

# Withdrawal/Redaction Sheet

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### RESTRICTION CODES

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- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE VICE PRESIDENT

Steve - Here's the form letter from the VP's Correspondence

ITEM #: 502 ( )  
administration's civil rights history \*\* WL \*\*

Office then outlines out efforts in the civil rights area. Please note last update date

TOP/SUBTOPIC (1): society/civil rights  
TYPE OF DOC.: issue  
CREATE DATE: JAN-28-94  
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Also, I am not sure who reviewed this for

Thank you for contacting my office regarding this Administration's commitment to civil rights. I appreciate hearing from you.

accuracy

Since our election, President Clinton and I have worked hard to empower people who historically have been excluded from political, economic, and educational opportunities. Our policy of empowerment seeks to create real opportunity. As President Clinton has said, "The absence of discrimination is not the same thing as the presence of opportunity."

Log

Our Administration has mandated that each department in the federal government develop, implement, and enforce civil rights policy. For instance, the Department of Housing and Urban Development has fought aggressively to knock down discriminatory barriers, successfully intervening to integrate a segregated public housing complex in Texas.

The Labor Department collected more than \$34.5 million in back pay and other financial remedies for discrimination victims, an increase of 12 percent from the year before. In 1993, minority-owned businesses were awarded 15 percent of the Department of Commerce's procurement contracts.

For the first time since the Age Discrimination Act was passed in 1975, the Department of Education issued regulations needed to implement the law. Prior administrations have failed to release the necessary guidelines. Twenty new environmental justice pilot projects were undertaken by the Environmental Protection Agency. These projects take contaminated sites in low-income communities and develop them into usable space, creating jobs and enhancing community development.

President Clinton and I have assembled a highly qualified team that includes the most diverse group of advisers ever found in a presidential cabinet. We are proud of what they have accomplished and look forward to working with them in the future to break down barriers and empower Americans.

I appreciate your interest in our commitment to civil rights

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**THE VICE PRESIDENT**

and encourage your thoughts and suggestions. Again, thank you for sharing your thoughts regarding this important issue.

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## PART II. DISCRIMINATION IN THE PRIVATE WORKPLACE

*St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (U.S., 6/25/93)

### Summary

The Supreme Court's message in *Hicks* sounded much like that sent in its series of employment discrimination cases issued in the 1989 term—job bias will be more difficult for plaintiffs to prove. It had been four years since the High Court had issued a ruling with such potentially far-reaching consequences.

*Hicks* raised procedural questions about proving and defending employment discrimination cases, believed to have been long settled by judicial precedent and 20 years of case law. Specifically, it involved the quantum and type of proof necessary for a plaintiff to meet his or her ultimate burden of proving that discriminatory animus motivated a particular employment decision.

Traditionally, a three-part scheme for proving discrimination has been applied in disparate treatment cases, i.e., cases in which intentional discrimination is claimed. First, the plaintiff is required to raise a prima facie inference of bias by a preponderance of the evidence. This shifts the burden of proof to the defendant, who must produce at least one legitimate, nondiscriminatory explanation for why it took the employment action challenged by the plaintiff. It then becomes the plaintiff's burden to show that the explanation proffered by the employer was "pretextual"—not the true reason for its actions. See e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Up until *Hicks*, and recent rumblings in the circuits, there seemed to be little doubt that the "pretext" inquiry involved whether the employee had successfully discredited the employer's explanation. If the explanation posited by the employer was shown to be untrue, the inference was that the real reason was more likely than not discriminatory.

The issue *Hicks* raised was whether plaintiffs, under this three-part proof scheme, should be entitled to judgment as a matter of law when the employer's reasons fall under the weight of the evidence. In what many called a blow to civil rights law, and a coup for employers, the

Court ruled 5-4 that proof of pretext did not automatically compel judgment in the plaintiff's favor.

In what appeared to many civil rights advocates (as well as the dissent) to be a monumental departure from prior law, the Court held that it is not necessarily enough to discredit the employer's proffered reasons in order to prevail, because proving pretext (that the employer lied) is not the same as proving intentional discrimination (that the employer intended to discriminate). The Court reminded us that the burden of proving intentional discrimination, not just pretext, remains at all times with the plaintiff.

It left it to the discretion of the fact-finder, however, to determine whether this additional measure of proof, referred to as "pretext plus," will be required in a given case. In other words, a fact-finder may find, as it did in *Hicks*, that a nondiscriminatory reason (which the employer may not even have stated) actually motivated the challenged act, even though the reasons set forth by the employer were shown to be pretextual.

The majority opinion, delivered by Justice Scalia and joined by Justices Rehnquist, O'Connor, Kennedy and Thomas, refused to view its approach to disparate treatment cases enunciated in *Hicks* as a step backwards in civil rights law, or a departure from precedent. In keeping with prior Supreme Court authority, the majority explained that once a defendant has met its burden by producing a legitimate, nondiscriminatory explanation, the prima facie case has been rebutted and the presumption of discrimination raised by the prima facie case "drops out." The burden of proof once again is the plaintiff's.

Essentially, the majority was not comfortable with the notion that employers could be liable for intentional discrimination where only pretext—but not intent—is demonstrated. The reason is that, in its view, disproving an employer's explanation is not the same as proving intentional discrimination. It is possible, the Court says, that when all is said and done, the real reason the employer acted will not be discriminatory.

The dissent, written by Justice Souter and joined by Justices White, Blackmun and Stevens, berated the majority for raising the standard of proof for plaintiffs in these types of cases, and substituting a proof scheme that "promises to be unfair and unworkable." These Justices warned that triers of fact should not look "beyond the employer's lie by assuming the possible existence of other reasons the employer might have proffered without lying.

By telling the fact-finder to keep digging in cases where the plaintiff's proof of pretext turns on showing the employer's reasons to be unworthy of credence, the majority rejects the very point of the *McDonnell Douglas* rule requiring the scope of the factual enquiry to be limited, albeit in a manner chosen by the employer."

This is what happened in *Hicks*. Although the trial judge did not believe the reason the employer gave for Hicks' discharge, i.e., misconduct, he found that the plaintiff's race was not the reason either. Rather, the judge gleaned that Hicks was removed for two reasons never even articulated by the employer—personal animosity and the desire to "clean house." The Eighth Circuit Court of Appeals reversed the finding of no discrimination. It took the position that the plaintiff was entitled to judgment because he disproved the employer's reasons.

Legislation has been introduced in both the House and Senate to reverse *Hicks*, and allow a plaintiff to prevail if either the employer fails to rebut the prima facie case, or if the employee can show that the proffered nondiscriminatory reasons were false.

*Hicks* seems to be a victory for business, at a time when compensatory and punitive damages raise the stakes in employment discrimination litigation. It is likely, however, that *Hicks* will be read narrowly—the decision does not require proof of "pretext-plus." The trier of fact may very well draw an inference of discrimination based on evidence of pretext alone.

But civil rights advocates are concerned, nonetheless. In their view, *Hicks* places employees in the rather awkward position of having to anticipate and prepare defenses for explanations not necessarily even relied on by an employer. Of course others applaud the ruling for ensuring that employers will not be liable when their reasons are false, but not discriminatory.

*William G. Mahoney, et al. v. RFE/RL*, 818 F.Supp. 1 (D. D.C., 11/24/92)

### Summary

When you chose to work abroad for an American business, you risk losing some of your protections against employment discrimination. This proposition is not as risky as it was, however, before legislation and judicial interpretation recognized the need for all employees, here and overseas, to benefit equally.

As originally drafted, none of the federal antidiscrimination statutes explicitly provided for extraterritorial jurisdiction. The presumption was, therefore, that U.S.

borders defined the American workplace. But the growing number of American workers overseas—and the concomitant growing number of bias concerns—forced the issue before Congress in the early '80s. By amending the Age Discrimination in Employment Act (ADEA) in 1984 to make age discrimination on foreign soil an unlawful employment practice, Congress issued a limited response.

But discrimination on other bases, namely those delineated in Title VII and the Rehabilitation Act, would still not be actionable against American employers on foreign soil. This is what the U.S. Supreme Court said in 1991 in *Equal Employment Opportunity Commission/ Bourseslan v. ARAMCO*, 111 S. Ct. 1227 (1991).

In this case, a U.S. citizen born in Lebanon and working in Saudi Arabia for a Delaware corporation alleged national origin discrimination when he was discharged. The petitioner argued that as an American citizen, he was entitled to Title VII's protections against discrimination in the workplace, notwithstanding the fact that it was in Saudi Arabia.

The High Court simply could not ignore the fact that Title VII, unlike the ADEA, did not contain specific language extending that statute's jurisdiction extraterritorially. The Court explained that if Congress intended this result, it would have designed that statute to reach employer conduct beyond the United States. And if it later desired to bring about that result, it would have amended Title VII like it did the ADEA in 1984. Since Congress did neither, and nothing in the statute or legislative history persuaded the Court towards a contrary interpretation, Title VII was not available to this plaintiff to remedy the conduct he charged.

With this literal construction of Title VII, the Court precluded all job bias claims, except those raised under the ADEA, by American workers abroad. Dissatisfied with this anomalous result, Congress again addressed the issue, and took initiative to reconcile these divergent applications of federal antidiscrimination legislation. After *ARAMCO* was issued, Congress amended Title VII in the Civil Rights Act of 1991 to bar employment discrimination against U.S. citizens employed in foreign countries by American owned or controlled companies. The result of this legislation was, essentially, to render *ARAMCO* void.

But even with extraterritoriality now built in, the ban on bias is not absolute. Congress was careful to carve out an exception reflecting the need to acknowledge social, policy and legal considerations of the "host" countries for American businesses.

Congress exempted companies from coverage under either statute where compliance would result in the violation of a law in the foreign country. This is known as the "foreign laws" exception. *See, e.g.,* 29 USC 623(f)(1).

*Mahoney* illustrates how that provision comes into play. In this case, employees of an American broadcast services operation who were stationed in Munich, Germany were fired from their jobs. The plaintiffs filed suit against their employer, Radio Free Europe and Radio Liberty, claiming that their removal violated the ADEA. The employer was a Delaware-based corporation with more than 300 U.S. citizens working at the Munich facility, and its activities were supported almost exclusively by federal funds.

The plaintiffs were fired pursuant to the labor contract between the parties, which expressly provided for mandatory retirement at age 65. Both plaintiffs had turned 65. Interestingly, the issue in *Mahoney* was not one of intent. The employer conceded that the plaintiffs' age was the motivating factor in this employment decision. Rather, the employer defended the discharge by raising the foreign laws exception to the ADEA.

Essentially, the employer argued that the exception was applicable in this case because mandatory retirement at 65 was German law. Providing otherwise in a contract, thus, would result in the type of conflict Congress hoped to avoid with the foreign laws exception.

29 USC 623(f) states that "it shall not be unlawful for an employer, employment agency, or labor organization (1) to take any action otherwise prohibited...where such practices involve an employee in a workplace in a foreign country, and compliance...would cause such employer...to violate the laws of the country in which such workplace is located...."

The employer's experts testified that mandatory retirement at age 65 was "deeply embedded in German collective bargaining agreements, and general labor policy." But the court was not persuaded that the ADEA should be preempted in this case; it may have been German *policy and practice* to require mandatory retirement in labor contracts at age 65, but it was not German *law* as contemplated by Congress. The court pointed out that the contract at issue involved private parties, and the provisions therein were in no way mandated by the German government.

Here, then, the foreign laws exception was not an available defense for this American employer.

*Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (U.S., 4/20/93)

### Summary

With *Hazen*, the Supreme Court ended the recent debate over the meaning of "willful" found in that section of the Age Discrimination in Employment Act (ADEA) providing for liquidated damages.

Although the Court earlier set out the parameters for establishing a willful violation under the ADEA, rulings in lower federal courts reflected confusion and inconsistency regarding the application of those parameters. The Court, in *Hazen*, actually said little that was new on this issue; it was well aware that it was important to reiterate, however, that which it had already established as ADEA law.

A second issue involving pension plans and age discrimination was also addressed.

In *Hazen*, the plaintiff had been hired as a technical director at a paper manufacturing company in 1977. In 1986, he was fired at the age of 62, just a few weeks before his pension was going to vest. Under the company's pension plan, pension benefits vest after an employee serves for ten years. The plaintiff filed suit under the ADEA, claiming that his discharge was discriminatory due to his age. The jury not only found that the plaintiff was the victim of age bias, but that the employer engaged in *willful* conduct. This meant that the employer was required to pay the plaintiff liquidated damages. The jury also found an Employee Retirement Income Security Act (ERISA) violation. 29 USC 1140.

The district court granted the employer's motion for judgment notwithstanding the verdict with respect to the finding of willfulness, and the Court of Appeals reversed this portion of the verdict.

Section 7(b) of the ADEA, 29 USC 626(b), states that "Amounts owing to a person as a result of a violation of the chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, *That liquidated damages shall be payable only in cases of willful violations of this chapter.*" (emphasis added).

The Supreme Court thought it had clearly defined this proviso in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In that case, it determined that a "willful" violation was one where an employer either knew that his actions contravened the ADEA or showed reckless disregard for that fact. Many of the lower courts felt this standard made it too easy to collect double damages.

The meaning the Court ascribed to willful was that which defined the term in other criminal and civil statutes, the Court pointed out. It had, in *Thurston*, rejected a broader definition, concerned that the "two-tiered" liability system built into the ADEA, i.e., those violations which do, and those which do not trigger double damages, would be vitiated. This standard would have required a finding of willfulness when the employer was aware that the ADEA "was in the picture."

The Court proclaimed *Thurston* clear, and good law. And it explained that under the standard articulated therein, not every knowing reliance on age will necessarily be a "knowing" violation for the purpose of establishing willfulness. It was referring to exceptions found in the ADEA where age may permissibly be factored into an employment decision. It is possible, the Court said, that employers may in good faith rely on age in making an employment decision, and that such reliance and personnel actions flowing therefrom will not give rise to double damages.

Examples are where age is a bona fide occupational qualification, 29 USC 623(f)(1), where a bona fide seniority system and employee benefit plans are involved, 623(f)(2), and where certain types of employees, i.e., bona fide executives and high policymakers, are at issue.

The Court also did not find *Thurston* distinguishable, as had some lower courts, because that case involved an unlawful formal, facially discriminatory company policy rather than informal animus against an individual like that charged in *Hazen*. It announced that the willfulness standard of *Thurston* and *Hazen* were applicable to all types of disparate treatment cases. It added that once willfulness is shown, "the employee need not additionally demonstrate that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision."

*Hazen* is also important because it speaks to a matter presenting the courts with some difficulty—the interplay between the vesting of a company's pension plan and age discrimination. As we have already seen, not every decision based on age is discriminatory. Certainly, employment decisions which *relate* in some way to age but do not actually *rely* on it should not be suspect under the ADEA.

This scenario was present in *Hazen*. Justice O'Connor, speaking for a unanimous court, identified the basis on which the plaintiff's pension would vest as *years of service* and not *age*, as the plaintiff had contended. Therefore, age was not the factor that motivated the decision

to discharge the plaintiff and, thus, caused the interference with vesting. The Court explained that to prove disparate treatment under the ADEA, age must be the determinative reason for the employer's actions.

