

1999

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Recommended Citation

Honorable Michael A. Wolff, *Ted McMillian: The Happy Coincidence of Timing, Talent, and Persistence*, 43 St. Louis U. L.J. (1999).

Available at: <https://scholarship.law.slu.edu/lj/vol43/iss4/8>

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**TED MCMILLIAN: THE HAPPY COINCIDENCE OF TIMING,
TALENT, AND PERSISTENCE**

THE HONORABLE MICHAEL A. WOLFF*

Ted McMillian started his legal career when “opening doors” was a fresh metaphor of the nascent civil rights era, that is, many years before Jackie Robinson took the field for the Brooklyn Dodgers.¹ Ted’s ascent began, as well, long before concepts of psychology were used to explain the personality traits of those who succeed in difficult and highly competitive circumstances.² Being first in time – as Ted often was – may seem more a matter of timing than of great personal accomplishment. But when a door was ready to be opened, Ted was there and ready, to revisit the fraying metaphor.

The *task* of being “first” is to be that extraordinarily qualified and talented person ready to be chosen when the time comes. The *burden* of being “first” is to excel in a way that vindicates the judgment of backers and thus makes easier the task of those who follow. Being “first” is not an accident of timing. It is the result of persistence in the face of repeated rejection and *still* being there when the time is right.

When Ted McMillian was ready to enter college in the 1930’s most doors were closed. We were a thoroughly segregated society. Lincoln University in Jefferson City was then the all-Black “separate but equal” state school, and there was a small all-Black teachers’ college operated by the St. Louis public school system. The doors of our beloved institution, St. Louis University, like all other state and private colleges and universities in Missouri, were closed by law and social custom. The Missouri Constitution, then in effect, provided for “separate free public schools . . . [for] children of African descent.”³ A Missouri statute made it *unlawful* for “any colored child to attend any white school, or for any white child to attend a colored school.”⁴ It was commonly

* Judge, Supreme Court of Missouri.

1. See ROGER KAHN, *BOYS OF SUMMER* (1987).

2. See, e.g., DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995).

3. MO. CONST. art. IX, § 3 (1875). The section was a part of Missouri’s current constitution until repealed by general election in 1976. MO. CONST. art. IX, § 1(a) (1945).

4. MO. REV. STAT. § 9216 (1929). The statute was later recodified at MO. REV. STAT. § 163.130 (1949) and repealed by 1957 Mo. Laws 452 § 1.

believed that Missouri law forbade integration in both private and public schools.⁵

While Ted was in college at Lincoln University, Lloyd Gaines sued to gain entrance to the University of Missouri Law School. While no one appears to know what happened to Lloyd Gaines or whether he ever joined the legal profession,⁶ his 1938 Supreme Court case produced a “separate” law school for African-Americans in Missouri.⁷

When Ted McMillian was graduated from Lincoln University with a Bachelor’s degree in 1941, his ambition to become a physicist was blocked: No graduate schools were open to him. World War II broke out shortly thereafter, and in 1942 he joined the United States Army and served there until 1946, rising to the rank of lieutenant with service in the European theatre.

The service of Ted McMillian and thousands of other African-American young men in our strictly segregated military in World War II stirred our conscience and prodded us into the era of civil rights - an era whose business has much advanced, but with further to go.

At St. Louis University, this conscience was sparked in 1944 by an eloquent sermon of a Jesuit priest, Father Claude Heithaus, whose words were apparently the first talk on race from a St. Louis pulpit. “It is a surprising and rather bewildering fact that . . . the followers of Mohammed and of Lenin make no distinction of color, but to some followers of Christ, the color of a man’s skin makes all the difference in the world,” Father Heithaus said.⁸ At the urging of Father Heithaus and others, St. Louis University became the first institution in a former slave state to admit African-Americans, despite the state law believed to forbid integration in private and public schools. Thus, as World War II was ending, St. Louis University was at long last ready to lead the way.⁹

5. WILLIAM BARNABY FAHERTY, S.J., BETTER THE DREAM: SAINT LOUIS UNIVERSITY AND COMMUNITY, 1818-1968 322 (1968) (St. Louis University Sesquicentennial ed.). *See also* Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) for the Supreme Court’s discussion of Missouri’s segregated educational system.

