilling to grant preferential treatment to the Negro because of past deprivation. Thus, an employer who negotiates a contract with a federal agency acts voluntarily—he is not required to agree to terms. Certainly employers have not looked upon repugnant terms demanded by other private employers as legally coercive. Yet in light of current conditions, where the federal government sponsors research and negotiates large contracts, it seems naïve to treat Uncle Sam in the same manner as an ordinary contracting party. To foreclose the possibility of entering into contracts with the federal government is to choke off a large source of business. Under conditions of great economic pressure, is a contract entered into voluntarily? Should a government contract be treated differently than an agreement made by a private party?

⁵⁸ 310 U.S. 113 (1940).

⁵⁹ *Id.* at 127.