The Court recognized the analytic difficulty presented in cases such as this one, where age is closely correlated to years of service. However, it pointed out that an employee can work for ten years and be eligible for vesting and still be outside the ADEA's protected age range.

Although the ADEA would not be available to a *Hazen* plaintiff, the Court reminded us that another statute, ERISA, was available to remedy the type of conduct challenged in *Hazen*.

***Barbara Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir., 7/30/92)**

### Summary

The judiciary, legislators and parties to employment discrimination suits will be relieved when the U.S. Supreme Court resolves the debate over the retroactive effect of the Civil Rights Act of 1991—one that has been raging for the past two years.

In February 1993, the Court granted review of *Rivers v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992) and *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), two circuit court rulings holding—as did most circuits addressing the issue—that prospective application of the statute was the appropriate interpretation of legislative intent. The Court will hear both cases this fall. [As of the date of publication, no decision had been issued.]

The Civil Rights Act of 1991 forever changed the landscape of job bias law by amending federal discrimination statutes to include, inter alia, "legal-type" relief. That is, plaintiffs alleging employment discrimination could now, for the first time, seek compensatory and punitive damages as a remedy in these suits. Jury trials were also made available.

Prior to the passage of the Act, only equitable remedies, such as back pay, reinstatement and promotions, could be awarded to winning plaintiffs. When drafting these statutes, Congress did not provide for relief in the form of damages, and neither administrative nor judicial interpretation ever reflected a contrary view. Rather, the nature of relief was "make-whole" only—that is, to place the victim of discrimination into the position he or she would have occupied had the unlawful conduct not oc-

the substantive rights and liabilities on unsuspecting defendants.

*Landgraf* involved the Act's damages and jury trial provisions. Section 101(2)(b). The plaintiff in that case had filed suit alleging that she was sexually harassed, retaliated against and constructively discharged under Title VII. Like the Sixth Circuit in *Rivers*, the Fifth Circuit declined to give these provisions retroactive effect.

Addressing the jury demand, the court stated that "To require [the employer] to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources." As for damages, the court found that "manifest injustice" would obtain if they were made available to plaintiffs for pre-Act conduct, as they are a "seachange in employer liability for Title VII violations."

In deciding the retroactivity question, the court focused on the practical consequences involved. It resolved that applying the law retroactively would place too big a burden on employers because compensatory and punitive damages "impose 'an additional or unforeseeable obligation' contrary to the well-settled law before the amendments."

The Equal Employment Opportunity Commission (EEOC) has also participated in the frenzy by switching its position midstream on the issue. The Bush administration had supported prospective application of the 1991 Act, and the EEOC had followed. However, with the recent change in administration—and the leadership at EEOC—retroactivity became the cry.

In the spring of 1993, the EEOC voted twice to rescind its year-old policy and, following its lead, the Justice Department modified an amicus brief already pending before the U.S. Supreme Court in *Rivers* and *Landgraf*. An EEOC directive to staff, however, advised not to reopen any cases closed as of June 2, 1993, the date of the directive. Underlying the EEOC's new approach was the view that the employer, not the victim of discrimination, should bear the burden of its conduct.

[Note: the Age Discrimination in Employment Act (ADEA) was not amended in the 1991 Civil Rights Act. As a result, ADEA claimants can not enjoy the benefits of jury trials and damages available to plaintiffs bringing suits under other statutes, i.e., Title VII and the Rehabilitation Act. Federal employees are the hardest hit by this omission, however, as private sector litigants can already have their cases heard by juries and may be entitled to double damages if a willful violation is proven.]

*Patricia Milligan-Jensen v. Michigan Technological University*, 975 F.2d 302 (6th Cir., 9/17/92)

### Summary

In 1993, the U.S. Supreme Court granted *certiorari* in *Milligan-Jensen* to determine what role after-acquired evidence of employee misconduct plays in Title VII suits. The controversy generated over this issue continues in the courts, however, because the parties settled the suit before the Justices had the opportunity to rule.

More and more employers are defending against charges of employment discrimination with after-acquired evidence of job application fraud or employee misconduct. In most cases, the evidence has been discovered by the employer during the discovery process in the Title VII case, and is used to nullify any request for relief by the plaintiff.

Employers are arguing that if an employee lied on a job application and, but for the lie he or she would not have been hired—or would have been fired if the lie was revealed during the employment relationship—the issue of Title VII damages becomes irrelevant. In short, an employee not entitled to a job, is not entitled to damages flowing therefrom.

The circuit courts seem to have splintered off into two camps on the subject of after-acquired evidence. One insists that evidence acquired post-termination serves as a complete bar—or defense—to discrimination claims. The other does not call for such a harsh result. It recognizes that although evidence of this type should not be ignored, it should not foreclose liability either. Rather, the evidence should be used to limit damages or to impeach the plaintiff's credibility at trial.

In *Milligan-Jensen*, the plaintiff had filed a Title VII suit claiming that she was fired from her security officer position because of her sex and in retaliation for filing a complaint with the Equal Employment Opportunity Commission. Her employer then discovered, while preparing to defend the Title VII action, that the plaintiff omitted a prior DUI conviction on her employment application.

The Sixth Circuit followed the approach adopted by the Tenth Circuit in *Summers v. State Farm Mutual Auto. Inc. Co.*, 864 F.2d 700 (10th Cir. 1988). That court granted summary judgment in a bias suit to an employer who had discovered over 150 instances of falsified records. See also, *Redd v. Fisher Controls*, 62 FEP 465, No. A 91 CA 691 (W.D. Tex. 1992) (relief barred where fired employee did not reveal felony conviction on job

application, and employer proved that she would not have been hired or would have been fired if it knew of the conviction and falsification).

Similarly, this year in *Agbor v. Mountain Fuel Supply Co.*, No. 92-C-0343A (D. Ut. 1993), a district court in the Tenth Circuit granted summary judgment for an employer who learned, during the pre-trial process, that the plaintiff lied about being an American citizen on his employment application. The employer had presented uncontroverted evidence similar to that raised in *Redd*. A few days later, a district court in the Second Circuit declined to dismiss a Title VII suit even though the plaintiff had falsified her insurance application and insurance claim. This misconduct was discovered during the plaintiff's pre-trial deposition on the Title VII claim. In this court's view, the plaintiff's misconduct had little relevance in assessing her discriminatory discharge claim. *Smith v. Equitable Life Assurance Society*, 90 Civ. 7742 (S.D.N.Y. 1993).

The government, in a brief submitted to the Supreme Court in *Milligan-Jensen*, urged that Court to follow the approach taken in an Eleventh Circuit decision. In *Wallace v. Dunn Construction Company, Inc.*, 968 F.2d 1174 (11th Cir. 1992), the court held that while the plaintiff, who had engaged in application fraud (failed to disclose narcotics conviction), would not be entitled to prospective remedies, after-acquired evidence could not be used as an affirmative defense to Title VII liability.

The circuit courts are in need of guidance in order to avoid such divergent applications of the after-acquired evidence defense. Although settling claims is favored, a ruling by the Supreme Court in *Milligan-Jensen* would have saved litigators and courts much time and trouble.

*EEOC v. Consolidated Service Systems*, 989 F.2d 233 (7th Cir., 3/4/93)

### Summary

When a Korean-owned small business hired almost all Koreans, and Koreans accounted for less than one percent of the work force, the Equal Employment Opportunity Commission (EEOC) sensed discrimination. It filed suit against the company arguing that its preference for Koreans violated Title VII.

The Seventh Circuit Court of Appeals acknowledged the existence of an "ethnically imbalanced workforce." However, it would not conclude that the imbalance resulted from discrimination.

The company was a "mom and pop-like" janitorial and cleaning service in the Chicago area, and the owner was a Korean immigrant. Most of his employees, hired by word of mouth, were Korean immigrants as well. The employer conceded that he did not recruit employees outside of his community. He did place one ad in a Korean-language newspaper which ran for three days, and two ads in the Chicago Tribune, but he found these methods of recruiting unavailing.

Notwithstanding the employer's hiring practices, and the skewed ethnic make-up of his company, the court declined to impute to him intent to discriminate. Instead, it found that this employer hired as he did because his method was effective and cheap. And it would not require him to recruit in other ways in order to ensure an ethnically balanced workforce. In the court's view it was secondary—and for a Title VII analysis irrelevant—that this employer may have preferred a predominantly Korean workforce.

The Court emphasized the special circumstances inherent in "ethnic communities," and recognized that it was inevitable that "recruits will be drawn disproportionately from the community."

"It would be a bitter irony," the court lamented, "if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick [immigrant business owners] off the ladder by compelling them to institute costly systems of hiring. There is equal danger to small black-run businesses in our central cities. Must such businesses undertake in the name of nondiscrimination costly measures to recruit nonblack employees."

In another interesting ruling this year involving national origin bias, the Ninth Circuit Court of Appeals held that it may be okay for an employer to require that only English be spoken in the workplace.

In *Garcia v. Spun Steak Co.*, No. 91-16733 (9th Cir. 1993), the company, a meat processing plant, instituted a policy wherein its employees were only able to speak English on the job. The company employed 33 workers, 24 of whom were Spanish-speaking (bilingual).

The district court had found that the employees had raised a prima facie inference of disparate impact due to the existence of the English-only policy, and that the employer failed to adequately justify its action, so as to avoid Title VII liability. The appeals court disagreed with the lower court and the employees that the rule affected the terms, conditions or privileges of their employment.

In particular, it ruled that Title VII does not ensure employees unrestricted rights to express their cultural identity. Moreover, although the rule may have inconve-

hindered them by preventing them from conversing in their primary language, it did violate their Title VII right to work in an environment free from unlawful discrimination.

In ruling as it did, the Ninth Circuit rejected Equal Employment Opportunity Commission Guidelines addressing the subject.

Specifically, 29 CFR 1606.7(a) provides that "A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. Prohibiting employees at all times from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin."

The court noted that it is not bound to follow EEOC guidance, such as 29 CFR 1606.7, particularly where, like here, it is found to be unsupported by statute and its legislative history.

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## II. Interpretive Issues

1. The Act explicitly states that the burden on the individual's religion must serve a compelling interest by the least restrictive means. The government can no longer argue that its general policy serves a compelling interest. Rather, it must have a compelling interest in refusing an exception to religious objectors. The government should not inflate its alleged interest by speculating about mass conversions. The typical case involves a religious practice that holds few attractions for persons not already committed to the claimant's faith.

2. The analysis should begin by identifying the harm that government is trying to prevent. Does the government seek to prevent that harm where ever it appears, however and by whomever it is caused, without exceptions, across the full range of its responsibilities? If so, preventing this harm might be a compelling interest. If not, the government itself has not treated the interest as compelling.

3. Even if the government has pursued a no-exceptions policy, the question remains whether the interest in uniform enforcement is so important that it overrides constitutional rights. We think that often the answer should be no, and that the government has historically been too quick to say yes. As Bill Bryson said, every bureaucrat thinks that what he does serves a compelling interest. He has a narrow mission and his own statute to enforce, and RFRA is not his responsibility. The agency can provide information, but its own assessment of the compelling interest question is not objective or impartial, and it is rarely informed by much experience with constitutional questions or a full understanding of the constitutional values at stake.

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1. Religious free speech issues, especially the Equal Access Act and the EEOC harassment guidelines. We appreciate the Justice Department's amicus brief in *Ceniceros v. San Diego Unified School District*. This is a very important case; the school district has declared a limited forum to exist after the buses leave, but it allows all the secular clubs to meet during lunch hour, when it claims that no forum can exist. This ruse renders the Act a nullity; if the Ninth Circuit approves, we hope that the Department will support a petition for certiorari.

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cc: William Bryson  
Walter Dellinger  
Stephen Neuwirth  
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**PRESENTS**



**ONCE  
AGAIN  
SECTION  
1983  
CASES**

have dominated much of the Supreme Court's agenda. Last term saw decisions in more than 12 important cases — including property rights and "takings" and First Amendment law — that greatly affected the capacity of individuals to sue state and local governments for alleged violations of constitutional rights. Civil rights cases under Section 1983 also continue to dominate the caseloads of the federal trial courts.

Although the Court was not active in making new precedent for police misconduct cases, social events in Los Angeles and elsewhere brought this topic to renewed prominence and greatly enhanced the plaintiff's standing with juries — and with local government attorneys who litigate or settle such cases.

**THE ELEVENTH  
ANNUAL**

# **SECTION 1983 CIVIL RIGHTS LITIGATION**

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SEMINAR  
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IN TWO  
WAYS.**

The first day it provides you with the basic framework for analyzing cases brought under Section 1983. Since this framework is a continually evolving one, both new attorneys and experienced practitioners in the field will be aided by a review of these issues.

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August 1994

I am pleased to introduce the initial report prepared by the United States Government concerning its compliance with the International Covenant on Civil and Political Rights. The report was submitted in July to the U.N. Human Rights Committee established by the Covenant. This is also the first report submitted by the United States in accordance with its obligations under an international human rights treaty. Written to United Nations specifications, and prepared through the collaborative efforts of the U.S. Departments of State, Justice and other Executive Branch departments and agencies, with input from non-governmental organizations and concerned individuals, it represents a government-wide commitment to creative interaction with the emerging global framework of international human rights law. It is meant to offer to the international community a sweeping picture of human rights observance in the United States and the legal and political system within which those rights have evolved and are protected.

The International Covenant on Civil and Political Rights was concluded in 1966, entered into force ten years later, in 1976, and was ratified by the United States in 1992. Work on this report began shortly after ratification. All told, 127 countries have to date become party to the treaty.

-1-

Together with the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, it represents the most complete and authoritative articulation of the tapestry of international human rights law that has emerged in the years following World War II.

The antecedents of contemporary human rights law stretch far back into history - to natural law traditions, the ethical teachings of the world's great religions - both East and West - Greco-Roman law, and the pioneering philosophical work of Hugo Grotius and John Locke. The concept of universal rights developed by 18th century political theorists nourished international law, as it also set the stage for American constitutionalism. Indeed international human rights law and the constitutional law of the United States are at bottom profoundly related: both seek to limit the authority of states to interfere with the inalienable rights of all individuals without discrimination.

The first major articulations of international human rights law took place after World War I around the creation of the ill-fated League of Nations, its system for the protection of minorities, and the more successful International Labor Organization.

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It was, however, the horrific experiences of mid-century totalitarianism and World War II that spurred the victorious allied powers to try to inscribe into international law the larger goals that had emerged during the war, such as President Roosevelt's Four Freedoms. The Nuremberg trials, in which the vanquished Nazi leaders were publicly tried, convicted and sentenced according to the principles of international law, represented an attempt to fashion a new international order which would work to protect human dignity and, in some measure, redeem the terrible sufferings of the victims of totalitarianism.

The capstone of these efforts was the creation of the United Nations and the adoption of its Charter, the promulgation of the Universal Declaration of Human Rights and the launching of the efforts that resulted in the two major covenants of international human rights.

While the League had focused on the rights of minority groups to self-determination, the UN Charter was all-embracing, making it the legal as well as the political responsibility of all Member States to protect and promote the human rights and fundamental freedoms of their people.