6. Editorial, *Remembering Lloyd Gaines*, ST. LOUIS POST-DISPATCH, Oct. 30, 1993, at 14B.

7. Missouri responded to the *Gaines* decision by appropriating money for a separate law school for Blacks which was operated in St. Louis as a branch of Lincoln University. William Freivogel, *Decades of Conflict But a Path to Current Case*, ST. LOUIS POST DISPATCH, Mar. 3, 1996, at 5B.

8. FAHERTY, *supra* note 5, at 340-342.

9. St. Louis University’s decision came three years before the report of the President’s Commission on Higher Education that recommended in 1947 the integration of the institutions of higher education. Chancellor Arthur H. Compton of Washington University in St. Louis, a member of the President’s commission, dissented from the recommendation of integration. FAHERTY, *supra* note 5, at 342.

After the war, Ted considered medical school because of his excellent undergraduate record in science, but racial quotas would have delayed his entry into medical school. So he turned to the law, and was admitted to the law school class of 1949. He finished first in his class and was associate editor of the law school's first law review, the *Intramural Law Review* whose first issue is bound as part of the first volume of the *St. Louis University Law Journal*.

One would think that after graduating first in his class, as a law journal editor, Ted would find a large, prestigious law firm waiting to hire him. But not even the local bar association was open.

After a few years of a modest private practice with one of his law school classmates, Ted was hired as an assistant circuit attorney in 1953. In 1956 he was appointed a circuit judge in the City of St. Louis under the nonpartisan court plan. In 1972, he was appointed to the Missouri Court of Appeals. Finally, in 1978, he was appointed by President Carter to the United States Court of Appeals for the Eighth Circuit, where he remains in active service. All of these are "firsts."

Ted McMillian was not only the first in each of these positions, he excelled in them. Moreover, he has held the door open to many other talented African-American lawyers who have followed him. In addition to holding judicial office for over 40 years, he has actively participated in the betterment of our community. The antipoverty program, the Herbert Hoover Boys Club, and the Legal Services program are only a few of many community programs to which Ted has devoted himself.

The crowning achievement of Ted's long and distinguished judicial career is not capable of being reduced to the outstanding decisions he has written, it is his truly extraordinary personality: his subtle sense of irony, his affable personality, and dry, sharp wit. Ted McMillian lacks the capacity to be bitter. He has overcome adversity by, among other things, sheer persistence. But the remarkable and essential feature of his personality is his ability to keep moving to always search for the way to build a useful career.

Ted McMillian is persistent, as well, in his principles. He is a forceful and consistent voice for fairness and equal treatment under the law.¹⁰ Ted

10. See *Moylan v. Maries*, 792 F.2d 746 (8th Cir. 1986) (recognizing a Title VII cause of action for sexual harassment due to a hostile work environment); *Hicks v. Brown Group*, 902 F.2d 630 (8th Cir. 1990), *vacated* 111 S. Ct. 1299 (1991), *on remand* 946 F.2d 1344 (8th Cir. 1991), *vacated* 112 S.Ct. 1255 (1992), *on remand* 982 F.2d 295 (8th Cir. 1992) (predating the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (1994). J. McMillian writing that discriminatory discharge based on race was actionable under 42 U.S.C. § 1981)); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983), *cert. denied* 464 U.S. 1063 (1984) (foreshadowing *Batson* by noting the difficulty of proving race based peremptory strikes of venirepersons); *Mergens v. Bd. of Educ.*, 867 F.2d 1076 (8th Cir. 1989), *aff'd* 496 U.S. 226 (1990) (upholding the

McMillian's intellect, his personality, and his adherence to principle has over the years earned the respect, and sometimes the votes, of many who share neither his view of the world nor the law. He brings to his tasks the kind of emotional intelligence that the rest of us should imitate, even though our talents are not as great as his. Ted McMillian has shown that if you cannot overcome your adversaries by logic and moral suasion, with the grace of God and good humor, you can outlive them. And, in Ted's case, we are thankful that he lives to see the result of what he worked for in the careers of those who follow and emulate him.