The Universal Declaration of Human Rights, adopted unanimously by the UN General Assembly in 1948, represented an authoritative articulation of the rights that Member States are generally obliged to protect and promote under the UN Charter. The Declaration synthesized the two categories of human rights that have emerged in international legal discourse, civil and political rights on the one hand and economic, social and cultural rights on the other. It has remained to the international community to sift out these distinct, though related, elements, in order to create workable instruments of international law.

Human rights have come to be recognized by most governments as the universal birthright of every man, woman and child on this planet. This faith in inalienable human dignity rests at the core of the international law of human rights; it has many different sources and has been articulated over time in different ways. Indeed, its commanding power rests in no small measure on the varied nature of its sources; nor is it anchored in any one philosophical, religious or ideological foundation. The Universal Declaration achieved inclusiveness precisely because it did not lodge these timeless principles in any specific, and thus inevitably debatable and partial, political program.

-4-

The Covenant on Civil and Political Rights contributes to the promotion of international human rights by codifying many of the principles we in the United States hold dear - political freedom; self-determination; freedom of speech, opinion, expression, association and religion; and protection of the family against governmental intrusion. The unfortunate fact that these principles are disregarded in many countries in no way diminishes their commanding authority.

The United States as a nation was founded on the principle of inalienable individual rights. The history of this country is in many ways the story of an ongoing struggle to fulfill the promise of that conception of rights, a struggle that continues today to overcome old and new injustices in our own vibrant democracy. As part of that struggle the United States is also firmly committed to promoting respect for human rights and fundamental freedoms around the globe.

As this report shows, United States law provides extensive protection against human rights abuses by government authorities. Under the U.S. Constitution, government authority is distributed and diffused through the separation of powers between the three branches of government. From the beginning of this nation's history, the United States Supreme Court has exercised the power of judicial review to check unconstitutional action by the executive and legislative branches.

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Freedoms of speech and religion are protected by law, police power is subject to significant constitutional limitations, and America's political leadership at all levels is held accountable to its citizens.

Our Constitution laid out a blueprint for the interpretation and realization of the idea of civil and political rights and freedoms, but it has taken the labors of generations of citizens from all parts of our society to build the institutions which carry the promise of these rights and freedoms. This process has unfolded over more than two centuries, through many chapters of history, some noble and others dark, and the task continues to this day.

*America's expansion into its own*  
The most egregious human rights violations in this ongoing <sup>its</sup> American struggle for justice were <sup>with</sup> the massive enslavement and disenfranchisement of African Americans and the virtual destruction of Native American civilization.

The profound injustices visited on African Americans were only partially eased after the Civil War (1861-1865), and then a century later by the civil rights movement of the 1950's and 1960's, a movement that wedded grass-roots organizing with dogged legal marches through courthouses and legislatures; a movement that took advantage of existing constitutional law to ensure that human rights were respected in practice.

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Those efforts to undo the bitter legacy of slavery continue today. The lessons learned from our nation's unfinished battle with racial discrimination can be shared with other members of the international community. Simply put, our national experience demonstrates that legal guarantees of human rights are a prerequisite to social progress, not the other way around.

Native Americans have also historically suffered the same fate as many colonized people: wholesale destruction and displacement and the ruin of their cultures and societies. The lessons of those injustices, and the responsibilities the people of the United States are charged with as a result, are also the legacies of American history.

The members of other minority groups have suffered injustices in the United States. The United States is largely a nation of immigrants, and has drawn wave after wave of men and women from around the world seeking a better life. Immigrants to these shores, like immigrants everywhere, have often met with discrimination and resistance that have deepened the personal dislocations of migration. The openness of our society has permitted, with time, mobility and release from poverty and marginalization. In the process, immigrant groups themselves have deeply enriched our national identity, as the 19th century's notion of a "melting pot" of assimilation has gradually given way to a broader notion of pluralism.

The ongoing struggle for full realization of the rights of women is a central feature of the human rights process in America. Women did not have the vote in the United States until 1920, a century and a half after the founding of the republic. With growing strength, women have moved to claim their equal place in the political, economic and social life of the country. Efforts are underway in all sectors of American life to broaden women's opportunities and end remaining discrimination.

There are many other human rights challenges in our nation's historical and contemporary experience. As we have continued to find new challenges, we have worked with varying degrees of success to strengthen the capacity of our institutions to address them.

As an open democracy, the United States tends to address its most difficult and divisive human rights issues in public and in the courts. The result is a number of long-standing issues with a large body of case law as well as relatively new issues on which precedent is currently being established. Among the former are such areas as freedom of religion, immigrants and refugees, race discrimination, and freedom of expression. More recent areas of concern include gender discrimination, the death penalty, abortion, police brutality, and language rights.

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As a matter of domestic law, treaties as well as statutes must conform to the requirements of the Constitution. No treaty provision will be given effect as U.S. law if it conflicts with the Constitution. In the case of the Covenant on Civil and Political Rights, the U.S. Constitution offers greater protection of free speech than does the Covenant; on those and some other provisions of the Covenant, the United States has recorded its understanding of a particular provision or made a declaration of how it intends to apply that provision or undertaking.

It is of little use to proclaim principles of human rights protection at the international level unless they can be meaningfully realized and enforced domestically. In the words of the renowned human rights and constitutional scholar Louis Henkin: "The international law of human rights parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws; but it does not replace, and indeed depends on, national institutions." It is up to the various organs of federal, state and local government here in the United States to bring those international commitments to fruition.

As observers have noted ever since the great French thinker and statesman Alexis de Tocqueville penned his classic "Democracy in America" in the 1830s, the United States possesses a strikingly robust legal and judicial system, and it is in and through that system that legal protection for human rights has taken shape. This report of the United States to the UN Human Rights Committee thus focuses on the law of human rights protection as it has evolved in the distinctive mix of statutory and common law that obtains at the federal level.

The broad conception of rights that has evolved in the course of U.S. history has come to serve as the basis for much of international human rights law, and, ironically but fittingly, to set the standard by which the United States is judged by other members of the international community.

While the state of human rights protection in the United States has advanced significantly over the years, many challenges and problems remain. The elaborate structure of human rights law set forth in this report emerged in the course of long and painful struggle in the United States, in a sweeping historical narrative displaying cruelty and injustice alongside vision and courage. It has been a distinguishing characteristic of our political and legal system to weave the constant possibility of change into the fabric of constitutional democracy.

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In publishing this report and giving it wide domestic distribution we hope to enhance public awareness of human rights protection and foster human rights education in the United States. We hope it will find a wide readership in schools and universities, among civic and political groups and with concerned citizens.

We will be issuing subsequent reports under the Covenant, and under additional human rights agreements to which the United States is a party.

Here as elsewhere the realization of universal human rights is a work-in-progress. While the U.S. system has done much over time to advance and champion human rights - as indeed this report demonstrates - much remains to be done. The U.S. Government welcomes spirited dialogue and debate on the advancement of human rights throughout the new global community that is taking shape on the horizon of the twenty-first century.

John Shattuck  
Assistant Secretary of State  
Democracy, Human Rights, and Labor

Drafted by: YMIRSKY DRL/EA 7-1403 SEMIRSKY 83

Cleared by: CHENRY DRL

DSTEWART L

JSHATTUCK DRL

CKUEHL USUN

SKAKESAKO H

MSMALL DOJ/OLC

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 - Appendix list

Who has experience & ~~scary to us~~

- keep affairs ~~...~~  
 Analysis?  
 of situation  
 Q's & A's

pos. form on this -

- Q's + A's for record -

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Fax (512) 471-6988 • E-mail dlaycock@msmail.law.utexas.edu

*Douglas Laycock*

*Alice McKean Young Regents Chair in Law*

June 24, 1994

Mr. Joel Klein  
Deputy Legal Counsel  
White House Counsel's Office  
1600 Pennsylvania Ave.  
Washington, DC 20500

Dear Joel:

Thank you very much for arranging Wednesday's meeting on the Religious Freedom Restoration Act. It was a special and unexpected honor to meet the President. All of us who are interested in religious liberty are very much aware of his continuing personal leadership on RFRA, and we are grateful.

We thought it might be helpful to provide a written summary of the key points raised in our meeting. We will add a few others that are important although we did not have time to discuss them.

#### I. Institutional Issues

1. There was apparently unanimous agreement that someone should be given special responsibility for enforcing the Act. The President said that it is very important to do this. We think that the key person should be someone who does not have conflicting responsibilities to the agencies and who has both the responsibility and clout to say no to an agency's litigating position when necessary. To say no to the agencies is not to hamper government functions; the faithful execution of RFRA is as much a function of the government as the faithful execution of any other law. The Office of Legal Counsel would be an appropriate place to locate responsibility for deciding what position to take on RFRA claims.

2. We anticipate some cases involving the United States but many more cases involving state and local government. It is important that the Department of Justice help defend the constitutionality of the statute in the state and local cases. The Department will also consider getting involved in a few early cases that present key interpretive issues. We will try to alert the Department to such cases.

## II. Interpretive Issues

1. The Act explicitly states that the burden on the individual's religion must serve a compelling interest by the least restrictive means. The government can no longer argue that its general policy serves a compelling interest. Rather, it must have a compelling interest in refusing an exception to religious objectors. The government should not inflate its alleged interest by speculating about mass conversions. The typical case involves a religious practice that holds few attractions for persons not already committed to the claimant's faith.

2. The analysis should begin by identifying the harm that government is trying to prevent. Does the government seek to prevent that harm where ever it appears, however and by whomever it is caused, without exceptions, across the full range of its responsibilities? If so, preventing this harm might be a compelling interest. If not, the government itself has not treated the interest as compelling.

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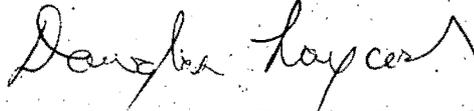
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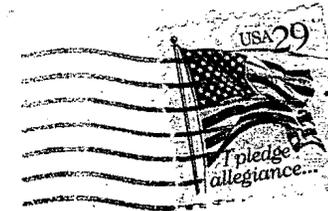
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Stephen Warnath



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727 E. 26th Street • Austin, Texas 78705-3299



Mr. Stephen Warnath  
Senior Policy Analyst  
Domestic Policy Counsel  
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1600 Pennsylvania Ave.  
Washington, DC 20500

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as of 6/29/94 - 6:00 p.m.

***Thursday, June 30***

●2:00 p.m. - Labor Organizations - AFL/CIO affiliates and NEA  
@ AFL/CIO, 815 16th Street  
Room 805  
Contact is Jane O'Grady of AFL/CIO & LCCR

\* Paul Steven Miller will attend

●4:30 p.m. - Asian Pacific American Groups  
@ National Asian Pacific American Legal Consortium (NAPALC)  
1629 K Street NW, Suite 1010 (Same suite as Ralph Neas/LCCR)  
(202) 296-2300  
Contact is Karen Narasaki, JAACL

Others attending include: Daphne Kwok, Organization of Chinese Americans; Philip Tajitsu Nash, NAPALC; Matt Finucane, Asian Pacific American Labor Alliance (APALA); and Bill Ho, NAPABA

\* Paul Steven Miller will attend

***Friday, July 1 -*** NO MEETINGS TO BE SCHEDULED

***Next Week*** Ellen is arranging a meeting with representatives of the business community (Chamber of Commerce, EEAC, NAM, and some prominent management lawyers). At this time, it is tentatively scheduled for Thursday or Friday of next week (July 7 or 8).

**FRANK R WOLF**  
 10th District, Virginia  
 WASHINGTON OFFICE  
 108 Cannon Building  
 Washington, DC 20515-4610  
 (202) 225-5135  
 MEMPHIS OFFICE  
 12573 Poplar Grove Road  
 Suite 130  
 Memphis, VA 22871  
 (703) 708-5800  
 (800) 945-8663  
 (Within Virginia)  
 110 Wynn - Canada Street  
 Winchester, VA 22601  
 (703) 667-0850

COMMITTEE ON APPROPRIATIONS  
 SUBCOMMITTEE  
 TRANSPORTATION  
 TREASURY - POSTAL SERVICE - GENERAL  
 GOVERNMENT  
 COMMISSION ON SECURITY AND  
 COOPERATION IN EUROPE

**Congress of the United States**  
**House of Representatives**  
 Washington, DC 20515-4610

June 22, 1994

**SUPPORT TAYLOR-WOLF AMENDMENT**

Dear Colleague:

You may have received a letter recently from the ACLU, the People for the American Way and some religious groups regarding an amendment that we intend to offer to the Commerce, State, Justice Appropriations bill this week. This letter mischaracterized the reach and scope of the amendment we will be offering.

Our amendment will merely limit the funding for the EEOC's proposed guidelines of October 1, 1993 covering religious harassment in the workplace. The amendment reads as follows:

*The amendment was passed 366-37*

"None of the funds made available in this Act may be used to implement, administer, or enforce any guidelines of the Equal Employment Opportunity Commission covering harassment based on religion, when it is made known to the Federal entity or official to which such funds are made available that such guidelines do not differ in any respect from the proposed guidelines published by the Commission on October 1, 1993 (58 Fed. Reg. 51266)

The amendment applies to the October 1, 1993 proposed guidelines only. It is a very narrow amendment. It would prevent the implementation during the next year of the proposed guidelines that virtually all sides agree are misguided. This amendment would not prevent religious harassment claims from being pursued at the EEOC; it would only prevent these proposed guidelines from being used to do so.

If you have any questions regarding this amendment please call Caroline Choi (x56401) or Barbara Comstock (x55136).

Sincerely,

*Charles H. Taylor*  
 Rep. Charles Taylor

*Frank R. Wolf*  
 Rep. Frank R. Wolf



somewhere might eventually rule that any discussion of religion or display of religious symbols or materials violates the EEOC's rules.

No one favors true religious harassment. We are informed such harassment is already made illegal by Title VII and other federal laws. But voluntary chapel services, Bible studies, religious symbols, and discussions of the gospel and other religious topics among adults in the workplace would be threatened if these EEOC guidelines are allowed to become final.

In an effort to strain out the last gnat of religious harassment, the EEOC appears ready to swallow up major portions of our religious liberty. We are unwilling to remain in the stands when our liberty is at stake. The EEOC needs to have the brakes applied to this effort. And we hope that Congress will bring this sorry episode of big government intrusion upon our liberties to a screeching halt.

*Continuing the race car conceit*

FRANK R. WOLF  
10th District, Virginia  
WASHINGTON OFFICE  
104 Cannon House Building  
Washington, DC 20515-2910  
(703) 775-9130  
LEGISLATIVE STAFFERS OFFICES  
13873 Page Center Road  
Suite 130  
Manassas, VA 20108  
(703) 708-2800  
1-800-945-8553  
Northern Virginia  
150 North Lincoln Street  
Washington, VA 22001  
(703) 687-0810

COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEE  
TRANSPORTATION  
TREASURY-POSTAL SERVICE-GENERAL  
GOVERNMENT  
COMMISSION ON SECURITY AND  
COOPERATION IN EUROPE

Congress of the United States  
House of Representatives  
Washington, DC 20515-4810

June 22, 1994

COACH JOE GIBBS SPEAKS OUT AGAINST  
EEOC RELIGIOUS HARASSMENT GUIDELINES

Dear Colleague:

In considering the Taylor-Wolf amendment to the Commerce, Justice, State Appropriations, I wanted to share with you a letter I received from former Radskins coach, Joe Gibbs. The Taylor-Wolf amendment would prevent the EEOC from moving forward on the proposed guidelines only. I urge your support for this amendment.

Sincerely,

Frank R. Wolf  
Member of Congress

June 20, 1994

Congressman Frank R. Wolf  
US House of Representatives  
104 Cannon House Office Building  
Washington D.C. 20515

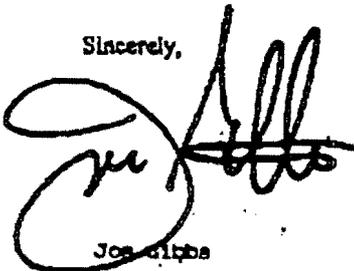
Dear Congressman:

I am writing in reference to the EEOC Proposed Work Place Harassment Guidelines which are to be presented to the House. I am not in agreement with including the word "religion" in the guidelines. Therefore, I am in support of House Resolution 446 which will remove all reference to religion.

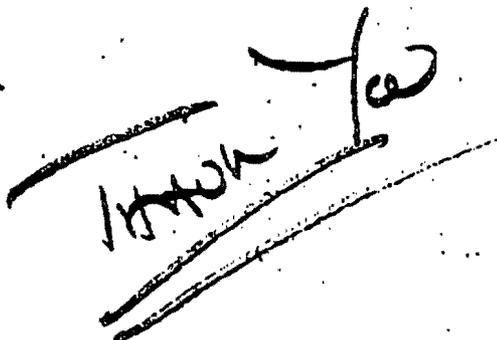
As a member of NASCAR, I am required to work most weekends and have appreciated the opportunity of attending a worship service which is provided at each race track. The possibility of a loss of my constitutional right to worship by governmental decree is totally unacceptable to me.

As an active voter in your district, and a part of the most popular and well attended professional sport in the country, I urge you to support House Resolution 446.

Sincerely,



Joe Gibbs  
10134 Wendover  
Vienna, VA 22181



# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Claire Gonzales to Esteban (1 page)	n.d.	P6/b(6)

**This marker identifies the original location of the withdrawn item listed above.  
For a complete list of items withdrawn from this folder, see the  
Withdrawal/Redaction Sheet at the front of the folder.**

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**COLLECTION:**

Clinton Presidential Records  
Domestic Policy Council  
Stephen Warnath (Civil Rights)  
OA/Box Number: 9589

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**FOLDER TITLE:**

[Civil Rights Working Group] [3]

ds61

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**RESTRICTION CODES**

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Chicago Tribune 6/29/1994



Mike Royko

# EEOC is lacking in wisdom teeth

**A** Chicago corporation recently received an ominous letter from the Equal Employment Opportunity Commission. The letter said: "You are hereby notified that a charge of employment discrimination has been filed against your organization under The Americans With Disabilities Act."

It told the corporation to submit "a statement of your position with respect to the allegation contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge."

Then came the specific allegation, which was made by a woman:

"On or about April 28, 1994, I applied for the position of Benefits Representative at the above referenced Respondent. On or about April 28, 1994, I was interviewed by the Respondent for the position.

"During the interview, I advised the Respondent that I have a microchip embedded in one of my molars and it speaks to me and others.

"I believe I have been discriminated against because of my disability in violation of the Americans with Disabilities Act of 1990, in that I am qualified for the position.

"After explaining to the Respondent that I have a microchip embedded in my molar, I was not hired."

Now, imagine for a moment that you are a federal bureaucrat at the Chicago office of the EEOC, and someone comes in and says something like this:

"I just applied for a job and I was turned down because of discrimination."

You would probably ask what form the discrimination took.

"I have a microchip embedded in one of my molars."

Ah, a microchip in your molar.

"Yes, the microchip speaks to me and to others."

Ah, the microchip in your molar speaks to you.

"Yes, and that is why they didn't hire me."

I see. They didn't hire you because a microchip in your molar speaks to you. Well, well. An interesting problem.

Assuring you are a reasonable person, how would you respond to such a complaint?

a statement from a physician or dentist verifying that she has a microchip in her molar that talks to her.

Or you might suggest that she ask her dentist to remove the microchip from her molar.

You might even ask her how and why the microchip found its way into her molar and what it talks to her about?

Actually, I've had considerable experience in such matters. Anyone who works on a newspaper long enough—especially the night shift—will eventually talk to people who receive personal messages through fillings in their teeth, bed springs, light bulbs, their TV sets, or voices that ride the winds.

So do desk sergeants in police stations and those who answer 911 calls.

Sometimes the strange messages come from outer space, fiendish neighbors, a nasty relative, Elvis or the president.

But when a caller says she is getting messages through fillings or microchips in her teeth, the cops don't send out a detective to peer into her mouth. Newspapers don't assign a reporter to press an ear against the molar to listen in on the messages.

Yet, here we have a federal agency that takes a talking molar seriously.

Some EEOC investigator actually took down the information and guided the woman through the complaint procedure.

Then the appropriate forms were filled out, a higher-up signed the complaint, and the file and investigation were officially opened.

Now an official at the accused corporation is required to formally respond to the federal complaint, supplying "any supporting documentation" as to why the corporation wouldn't hire a woman who said she had a microchip embedded in her molar that talked to her.

I don't know what the corporation's response will be. How do you answer a charge of this sort?

Maybe you could say: "Our company policy forbids employees receiving personal calls through microchips embedded in their molars on company time."

Or maybe: "At this time, we did not have a need for someone with a talking microchip embedded in her molar. However, should such a position open ..."

The most appropriate response would be to dash off a note saying: "Hey, do you bureaucrats have microchips embedded in your heads? Is this what we're paying taxes for? Bug off."

But that wouldn't be smart. If offended, the EEOC might very well order the company to make amends by hiring a dozen people who receive messages through their teeth. Nothing the EEOC does would surprise me. Or any of the businesses they torment.

We asked a spokesperson for the EEOC whether the laws require the agency to investigate any and all discrimination complaints—even those from people who claim to have microchips in their molars.

No, the law doesn't require it, the spokesperson said. It is an office policy.

"You have to remember," she said, "what's crazy to you might not be crazy to someone else. ... Besides, you're always calling us heartless bureaucrats. Do you really want us heartless bureaucrats making the decision about what cases to take?"

I'll have to think about that question. Or maybe I'll get the answer through one of my

6/29/94



Mike Royko

## Restaurateur's case served in Congress

**W**hatever happens to Hans Morsbach, the Hyde Park restaurant owner being hounded by federal bureaucrats, he's now had his case brought to the attention of Congress.

Rep. John Porter, normally one of our quieter legislators, stood up Thursday and raised some hell about the way Morsbach is being treated by the Equal Employment Opportunity Commission.

Porter compared the methods used by the EEOC to those of the Spanish Inquisition.

He said: "Chicagoans have been following the EEOC's work ... and frankly they're mad, and they have a right to be mad.

"Recently in Chicago, a restaurant owner, Hans Morsbach, was notified by the EEOC in writing that he was guilty of hiring discrimination. The letter explained that because he placed an ad with a hiring agency for someone who was 'young' and 'bub,' he is guilty of age discrimination.

"... Morsbach was informed by the EEOC that he must hire four people over the age of 40, give them back pay and seniority and post a notice in his restaurant stating that he will no longer discriminate because of age.

"The EEOC has decided he is guilty and determined his sentence, and if he doesn't comply he will be hauled into court and must hire an attorney to defend himself. What really galls, however, is that he's prevented from knowing anything about the genesis of the charge against him because the EEOC refuses to give him any information on this, citing confidentiality.

"Well, Morsbach didn't place any such ad with a hiring agency and his hiring record is an excellent one. He has employed a very diverse group of individuals in his restaurant. Morsbach doesn't know what hiring agency is involved, when the incident occurred, or what the word 'bub' means. Regardless, Morsbach must invest time and resources when he goes to court to prove his innocence.

"This is crazy. It's crazy that out of the blue comes a charge that the accused knows nothing about. It's crazy that the agency deems him guilty but at the same time refuses to tell him anything about the charges against him. And crazy that his only recourse is an expensive court proceeding.

"This is an important agency charged with the role of protecting the civil rights of employees and protecting them against discrimination. These are important

"But in this case apparently, and apparently in many others, it proceeds like the Spanish Inquisition. This is not right. This matter should be looked into and corrected."

Porter deserves praise for taking up Morsbach's cause. But was anybody listening?

Probably not. His speech came while his fellow congressmen were in the midst of figuring out ways to spend hundreds of billions of tax dollars. So it's hard to get congressmen interested in one restaurant owner's problems when they are whooping it up with tons of our money.

When Porter finished his speech, I actually believed that the next voice would be that of Rep. Mel Reynolds.

Why Reynolds? Because Morsbach's restaurants are in Reynolds' South Side congressional district. If anyone was going to bat for Morsbach, it definitely should have been his very own congressional representative.

But, no, if Reynolds was in the chamber, he didn't say anything. And so far, he has apparently shown no interest in Morsbach's problems.

So Morsbach, who lives and works in one of Chicago's most liberal Democratic neighborhoods, wound up being defended only by Porter, a Republican from the North Shore suburbs. Go figure. Or maybe Reynolds should go figure.

Will the arrogant bureaucrats at the EEOC be influenced by what Porter said? You might imagine that being publicly lambasted by a member of Congress would get their attention.

Probably not. There were times in our history when one congressman could make bureaucrats tremble. But no longer. We now have a federal bureaucracy that is so firmly entrenched, so secure, so safe from outside scrutiny and discipline, that it doesn't appear to care what anyone says.

Consider the Chicago Post Office scandal. A bureaucrat spends a fortune building herself a luxury office suite in a building that will soon be torn down. Is she fired? No, she is transferred because the bureaucratic rules make firing her almost an impossibility.

At the same time, the firing-proof, criticism-proof bureaucrats at the EEOC can find someone like Morsbach guilty of discrimination without being required to show him the evidence, give him a genuine hearing, or let him confront his accuser.

So here we have a congressman saying that the way a government agency operates is "crazy."

What will the EEOC say? Based on my experience with the EEOC, it will say nothing. It doesn't have to say anything. The bureaucrats are secure in their psyches, their medical benefits, their vacations, their pensions and a civil service system that makes it almost impossible to fire anyone.

And we're paying for it, which is the height of craziness.

Chicago Tribune, June 17, 1991



Mike Royko

## U.S. trying to pluck a chicken company

**T**he jobs at Koch Poultry Co. are not exactly high-tech.

The workers stand in a cold, damp room at a table waiting for raw chicken breasts to come down a conveyor belt.

They carve out the bones and flip the breasts back on the belt, which takes them to workers who weigh, pack and freeze the product.

The jobs pay from \$4.50 an hour to start to \$6.75 an hour tops. Not a lot, but for people with little education and few skills, it beats welfare, panhandling or stealing.

And Mark Kaminsky, the chief financial officer of Koch Poultry, believes he is a fair employer.

"The job is perfect for a lot of our workers. Some don't speak English, but that doesn't matter. It's good, steady work—the first hook on the American ladder.

"It's like what my grandparents did when they came here from Poland. They took jobs cleaning floors and worked their way up. My father did a little better than his parents, and hopefully I'll do a little better than my father."

More than 80 percent of the 300 workers are Hispanic. That's the way the work force evolved. When the company was small and there was a job opening, somebody would bring in a friend or a relative.

And over the years, that's basically the way Koch has done its hiring—word of mouth among the employees. Somebody from the neighborhood or the family.

There are those who might say that this is a good way to run a business. First, it simplifies hiring because there is no advertising cost. Since most new people come with the recommendation of a present employee, a big personnel department isn't needed. And it provides jobs for members of a minority group.

Ah, but if you think that way, it just proves that you are not a federal bureaucrat in the Chicago office of the Equal Employment Opportunity Commission.

To them, Koch Poultry is a villain because it has too many Hispanics.

So the EEOC, over the last few years, has come down on the company with both feet. It accused Koch of not hiring enough non-Hispanics. In other words, not enough majority members.

The company was told that hiring through word-of-mouth was "inherently discriminatory."

OK, for the sake of argument, let us say that makes sense, as crazy as it sounds.

If you were a reasonable person, how would you go about seeking a remedy?

Me, I would go in and tell the people at Koch: "Look, you have to hire more non-Hispanics. I don't care what Swedes, African-Americans, Asians, Bulgarians, Native Americans, whatever. Start filling your vacancies that way. I'll check back in six months to see how you are doing."

Even that sounds whacky, but it is not complicated and would probably achieve a dubious goal.

No, that isn't how the EEOC does it.

What it does is work out some sort of bizarre mathematical formula. How many workers do you have? How much are they paid? Multiply this by that by how many non-Hispanics you didn't hire. Then pay this money to people who didn't go to work for you but might have if they knew the jobs were available.

"They told us," Kaminsky said, "that we were supposed to take out newspaper ads that asked for people who might have applied for a job, or if they were thinking about applying with us, so they might be entitled to a financial settlement.

"They said they wanted \$5.2 million. They never put that in writing, but the EEOC investigator spelled it out for us.

"Of course, the entire company isn't worth that much, so we told them no way, we can't afford it.

"Then they told us that they didn't know what we could afford unless they saw our financial records. So we gave them our records. And they said: 'OK, you can afford this.' And they made it \$1.5 million. And then they dropped it to \$300,000."

Keep in mind, this money—whether it was \$5.2 million or \$300,000—is to go to people who probably never heard of Koch Poultry or even wanted to work there. Any non-Hispanic could show up and say: "Sure, yeah, I really wanted to chop up chicken breasts. Give me my settlement."

After some angry exchanges between the bureaucrats and Koch's lawyers, the company decided not to give in to the shakedown effort.

Demanding a scalp, the EEOC has filed a suit in federal court asking for all sorts of dingbat concessions.

Koch will fight it. "We're better off going to court and spending \$100,000 in lawyers' fees," Kaminsky said.

So here we have a company that provides regular paychecks for genuinely needy members of a genuine minority group. And it is being hounded by the government because it doesn't hire enough non-minorities.

Is that nuts or is that nuts?

Incidentally, we called the EEOC office in Washington and asked for a breakdown of EEOC employees by race, gender, ethnicity and age.

They told us to put our questions in writing. Try telling the EEOC to put their questions in writing, and you'll be talking to a judge.

Mike Royko

# Restaurant case as weak as it seems

**A**s a service to American taxpayers, I'm going to give some free advice to the bureaucrats at the Equal Employment Opportunity Commission.

My advice is this: Don't waste taxpayers' money by further harassment of Hans Morsbach, a Hyde Park restaurant owner.

"If you go into court with your anemic charges that he discriminates in hiring, any rational judge will probably whack you on the head with his gavel.

"Even though you paper shufflers have refused to discuss your evidence, other sources have provided information about your Morsbach file. Based on what they say, as investigators you people should try doing standup comedy.

What you're running appears to be a scam. You apparently believe that if you send out scary official letters to businessmen such as Morsbach, you can stampede them into what amounts to a guilty plea.

It probably works often, too, since many small-business people go into shock at having to deal with the government. And when they cave in and plead for mercy, you have scalps that help justify your existence and your paychecks.

Since you won't talk about how you built your age-discrimination case against Morsbach—not even with Morsbach—let me make a stab at it.

First, let's say you had an investigator go to an outfit called the Job Exchange because you had a complaint about them or one of the hundreds of restaurants they work with. This is an outfit that finds jobs for people in the food industry. In effect, an employment agency.

While your investigator was going through records to check out the complaint—which was unrelated to Morsbach—he came across a small file card. On it was written the name of one of Morsbach's four restaurants.

The card also contained the words "wts" "young" and "bub."

Being a clever fellow, your investigator decided that the word "wts" meant waitress. "Young" meant whatever you decide it means. To me, President Clinton is young. So is his wife. On the other hand, a baseball player is ancient at 38. Age is in the eye of the bureaucrat.

Then we have the word "bub." This you took to mean "bubbly." Those in the restaurant business tell me that bubbly is sometimes used to mean enthusiastic.

So your investigator zipped back to the office, proudly displayed his find, and you decided that you had a case: Morsbach was obviously guilty of trying to hire a young, enthusiastic waitress. That means he was discriminating against people who are old and lacking in enthusiasm.

Then you had an investigator go to Morsbach's restaurant to look at his files. And you determined that your suspicions were correct. He had not recently hired anyone who was old and lacking in enthusiasm.

The next step was to send a letter telling Morsbach what he must do to atone for his sins. He had to hire four people in their 40s, which you believe to be a non-young age bracket. (Does this mean a group like the Rolling Stones qualifies for Social Security?)

He must give them back pay, benefits and credit them with seniority. In addition, he has to post a sign effectively admitting his guilt and promising to never sin again.

Of course, your investigation didn't extend to checking out Morsbach's hiring policies. If it had, you would have found that he hires people who are young and not so young. Or that as many as half of his managers are black. That he has fired someone for making bigoted remarks.

And if you knew anything about Chicago, you would know that nobody can be a successful businessman in Hyde Park—the city's most liberal community—if he is even suspected of being a bigot. In Hyde Park, you can't even be bigoted against serial killers.

So it appears that one of Morsbach's managers may have talked to the Job Exchange. Maybe they called the manager, which the agency often does, or maybe he called them. You don't know, and Morsbach doesn't know.

And there may have been a conversation about the hiring of a waitress—maybe someone enthusiastic and young—which someone at the employment agency jotted on a card.

But no such ad was ever placed in a newspaper. The Job Exchange advertises only in The Reader, which has strict anti-discrimination rules. We checked and found nothing during that time frame about a waitress who is "young" or "bub."

Your entire case, in fact, is based on one little file card containing a few words. And Morsbach, your bureaucratic victim, knows nothing about the card, about who wrote it, or about how it came into existence.

But based on that card, you have threatened to take him to court unless he grovels before your bureaucratic might and agrees to accept the punishment you foist at him.

Actually, you have done something useful. The Morsbach case has caught the attention of Luis Outlarrez, a Chicago congressman, and he is going to look into your methods, which appear to be un-American. Or do you believe that the accused should not be able to see the evidence against him?

Also, several other small-business owners who have been bullied by the EEOC have called me with fright stories. My, you desk jockies do like playing the bogymen.

So I've changed my mind. Keep chasing Morsbach. Make fools of yourselves.

And if anyone out there has had similar dealings with these bureaucratic storm troopers, you can write me at 486 N. Michigan Ave., Chicago, 60611. Or phone 312-223-3111. Meanwhile, be careful about hiring someone

crimes. residents can them right surgery.

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**Mike Royko**

## Bureaucratic justice is hard to swallow

**T**he other day, a Senate committee was talking about universal health care and the need to assure that no one is discriminated against for reasons of age, sex, or any other reason. It is a fine concept, but it made my blood run cold.

That's because these decisions seem to wind up being made by federal bureaucrats. And they have a strange way of dispensing what they consider to be justice.

An example is a case I wrote about last week, that of a restaurant operator named Hans Morabach, who runs several restaurants in the Hyde Park area.

Morabach has been found guilty, in effect, of hiring practices that discriminate against older people.

He's been told what his punishment will be and what he must do to make amends. It includes a public confession of his guilt and a promise that he will never do it again.

All of this has happened without (1) Morabach having the faintest idea what the government is talking about and (2) without confronting his accuser or (3) getting to look at the evidence against him.

It is the kind of lopsided justice one might expect to find in China or the old Soviet Union, but not in this country.

And what makes this case even more weird is that it could probably be cleared up by reasonable people in a few minutes if only the Equal Employment Opportunity Commission would bring out the evidence.

Mr. Morabach has asked to see the evidence against him. You would think he's entitled to that courtesy. But the EEOC turned him down.

I've asked to see the evidence against him. Same results. The EEOC haughtily says such matters are confidential.

And now the office of U.S. Rep. Luis Guitierrez has asked to see the evidence.

You would think that a request from a member of the Congress of the United States would carry some weight with a federal agency.

But as an aide to Guitierrez says: "We've had dealings with the EEOC before, and let's just say that they're not helpful."

For those who missed the earlier column, here is what Morabach is accused of.

The EEOC says that an ad on his behalf was placed with an agency called the Job Exchange, seeking a "wtr" who is "young, bub."

This means Morabach discriminated against potential applicants who might not be young.

But it is not clear what "bub" means.

Morabach says he doesn't know, and the EEOC won't tell him.

Morabach says he doesn't know about "young, bub" because he never placed any such ad. Nor, he says, did any of his managers.

We talked to the Job Exchange, which seeks workers for many restaurants and food service agencies. A manager said he has no idea what the heck the EEOC is talking about.

"For one thing," he said, "the EEOC has not been in touch with us."

"For another, we don't run ads for specific businesses."

"And we wouldn't run an ad like that. We advertise only in the Chicago Reader, which has strict codes for appropriate wording. We can't even use waiter or waitress. We must say waitstaff. There's no way we ever used that wording."

"And 'bub'? I've heard of bub meaning 'bubbly.' A 'bub' in a dictionary is a young boy. So I don't know what this 'bub' is all about. We'd never place an ad for a 'bub,' whatever it is."

It makes you wonder what kind of investigators the EEOC has, when it apparently failed to talk to the Job Exchange, which they say ran the ad, and when it refuses to say where the ad appeared.

But in an arrogant, patronizing letter to Morabach, the EEOC told him that he must comply with their demands or he will be taken to court.

Their demands include his hiring four older people, giving them back pay, retroactive benefits, seniority, etc.

And he must post a sign in a prominent place in his restaurant, effectively admitting his guilt and promising not to discriminate ever again.

Which has steam squirting out of Morabach's ears, since he has always had a policy of hiring people regardless of their race, age, sex or any other consideration besides ability.

So he is going to tell the EEOC to shove it and take him to court.

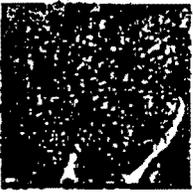
That means government lawyers will have something to do. A judge will be required to preside over the case. The court clerks and bailiffs will be put to work. Who knows how many thousands of dollars in tax money will be spent to receive the strange case of the "young, bub."

And it could probably be cleared up in minutes if the EEOC would open the file and say: "Here's what we have. What do you say?"

But as a spokesman for the EEOC says: "We have confidentiality rules."

Confidentiality. Yes. And back in the old days the hangman wore a mask for purposes of confidentiality. Some things don't change.

CHICAGO TRIBUNE 6/9/94



Mike Royko

## Restaurant owner getting a 'bub' rap

**H**ans Morsbach is a liberal. A Hyde Park and University of Chicago liberal, in fact, which is just about the most liberal kind of liberal that you can find in Chicago.

So he is confused and angry at finding himself accused by federal bureaucrats of being the kind of guy who discriminates.

Morsbach, 61, is well-known in the Hyde Park area, where he has owned restaurants since 1963.

Currently he operates the Medici on Harper, another Medici on 57th Street and Ida's Cafe and the Pub, both on the U. of C. campus.

Without false modesty, he says: "I think I'm a damn near model employer. I hire black people, white people, young people, older people. I have older people who have worked for me for 20 years.

"I have a history of promoting based on merit, and at this time nearly half my managers are black."

So what's the problem?

The problem sounds so weird that if I didn't know Morsbach, and hadn't seen the bureaucratic documents, I would think he made the story up as a hoax.

Here, believe it or not, is what has happened to him.

A few months ago, a man came into his Medici restaurant and asked the manager about the restaurant's hiring practices.

He was an investigator from the Chicago office of the Equal Employment Opportunity Commission.

"I paid no attention to it," Morsbach says. "I knew I had a good conscience, so I ignored it, and my manager gave the investigator some personnel records.

"Then in April I got a call and they say they have found a violation and I had to do certain things to get back into their good graces.

"They proposed a conciliation agreement, or whatever it's called, but they refused to tell me what it was I did. They just told me I must do this conciliation.

"Then I got this letter from them. And it told me what I did wrong, but I still don't understand it."

I have seen the bureaucrat's letter, and I can understand Morsbach's confusion. The letter sounds nuts.

Although I cannot release your file to you at this time, I can advise you that the finding is based in large part on a notice placed with

Chicago Tribune

6/3/94

because he is accused of advertising for a "wis," which we assume means a waitress, and that he wanted that waitress to be "young" and a "bub."

But Morsbach says: "I never advertised for a waitress. And I don't even know what 'young, bub' means. Bub? Why would I advertise for a bub if I don't know what a bub is?"

So Morsbach made what appears to be a reasonable suggestion: He asked the EEOC bureaucrats if they would show him the ad, tell him in what publication it appeared, who placed the ad, and he might be able to figure out what the heck is going on.

No, say the bureaucrats. He has two options: He can mediate a settlement, which means hiring four people who are over 40 years old, giving them back pay, full benefits, seniority, etc., etc.

And he must post a notice in his restaurant promising to never again discriminate against anyone because of their age.

If he doesn't do these things, then they will take him to court.

That's the way it now stands, with Morsbach not having the faintest idea how an ad about a "young, bub" was placed somewhere without his knowing it.

As he wrote to the EEOC, "I am utterly unconvinced that any of my employees discriminated against anybody. It is conceivable that an employment agency may have placed an ad in our behalf over which we had no control. The Medici never uses lingo such as 'wts' or 'young, bub.' I don't even know what 'bub' means; it is not listed in my dictionary.

"I should state that you have not shown me a copy of the ad nor established that anyone in my organization conceived it or approved it.

"Your suggestion that I should post notices promising to stop discriminating is an insult. The Medici has always enjoyed excellent rapport with its employees. Many have worked for me for decades; we have minority individuals in managerial positions, not because they are ethnically different, but because they deserve the position. I have fired a manager for making an anti-Semitic remark. Being a decent employer is as important to me as making money."

We called the EEOC and asked about the ad for someone who is "young, bub." A bureaucrat said they would get back to us. They didn't.

So Morsbach is now deprived of his most basic legal rights: facing his accuser and being shown the evidence against him.

I think some Chicago congressman should pick up a phone, call the EEOC and say: "Why are you paper-shufflers picking on this taxpaying businessman? And what the heck is a 'young, bub'?"

And if they can't explain, maybe they should start advertising for bub jobs themselves.

GAO

## Testimony

Subcommittee on Select Education and Civil Rights,  
Committee on Education and Labor, House of Representatives

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For Release on Delivery  
Expected at 10:00 a.m.  
EST  
Tuesday  
July 27, 1993

## EEOC

# An Overview

Statement of Linda G. Morra, Director, Education and  
Employment Issues, Human Resources Division



## SUMMARY

EEOC upholds a basic right of Americans: the right to equal employment opportunity regardless of race, color, religion, sex, national origin, age, or disability. How well EEOC performs this mission has been the subject of congressional hearings and a number of GAO reports. In these times of shrinking resources, government agencies are rethinking their roles and how they do business. EEOC may also need to change.

**HOW EEOC OPERATES.** EEOC carries out its mission through 50 field offices that receive, investigate, and resolve charges of employment discrimination in the private sector; it coordinates these activities in the public sector. In fiscal year 1993, EEOC's budget was \$220 million and it was authorized 2,793 full-time equivalent positions by the Congress.

**EEOC'S INCREASING RESPONSIBILITIES AND WORKLOAD.** EEOC's responsibilities and workload have generally been increasing over the years. In 1964, when EEOC was established, it was responsible for investigating employment discrimination charges relating to race, color, religion, sex, or national origin. Since that time, EEOC has become responsible for administering additional laws: (1) the Equal Pay Act of 1963, (2) the Age Discrimination in Employment Act of 1967, (3) the Equal Employment Act of 1972, (4) Section 501 of the Rehabilitation Act of 1973, (5) the Americans With Disabilities Act (ADA) of 1990, and (6) the Civil Rights Act of 1991.

**CONCERNS ABOUT EEOC'S OPERATIONS.** In addition to general concerns about EEOC's ability to fulfill its increased responsibilities and greater workload, GAO--as well as civil rights organizations--have raised specific concerns about EEOC's operations. These concerns include (1) the increasing time it takes EEOC to investigate and process charges, the increasing inventory of charges awaiting investigation, and the adequacy of investigations; (2) the high proportion of "no cause" findings, that is, determinations that the evidence does not sufficiently support the discrimination charge; (3) the limited number of litigation actions and systemic investigations initiated by EEOC; and (4) the usefulness of the data collected from some state and local Fair Employment Practices Agencies.

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to (1) present an overview of the Equal Employment Opportunity Commission (EEOC) and (2) discuss some concerns about EEOC operations that have been raised over the years.

EEOC upholds a basic right of Americans: the right to equal employment opportunity regardless of race, color, religion, sex, national origin, age, or disability. How well EEOC performs this mission has been the subject of congressional hearings and several GAO reports (see attachment I). Within the next few months, we will be reporting on EEOC's enforcement of the Age Discrimination in Employment Act to the Chairman of the Senate Special Committee on Aging.

Mr. Chairman, EEOC's world has changed drastically since the Commission was established by the Civil Rights Act of 1964. A key question arises: With substantial increases in staff unlikely, does EEOC have the processes in place that will allow it to respond effectively to the demands of its new environment--increasing responsibility and workload? In these times of shrinking resources, government agencies are rethinking their roles and how they do business. EEOC may also need to change.

Let me proceed by focusing on (1) a brief description of how EEOC operates, (2) its increasing responsibilities and workload, and (3) concerns about its operations.

### BACKGROUND

EEOC carries out its mission through 50 field offices that receive, investigate, and resolve charges of employment discrimination in the private sector, and it coordinates these activities in the public sector. In fiscal year 1993, EEOC's appropriation of \$220 million budgeted for 2,793 full-time equivalent positions.

EEOC is one of several federal agencies responsible for enforcing equal employment opportunity laws and regulations. Other agencies include, for example,

- the Department of Justice, which is authorized to file suit in federal district court against state and local government employers charged with discrimination, but only after EEOC has processed the case and failed in conciliation efforts;
- the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which enforces laws against discrimination by federal government contractors and subcontractors; and
- the Merit Systems Protection Board, which serves as an avenue of appeal for federal employees with employment discrimination complaints related to various personnel actions.

By law, a five-member commission heads EEOC. The President appoints the members, with the consent of the Senate, for rotating 5-year terms. No more than three members can be in the same political party. The President designates one member to serve as Chairman and another as Vice Chairman. As of July 1993, EEOC lacked one commissioner, and the President had not appointed a Chairman.

About 90-percent-of-EEOC's-annual-budget is used for enforcement, mainly in the private sector. By law, each charge, except those involving age discrimination, is to be "fully investigated." By policy, EEOC fully investigates age discrimination charges in the same way. In effect, EEOC emphasizes that all charges should receive equal treatment. At a minimum, EEOC's full investigation procedures require EEOC staff to obtain pertinent evidence, interview relevant witnesses, and verify the accuracy and completeness of evidence obtained. The remaining portion of EEOC's budget is used to develop and provide the policy and program directives EEOC needs

to carry out its mission, to help employers in complying with the laws, and to help employees understand their rights.

EEOC has work-sharing agreements with state and local Fair Employment Practices Agencies (FEPAs). Under these agreements, EEOC agrees to pay for the processing of employment discrimination charges filed with, or deferred to, the FEPAs. For fiscal year 1992, the FEPAs conducted about 43 percent of the investigations of discrimination charges. EEOC monitors the FEPAs through reviews of individual investigation results to ensure that they meet EEOC's standards.

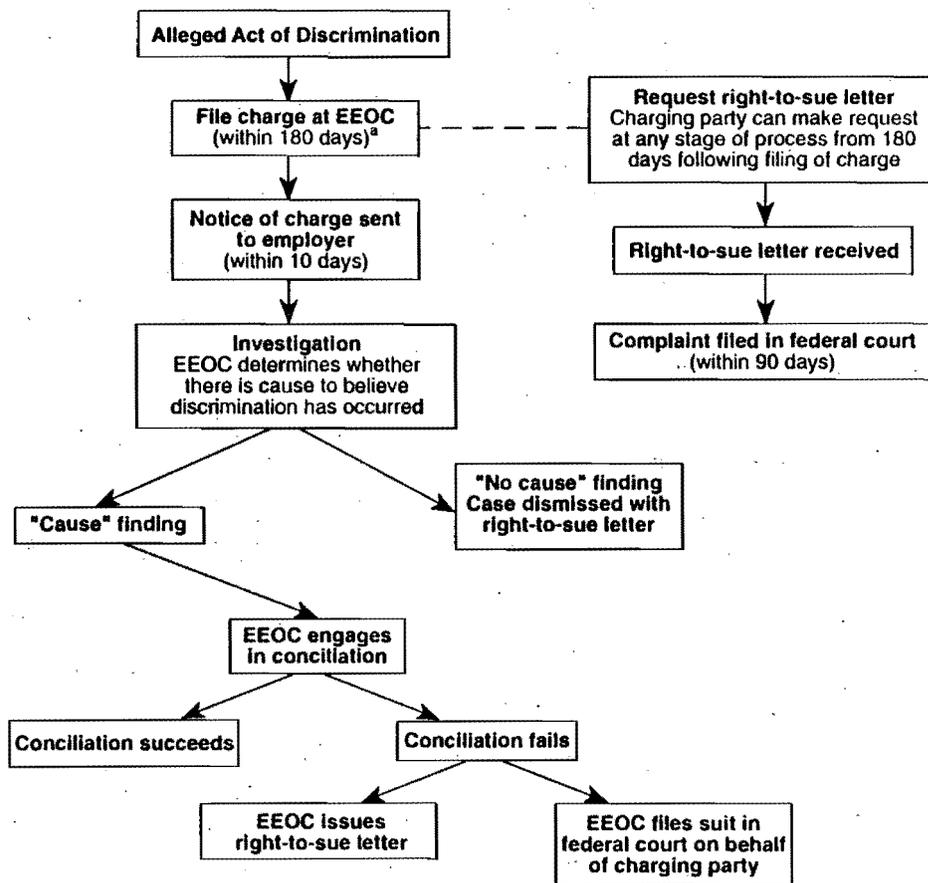
Most of EEOC's efforts to combat employment discrimination take place as a result of discrimination charges being filed. EEOC initiates some efforts by educating employers and employees through seminars; providing technical assistance to employers, employees, and state agencies; and coordinating federal agency efforts. On behalf of groups, EEOC also initiates investigations of possible discriminatory practices. Charges related to group discriminatory practices are called "class actions" when individuals in the private sector initiate them and "systemic" when EEOC initiates them.

In addition, EEOC collects and maintains minority profile data from private employers with (1) 100 or more employees and (2) 50 or more employees, if the employers are awarded federal contracts totaling \$50,000 or more. It shares this information with other federal agencies working on discrimination issues, such as the OFCCP in the Department of Labor. EEOC uses the profile data to monitor discrimination patterns by employers and to help develop the cases in systemic investigations.

#### **What Happens When a Charge Is Filed**

As shown in the flow chart on the next page (see fig. 1), EEOC's procedures begin with the investigation of a discrimination charge that an individual has filed, at no

# GAO EEOC Procedures in Private Sector Cases



<sup>a</sup>In jurisdictions where there are state or local laws prohibiting employment discrimination, this period will be 300 days.

Source: This figure is based on an EEOC chart that describes the procedures for processing charges brought under Title VII of the Civil Rights Act. These procedures generally apply to the processing of charges brought under the other statutes for which EEOC has responsibility.

cost, with either EEOC or a FEPA. The alleged discrimination may have occurred while the individual--that is, the charging party (I'll call her Ms. Smith)--was applying for a job or while she was employed. Ms. Smith needs only to allege that some act of discrimination has occurred. First, Ms. Smith files the charge--specifying the act, date of alleged discrimination, and the law that was violated. EEOC staff interview her to obtain as much information as possible about the alleged discriminatory act. EEOC notifies the employer about Ms. Smith's charge and requests relevant information from the employer. EEOC also interviews any witnesses who have direct knowledge of the alleged discriminatory act. If the evidence shows there is no reasonable cause to believe that discrimination occurred, Ms. Smith and the employer are notified. Nevertheless, EEOC gives Ms. Smith a right-to-sue letter--a document that allows her to take private court action if she is dissatisfied with EEOC's resolution of the determination charge. (Ms. Smith may not take her case to court without the right-to-sue letter.)

If the evidence shows that Ms. Smith has reasonable cause to believe that discrimination occurred, EEOC conciliates, that is, attempts to persuade the employer to voluntarily eliminate and remedy the discrimination. Remedies may include Ms. Smith's placement in the job she previously sought, reinstatement to the job she had lost, back pay, restoration of lost benefits, or damages to compensate for actual monetary loss.

EEOC would consider filing a lawsuit in federal district court on Ms. Smith's behalf if conciliation fails. Because of resource limitations, EEOC cannot litigate all such cases. In place of EEOC litigation, Ms. Smith may initiate private court action.

#### **EEOC'S INCREASING RESPONSIBILITIES AND WORKLOAD**

EEOC's responsibilities and workload have generally been increasing over the years. From 1989 to 1992, the number of charges received to process increased 26 percent,

while staffing decreased 6 percent. EEOC anticipates an additional increase of about 18 percent in charges received in fiscal year 1993 over fiscal year 1992, with no additional increase in staffing (see fig. 2).

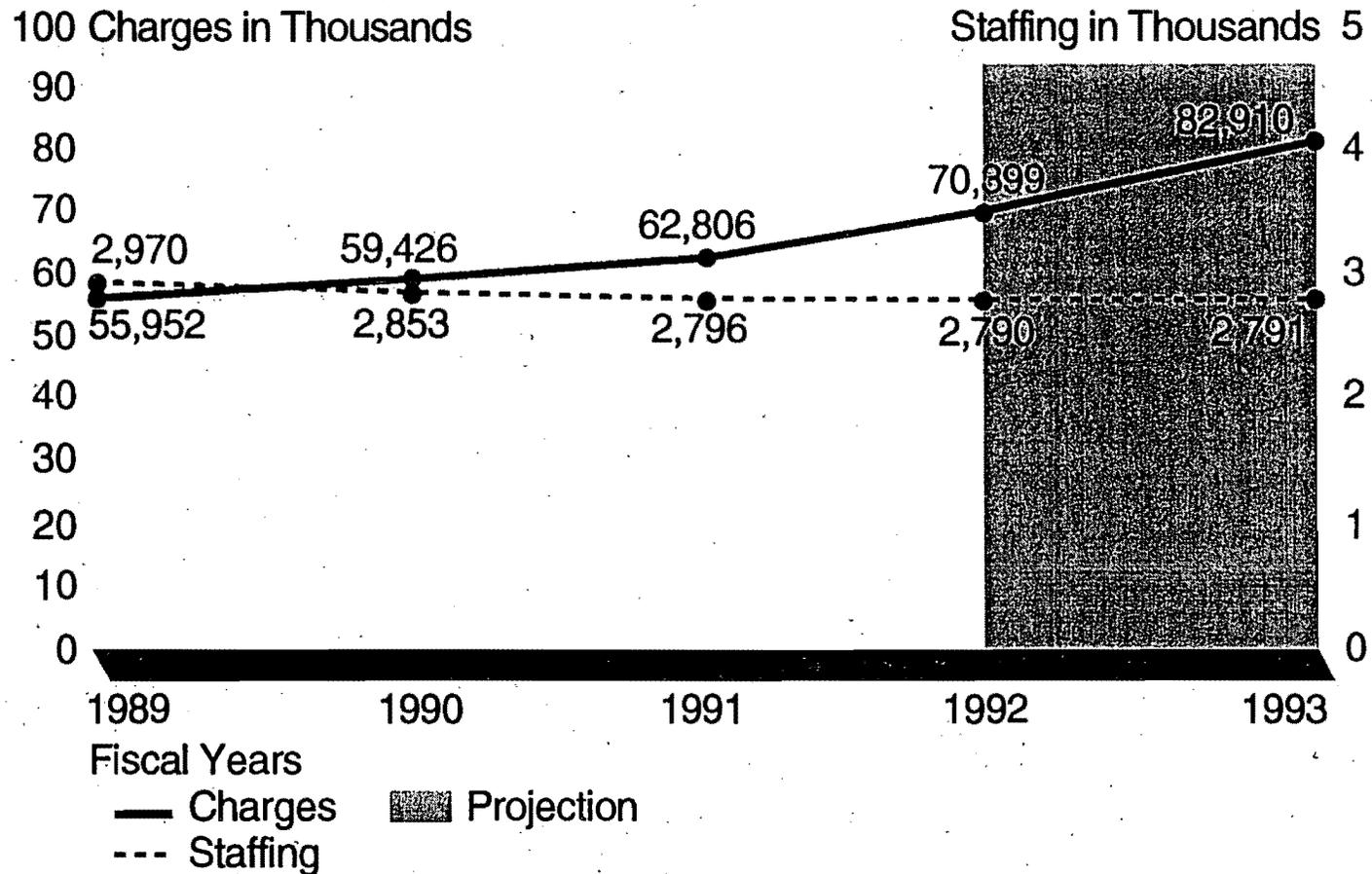
In 1964, EEOC was responsible for investigating employment discrimination charges relating to race, color, religion, sex, or national origin. In 1978 and 1979, EEOC assumed responsibility for administering additional laws: (1) the Equal Pay Act of 1963, which prohibits payment of different wages to men and women doing the same work; (2) the Age Discrimination in Employment Act of 1967, which prohibits employment discrimination against workers aged 40 and over; (3) the Equal Employment Act of 1972, which gave EEOC the right to file suit in federal district court to achieve compliance with Title VII; and (4) Section 501 of the Rehabilitation Act of 1973, which bars federal agencies from discrimination on the basis of disability. Before EEOC assumed these additional responsibilities, these laws were administered by the Department of Labor. Also in 1978, Executive Order 12067 gave EEOC the responsibility to provide leadership for, and coordination among, the other federal agencies that enforce equal employment opportunity.

More recently, EEOC became responsible for enforcing the Americans With Disabilities Act (ADA) of 1990. This law, covering some 43 million Americans with one or more physical or mental disabilities, provides a clear and comprehensive mandate for eliminating employment discrimination against those with disabilities. Finally, EEOC's responsibility was increased further with the passage of the Civil Rights Act of 1991; a key provision of this law allows employees who think they have been discriminated against to file for compensatory and punitive damages.

The passage of ADA and the Civil Rights Act of 1991 is adding to EEOC's workload in two ways: (1) more charges are being filed and (2) because they are often complex, these charges take longer to process.

Figure 2

# GAO Charges EEOC Received to Process Increasing and Staff Decreasing



Note: Fiscal year charges received are projected, based on second-quarter fiscal year 1993 data for charges received.

To meet this increased workload, EEOC has argued that it needs more staff. In a 1988 report, we raised concerns over how EEOC determines staffing needs and recommended that the Chairman conduct a study to determine (1) the number of charges an individual investigator should be able to "fully investigate" annually and (2) the resources EEOC would need to fully investigate all charges filed.<sup>1</sup> This information would provide a better basis for EEOC to determine its staffing needs and develop a budget to carry out its investigative work. It would also provide a better basis for establishing realistic goals and expectations for staff in EEOC district offices. EEOC disagreed with our assessment of the need for such a study and none has been done.

### CONCERNS ABOUT EEOC OPERATIONS

In addition to our general concerns about EEOC's ability to fulfill its increased responsibilities and greater workload, we--as well as civil rights organizations-- have raised specific concerns about EEOC's operations. These concerns include (1) the increasing time it takes EEOC to investigate and process charges, the increasing inventory of charges awaiting investigation, and the adequacy of investigations; (2) the high proportion of "no cause" findings, that is, determinations that the evidence does not sufficiently support the discrimination charge; (3) the limited number of litigation actions and systemic investigations initiated by EEOC; and (4) the usefulness of the data collected and reported by some FEPAs.

Because about 90 percent of EEOC's efforts are in the private sector, again my statement will focus on this sector.

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<sup>1</sup>Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11, Oct. 11, 1988).

## Increasing Time to Investigate Charges, Increasing Inventory, and Adequacy of Investigation

The average time for completing an EEOC investigation of a charge in the private sector increased from 254 days in fiscal year 1991 to 292 days in fiscal year 1992 (a 15 percent increase). EEOC measures average time from the date a charge is filed until the date it apprises the charging party and the employer of the results of the investigation. This increase occurred even though the average number of completed cases per investigator also increased--from 88.5 resolutions in fiscal year 1991 to 92.8 in fiscal year 1992.

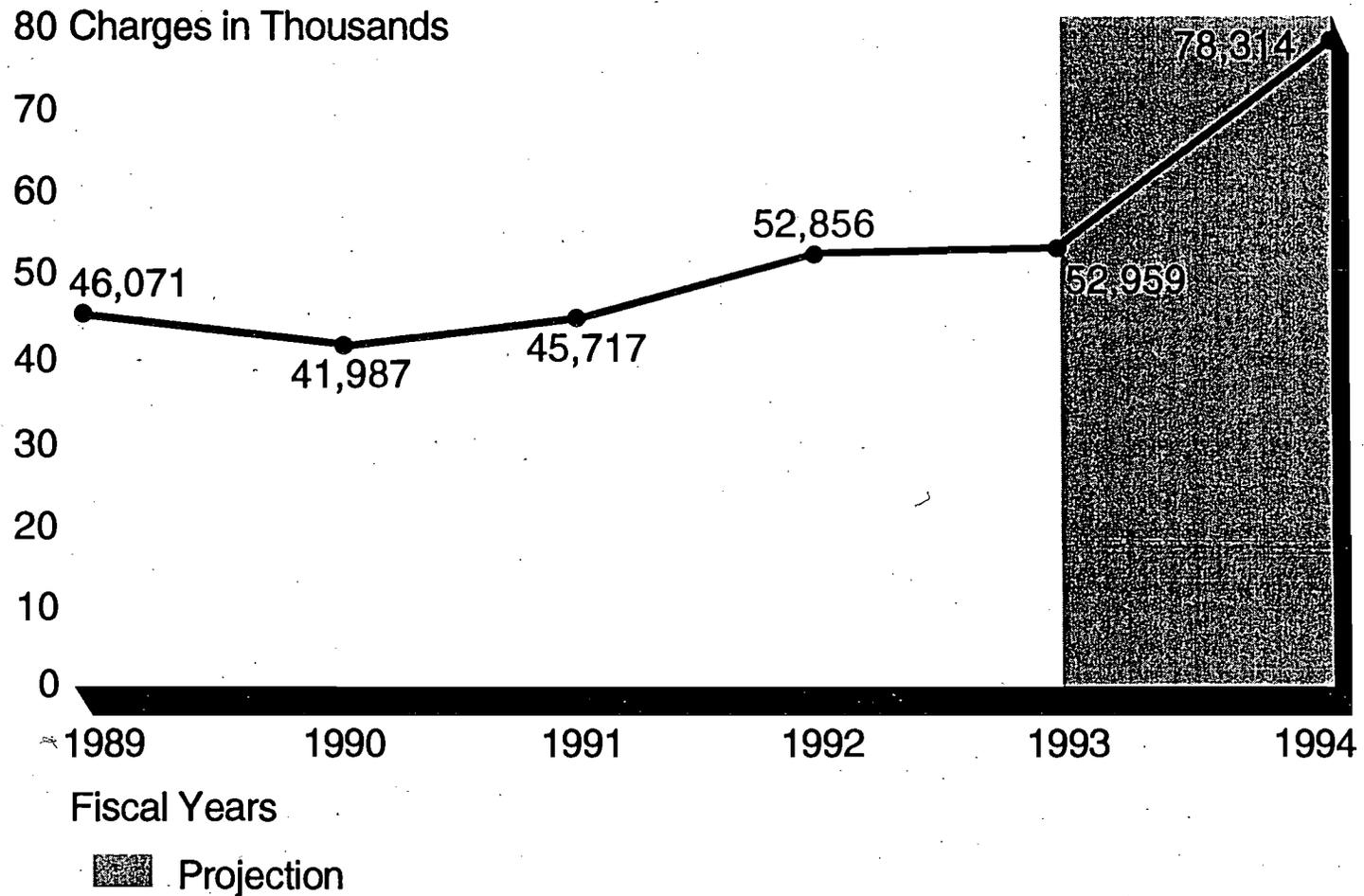
EEOC's inventory of cases carried over from previous years also continues to increase and age. From fiscal year 1989 through fiscal year 1992, the inventory rose nearly 15 percent (see fig. 3).

During that period, the average age of cases in the inventory increased from 7.9 months to 10.4 months. EEOC estimates that by fiscal year 1994, the average age of cases in the inventory will more than double, to 21.3 months (see fig. 4).

The full investigation approach, as described in EEOC's manual of compliance standards, requires EEOC to investigate all charges and give all the same degree of attention. In 1988, we reported that our review of a sample of cases, closed as "no cause" determinations by EEOC district offices and state agency FEPAs, showed that from 40 to more than 80 percent of the charges were not fully investigated. Deficiencies included failing to verify critical evidence, interview relevant witnesses, and compare charging parties with similarly situated employees. EEOC's increasing workload, the resultant pressures experienced by EEOC investigators to complete investigations quickly, and the possible effects of both on the adequacy of investigations have been discussed at congressional hearings in recent years.

Figure 3

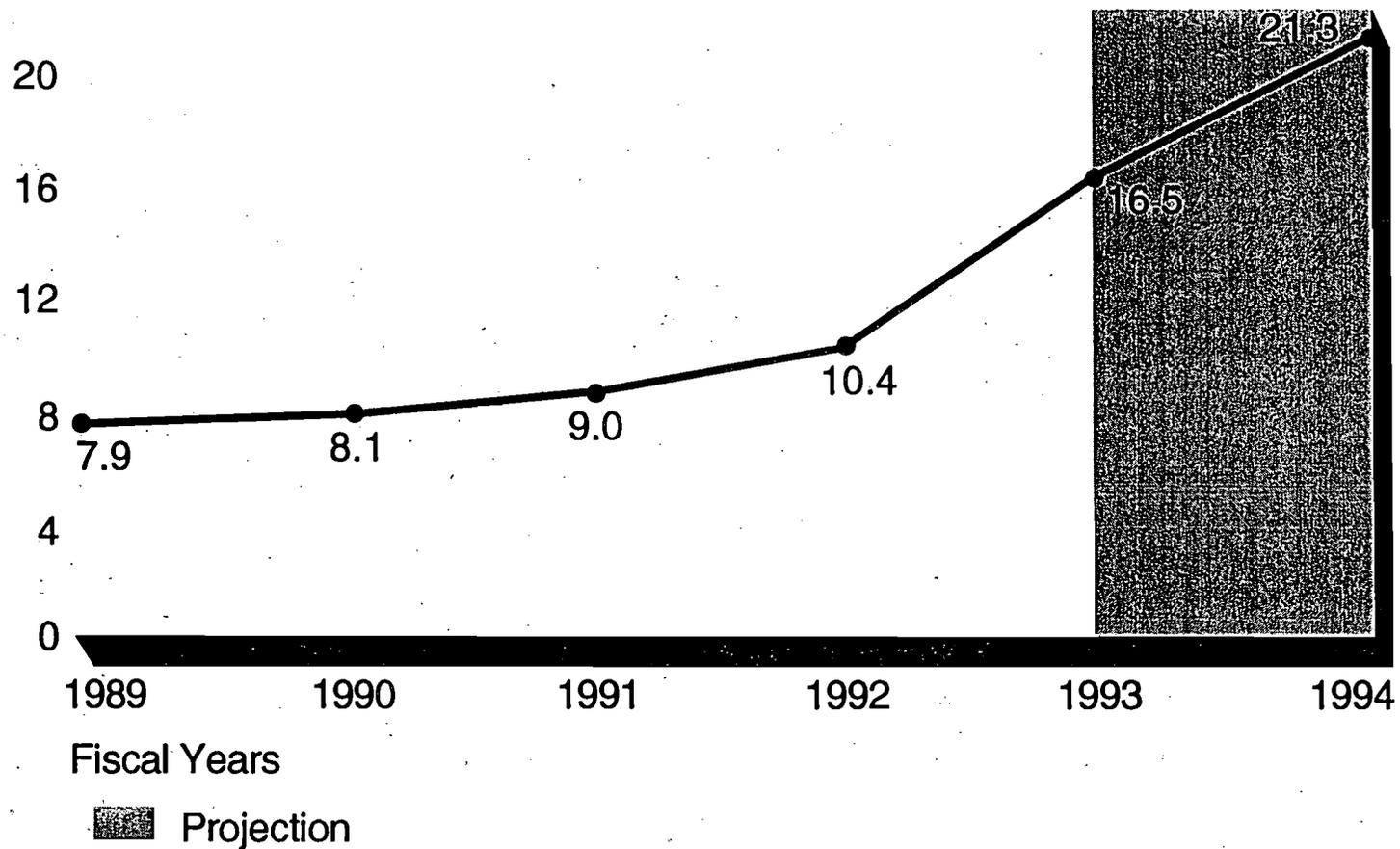
# GAO Charges in EEOC Inventory Increasing



10

# GAO Average Age of Charges in EEOC Inventory Increasing

24 Charges in Months



### High Rate of "No Cause" Findings

In fiscal year 1992, EEOC processed more than 68,000 discrimination charges. Only 2.4 percent resulted in "reasonable cause" findings. Of the remaining charges, 6.4 percent were settled through conciliation and 6.8 percent were settled through withdrawal and included monetary benefits. An additional 23.4 percent of the charges was closed administratively for various reasons, such as the charges were withdrawn or the charging party did not cooperate with the investigation. About 61 percent were closed with no reasonable cause since EEOC determined the evidence did not support the discrimination charge.

EEOC's rate of "no cause" determinations has been high for many years. We noted, in our 1988 report, that several investigators said that some "no cause" determinations were cases closed prematurely to avoid investigators' receiving a lower performance rating for failing to meet deadlines for case closures. In recent years, two legal service organizations have voiced similar concerns over the possible unwanted effect of this rating system on the number of "no cause" determinations.

### EEOC Initiates Few Litigation Actions and Systemic Investigations

EEOC has been criticized for failing to litigate more cases and initiate more systemic investigations (which are, as mentioned earlier, like class actions, but EEOC-initiated). Arguments for more EEOC litigation stem from the belief that court decisions have a far-reaching effect on eliminating discrimination in the workplace and, in a sense, are more cost-effective than individual investigations. However, of the total charges received each year, EEOC litigates less than 1 percent on behalf of charging parties. In fiscal year 1992, EEOC litigated 447 charges. EEOC has no plans to increase either staff in the Office of General Counsel or litigation efforts, an EEOC official said in July 1993.

In fiscal year 1992, special units in EEOC initiated 50 systemic investigations. EEOC officials say that they cannot initiate more systemic investigations because they are labor intensive. The officials also believe that if more EEOC staff were assigned to systemic investigations, there would be less staff to work on the individual charges that EEOC must, by law, investigate. A contrary view holds that if EEOC initiated more systemic investigations and assigned sufficient staff to them, a possible result might be fewer individual charges brought to EEOC.

#### Usefulness of Data Reported by Some FEPAs Is Questionable

Although EEOC uses the data from its information system to track the age of discrimination charges, answer questions on particular cases, and produce internal and external reports, the usefulness of data collected and reported by some FEPAs is questionable.

We cited several data collection and reporting problems at EEOC district offices and FEPAs in our 1989 report, and recommended that EEOC address these problems.<sup>2</sup> Since that report, EEOC has improved the accuracy and completeness of the data collection activities in its field offices. EEOC officials believe this part of the information system is now operating relatively well. According to EEOC, the FEPAs' cooperation in collecting and reporting data, however, varies from excellent to poor, and the quality and completeness of the data submitted to EEOC also vary. As a result, the usefulness of the data submitted by some FEPAs is questionable. EEOC is continuing to work with the FEPAs to improve the data they collect and provide.

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<sup>2</sup>ADP Systems: EEOC's Charge Data System Contains Errors, but System Satisfies Users (GAO/HRD-90-5, Dec. 12, 1989).

Given the tension between EEOC's increasing responsibilities and workload and the concerns about EEOC's operations, the Subcommittee is holding this hearing at a most appropriate time. We hope that some of the issues raised today will help the Subcommittee in planning for future EEOC hearings and will help to make EEOC more efficient and effective.

Mr. Chairman, that concludes my prepared statement. I will be happy to answer any questions you or other members of the Subcommittee may have.

RELATED GAO PRODUCTS

Federal Employment: Sexual Harassment at the Department of Veterans Affairs  
(GAO/T-GGD-93-12, Mar. 30, 1993).

Affirmative Employment: Assessing Progress of EEO Groups in Key Federal Jobs Can Be Improved (GAO/GGD-93-65, Mar. 8, 1993).

Information on EEO Discrimination Complaints (GAO/GGD-93-6RS, Dec. 31, 1992).

Age Employment Discrimination: EEOC's Investigation of Charges Under 1967 Law  
(GAO/HRD-92-82, Sept. 4, 1992).

Federal Workforce: Continuing Need for Federal Affirmative Employment  
(GAO/GGD-92-27BR, Nov. 27, 1991).

Federal Affirmative Employment: Status of Women and Minority Representation in the Federal Workforce (GAO/T-GGD-92-2, Oct. 23, 1991).

Federal Affirmative Action: Better EEOC Guidance and Agency Analysis of Underrepresentation Needed (GAO/T-GGD-91-32, May 16, 1991).

Federal Affirmative Action: Better EEOC Guidance and Agency Analysis of Underrepresentation Needed (GAO/GGD-91-86, May 10, 1991).

EEO at Justice: Progress Made but Underrepresentation Remains Widespread  
(GAO/GGD-91-8, Oct. 2, 1990).

ADP Systems: EEOC's Charge Data System Contains Errors but System Satisfies Users (GAO/IMTEC-90-5, Dec. 12, 1989).

Equal Employment Opportunity: Women and Minority Aerospace Managers and Professionals, 1979-86 (GAO/HRD-90-16, Oct. 26, 1989).

Discrimination Complaints: Payments to Employees by Federal Agencies and the Judgement Fund (GAO/HRD-89-141, Sept. 25, 1989).

Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11, Oct. 11, 1988).

Equal Employment Opportunity Commission's Charge Data System (GAO/T-IMTEC-88-5, June 24, 1988).

Equal Employment Opportunity: EEOC Birmingham Office Closed Discrimination Charges Without Full Investigation (GAO/HRD-87-81, July 15, 1987).

Equal Opportunity: Information on the Atlanta and Seattle EEOC District Offices (GAO/HRD-86-63FS, Feb. 21, 1986).

Survey of Appeal and Grievance Systems Available to Federal Employees (GAO/GGD-84-17, Oct. 20, 1983).

Problems Persist in the EEO Complaint Processing System for Federal Employees (GAO/FPCD-83-21, Apr. 7, 1983).

Inquiry Into Alleged Operating and Management Problems in EEOC's Office of Review and Appeals (GAO/FPCD-82-68, Aug. 25, 1982).

Age Discrimination and Other Equal Employment Opportunity Issues in the Federal Work Force (GAO/FPCD-82-6, Nov. 20, 1981).

Implementation: The Missing Link in Planning Reorganizations (GAO/GGD-81-57, Mar. 20, 1981).

Equal Employment Opportunity Commission Needs to Improve Its Administrative Activities (GAO/HRD-81-74, Apr. 21, 1981).

Further Improvements Needed in EEOC Enforcement Activities (GAO/HRD-81-29, Apr. 9, 1981).

Achieving Representation of Minorities and Women in the Federal Work Force (GAO/FPCD-81-5, Dec. 3, 1980).

Development of an Equal Employment Opportunity Management Information System (GAO/FPCD-80-39, Mar. 4, 1980).



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

June 23, 1994

MEMORANDUM

To: Claire Gonzales  
Director  
Office of Communications and Legislative Affairs

From: Elizabeth M. Thornton *EMT*  
Acting Legal Counsel

Subj: Request for an Opinion

You have asked this office to advise you whether Commission personnel can be used to provide technical assistance to the Executive Office of the President as they prepare nominees for the confirmation process. You have indicated that the time needed would be limited and not require a personnel action as a transfer or a detail. We are not aware of any law, regulation or decision that would prohibit the Commission from honoring that request. We have reviewed the Comptroller General's Principles of Federal Appropriations Law and other analogous provisions. As a result, it is our opinion that Commission personnel can be used for limited periods of time to explain what work is being done by the Commission at this time and to identify issues of current interest to employers, employees, those representing their interests and Members of Congress.

Please feel free to contact me or Nicholas M. Inzeo if you have any questions about this matter.

Info re: President Clinton's  
civil rights accomplishments & plans

TO: Linda Fay Williams Congressional Black  
FAX 202 547-3806 Caucus Foundation

- Dany!
- Public Liaison
- Kunita

NOV 29 1994

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

FROM: Deval L. Patrick  
Assistant Attorney General  
Civil Rights Division

SUBJECT: Impact of Majority-Minority Congressional Districts on  
1994 Election

The notion that the new majority-minority congressional districts, as opposed to a national political trend, are to "blame" for Democratic losses in the 1994 election is gaining some currency in the media. I thought you would want to know that this notion falters upon close inspection.

In the 1990 round of congressional redistrictings, the Republican National Committee supported drawing majority-minority districts wherever possible on the theory that that would reduce the minority (and Democratic) population in the surrounding districts. That, coupled with the recent Republican success, is the basis for commentators leaping to the conclusion that the majority-minority districts fueled the Republican success.

In our view, this issue is an empirical question that requires close examination of the local political equation, both before and after the majority-minority district is drawn. The results of the 1994 elections cannot be viewed independently of the trend to vote Republican by white voters in the South, which has been growing since the 1964 presidential election. Nor can the Republican voting pattern in the South be separated from the nationwide pattern.

First, the premise that Democrats will succeed in the South in districts with substantial black minorities appears to be breaking down. South Carolina and Mississippi, states that are roughly one-third black in population, recently have been consistently electing Republicans to statewide office. It is not clear that congressional districts with similar racial percentages would produce different results. For that reason, one can argue that the majority-minority congressional districts prevented a complete disaster for Democrats by maintaining a

substantial number of solidly Democratic seats. (None of the Democratic incumbents from majority-minority districts in the South were defeated.)

Second, in the nine states in which new majority-black congressional districts were drawn following the 1990 Census,<sup>1/</sup> the Republicans picked up 13 of 68 Democratic seats for a 19% gain. In the states where no new majority black districts were created, Republicans gained 40 of 188 Democratic seats, for a 21% gain. Thus, Democrats did not do worse in the states with new majority-black districts than they did in the remaining states. Moreover, many of the Republican gains are not attributable to the new majority-black seats. For example, the Republican gain of two seats in Texas came in areas not affected by the new majority-black districts. In Virginia, the seat that went Republican is in Northern Virginia, nowhere near the new black-majority district.

Third, even if the Democrats had retained every one of their House seats in the nine states that had new majority black districts -- in complete opposition to the nationwide Republican surge -- the Republicans still would have gained control of the House in 1994. History bears out the political neutrality of these districts. Remember that, with one exception, congressional district boundaries did not change between 1992, when Democrats gained a 41-seat majority, and 1994, when Republicans gained a 15-seat majority. The one exception is Louisiana where the change in district boundaries made no difference in the Democrats' fortunes.

In this regard, how a majority-minority district is drawn may have just as much bearing on partisan outcomes as whether a majority-minority district is drawn. For example, in 1990 the Department prevailed in its claim that the redistricting plan for the Los Angeles County Board of Supervisors diluted Hispanic voting strength. The challenged plan, with no majority-Hispanic district, had produced a 3-2 Republican majority for a decade. When elections were held under the remedial plan, with a majority-Hispanic district, Democrats gained control of the board and have retained that control since then.

The main point, however, is that the Voting Rights Act requires that black and Hispanic voters have an equal opportunity to elect candidates of their choice, regardless of which political party stands to benefit. In the context of racially

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<sup>1/</sup> The states are Alabama, Florida, Georgia, Louisiana, Maryland, North Carolina, South Carolina, Texas and Virginia. Notably, the 1994 election produced no partisan change at all in the congressional delegations from Alabama, Louisiana or Maryland.

polarized voting, majority-minority districts are necessary to provide that opportunity. The 1994 election provides no occasion for the Administration to depart from this basic principle of political fairness.

cc: Carol D. Rasco (FYI)  
Assistant to the President

these considerations, the dissent concluded that, while interns/residents may be characterized as primarily students, that characterization does not deprive them of status as employees under the NLRA.

The Commission agrees with both the majority and the dissent in *Cedars-Sinai* that status as a student and status as an employee are not necessarily mutually exclusive.<sup>12</sup> However, the Commission find the reasoning of the dissenting opinion in that case to be more persuasive than that of the majority opinion and concurs with the dissent that the question to be decided is whether a student, here an intern or a resident, is also an employee with rights under the law.

The evidence presented in this case supports a finding that the Charging Party, a student pursuing professional advancement in a graduate medical educational program, was also an employee of the Respondent during her internship in the Respondent's orthopedic surgery program.<sup>13</sup> As set forth above and, similarly, as discussed in detail in the *Cedars-Sinai* case, the evidence shows that interns and residents perform numerous valuable services for which they receive both monetary compensation and traditional employee benefits. Significantly, these services are performed under either

direct or indirect supervision, with the employer's retaining the right to control and direct the work performed and the manner of performance. These considerations establish the existence of an employment relationship in these circumstances.<sup>14</sup>

While the Commission recognizes that the relationship between a medical intern or resident and the organization that operates the internship/residency program may well be unique, since the program partakes of both education and employment, the work performed by interns and residents in a hospital or other clinical setting is not an incidental feature of a scholastic program.<sup>15</sup> Rather, it is an intergral and mandatory component of the graduate medical training program. With respect to the performance of this work, the Commission finds that the relationship between the parties is an employment relationship within the coverage of Title VII.<sup>16</sup>

Based on the foregoing, the Commission concludes that it has jurisdiction over this charge. Accordingly, the Commission returns the charge to the district office in which it was filed for a determination on the merits of the Charging party's allegations of sex discrimination and for final processing.

#### ¶ 6871] TIME AFTER BIAS INCIDENT COUNTS IN DETERMINING TITLE VII COVERAGE

U.S. Equal Employment Opportunity Commission, Decision No. 88-2, September 6, 1988.

#### Title VII—Civil Rights Act of 1964

**Coverage—Title VII—Twenty-Week Requirement.**—The remainder of the calendar year after a respondent's alleged unlawful discharge of a worker on January 19, 1988, could be counted in determining whether the respondent was a covered "employer" with 15 or more employees during 20 or more weeks "in the current or preceding calendar year." An

<sup>12</sup> See Commission Decision No. 75-204 (unpublished) (student teacher was "employed" by the school district even though she was not compensated by the school district but received academic credit for her services). *Cf. Marshall v. Marist College*, 14 Empl. Prac. Dec. (CCH) ¶ 7735 (S.D.N.Y. 1977) (college students who were paid a stipend for functioning as resident advisors and coordinators had the status of employees under the Fair Labor Standard Act, as amended).

<sup>13</sup> *Cf. Amro v. St. Luke's Hospital of Bethlehem*, 39 Empl. Prac. Dec. (CCH) ¶ 36,079 (E.D. Pa. 1986), discussed *supra* note 8.

<sup>14</sup> *Cf. Commission's "Policy Statement on Title VII Coverage of Independent Contractors and In-*

*dependent Businesses*," No. N-915, date 9/4/87 [to be incorporated in EEOC Compl. Man. § 605, Jurisdiction].

<sup>15</sup> *Cf. Pollack v. Rice University*, 29 Empl. Prac. Dec. (CCH) ¶ 32,711 (S.D. Tex. 1982), *supra* note 8.

<sup>16</sup> Although not necessary for purposes of reaching a determination with respect to the present charge, the Commission notes that its position in this case would be applicable to a similar charge/complaint brought under the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.* (1982), or the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(D) (1982).

¶ 6871

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employer is covered by the Act if it employs 15 or more people for at least 20 weeks during the *entire* current or preceding calendar year. However, because sufficient data was lacking for a determination of whether the respondent had 15 or more employees for 20 or more weeks during 1988, the charge was remanded for further processing.

Back reference.—¶ 306.40.

**[Full Text of EEOC Decision]**

*Issue*

The Charging Party alleges that he was subjected to racial harassment and retaliation, and that he was discharged because of his race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e, *et seq.* The Respondent argues that there is no jurisdiction under Title VII because its business had not been in operation twenty weeks during the year preceding the discharge, nor had it been in operation twenty weeks during the current year, as of the date on which the Charging Party was terminated. Since Title VII only covers employers who have had fifteen or more employees during twenty or more weeks in the current or preceding calendar year, the Respondent argues that it could not be covered as an "employer" under § 701(b) of Title VII.

*Holding*

The Respondent is an "employer" within the meaning of Title VII, if it has fifteen or more employees for twenty or more weeks during the entire current year.

*Discussion*

Respondent opened its commercial car wash and auto care business October 9, 1987. One week later, the Charging Party began his employment with the Respondent. The Charging Party alleges that during the course of his employment he was subjected to racial harassment. He also alleges that the Respondent retaliated against him for filing a charge against the Respondent's friend, the owner of another car care business. On January 19, 1988, the Charging Party was discharged, allegedly because of his race. One day later he filed a charge with the Commission, alleging race discrimination and retaliation.

The Respondent argues that he is not an "employer" within the meaning of Title VII. Section 701(b) of Title VII provides that an "employer" must maintain "fifteen or more employees for each working day in each of twenty or more calendar weeks in the cur-

rent or preceding calendar year."<sup>1</sup> Since the Respondent's first day of operation was in October 1987, he could not possibly have had fifteen employees for twenty weeks during that calendar year. He also could not have had fifteen employees for twenty weeks in 1988 as of the date of discharge, since the discharge occurred only nineteen days into the year. The issue to be resolved is whether we may look to the remainder of the calendar year after the alleged act of discrimination took place in determining whether the Respondent meets the jurisdictional requirement of Section 701(b).

It is the Commission's position that an employer is covered by Title VII if it maintains fifteen or more employees for twenty or more weeks during the *entire* current or preceding calendar year. A contrary result would allow employers who did not meet the statutory minimum in the preceding year to discriminate freely during the current year until twenty weeks had passed during which they had fifteen or more employees. Considering the plain language of the statute, this is not a result that Congress intended. Congress, in drafting Section 701(b), did not limit the phrase "current . . . calendar year" to cover only the portion of the current year that preceded the discrimination, and there is no indication in the legislative history that Congress intended that result.

The Commission's position is in accord with the case law on this issue. In *Slack v. Havens*, 522 F.2d 1091, 10 EPD ¶ 10,343 (9th Cir. 1975), the employer contended that he was not covered by Title VII because he had employed fifty workers (the statutory minimum for the relevant year, 1968) for only eleven weeks during the year preceding the alleged discrimination, and for only four weeks prior to the alleged discrimination during the year in which it occurred. Counting beyond the date of the alleged discrimination, the employer did have the requisite number of employees for at least twenty weeks during that year. However, he argued that Title VII requires a "critical mass" of the requisite number of employees for a total of twenty weeks during the prior calen-

<sup>1</sup> Full-time and part-time employees are counted together. See EEOC Compl. Man., Volume II § 605, Jurisdiction, p. 605-21.

dar year or during only those months of the current year preceding the incident at issue. Such a reading, he asserted, was required to give employers notice of their potential liability before a discriminatory incident occurred, and to prevent after-the-fact removal of jurisdiction by an employer's reduction of his work force to fall outside the statutory limit. The Ninth Circuit found these arguments "unpersuasive." *Id.* at 1093. It stated:

Employers have had notice of the requirements of the Civil Rights Act since the time of its passage. Whether they could attempt to circumvent its provisions by manipulating the number of persons they employ is irrelevant to the problem of statutory construction facing us. The language of the statute is plain: Congress clearly spoke in terms of "calendar years" . . . We can therefore only conclude that Congress meant what it said and that Havens is indeed an "employer" within the terms of the statute . . . *Id.*<sup>2</sup>

In *EEOC v. Metropolitan Atlanta Girls' Club, Inc.*, 416 F. Supp. 1006, 1011-12, 12 FEP Cases 871 (N.D. Ga. 1976), the district court adopted the Ninth Circuit's reasoning in *Slack*. In determining jurisdiction, the court measured the number of employees in the calendar weeks both before and after the alleged discrimination during the year in which it allegedly occurred.<sup>3</sup> See also Schlei & Grossman, *Employment Discrimination Law* 996 (1983) ("It is unnecessary that the 15-employee/20 week requirement be met prior to the alleged discrimination").

The investigative file in this case lacks sufficient data to determine whether the Respondent has had fifteen or more employees for twenty or more weeks during 1988. Accordingly, the Commission remands this charge to the District office for further processing consistent with this decision.

#### [¶ 6872] FORCED MATERNITY LEAVE FOR X-RAY TECHNOLOGIST IS UNLAWFUL

U.S. Equal Employment Opportunity Commission, Decision No. 89-1, October 5, 1988.

#### Title VII—Civil Rights Act of 1964

**Sex Discrimination—Fetus Protection Policy—X-ray Technologist.**—By requiring an X-ray technologist to take maternity leave immediately upon discovering that she was pregnant, a hospital acted unlawfully. Without merit was the hospital's contention that placing the technologist on maternity leave was necessary to protect her fetus from radiation because there is no safe level of exposure of a fetus to radiation. The hospital failed to show by independent, objective evidence and by the opinion evidence of qualified experts that any exposure of a pregnant women is harmful to the fetus. In fact, credible evidence indicated otherwise.

Back reference.—¶ 240.36.

<sup>2</sup> The employer in *Slack* also argued that this interpretation was inconsistent with the requirement in Section 706(b) of Title VII that the Commission make its determination on reasonable cause "as promptly as possible" and "so far as practicable" within 120 days. The court rejected this argument as well, stating that "a determination of reasonable cause would not be possible and would not be required until it were established that the putative 'employer' actually came within the terms of the Act." *Slack*, 522 F.2d at 1093 n.2.

*tain View Broadcasting, Inc.*, 578 F. Supp. 229, 34 FEP Cases 49 (E.D. Tenn. 1984), the employer argued that it was not covered by Title VII because it had not employed the requisite number of employees. The court found that the "current calendar year" was the year in which the plaintiff was discharged. Although she was discharged on January 5th of that year, the court measured the number of employees in the course of that entire year, and on that basis it found jurisdiction.

<sup>3</sup> Another district court has found jurisdiction under similar circumstances. In *Musser v. Moun-*