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001. letter	Claire Gonzales to The Honorable Elton Gallegly (partial) (2 pages)	n.d.	P6/b(6)
002. report	Confirmation Issues Outline (partial) (1 page)	7/12/1994	P5
003. memo	Peter Yu to Robert Rubin re: Affirmative Action & Procurement Reform (2 pages)	9/28/1993	P5

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FOLDER TITLE:
[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

ds56

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]
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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]

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

May ~~13~~ 16, 1994

Donsia Strong
White House Domestic Policy
Eric Senunas
White House Legislative Affairs

Dear ~~Donsia and Eric~~ Steve:

This package includes a variety of pieces that I thought might be helpful to you both. The pieces produced by my office are in draft form and will be revised as needed. I wanted to give you an idea of how we are proceeding in pulling together briefing material for the nominees.

Included in this package are the following:

- EEOC's FY 1995 Budget Request -- this has a lot of basic background information about the agency.
- Office of Legal Counsel's April 1993 Report to the Chairman -- Thomasina Rogers prepared this for the Interim Chair; it outlines some of the fundamental structural problems within the agency.
- July 1993 GAO Testimony on the EEOC's performance presented to Chairman Owen's Subcommittee.
- OCLA Draft of working plan for confirmation preparation.
- OCLA Draft of Pending Legislative Issues -- summarizes the active and pending legislative matters in which the EEOC is involved.
- OCLA Draft of current agency workload profile. This should give you some idea of the significant backlog and resource problems the agency is facing.
- List of SES slots at the EEOC with important vacancies noted.

I hope this information is helpful. Donsia, I will look forward to your call to discuss the agenda for Monday's meeting.

Sincerely,

Claire

Claire Gonzales

DRAFT

CONFIRMATION PLAN

I. SUBSTANTIVE BRIEFING

The substantive briefing should include an overview of current and upcoming legislative and policy matters facing the EEOC, as well as information on internal organizational matters that directly affect the ability of the EEOC to perform its statutory missions. A review of the Transition Report and recent communications with key Congressional figures make it abundantly clear that current complex policy issues are only a portion of the many problems which the agency must address in order to function effectively.

The oversight committees, and interested parties in the civil rights community, are extremely interested in the agency's many institutional problems that now severely impair its ability to serve the public. These problems include a wide range of issues related to structure, management, operations, and programs/strategic planning.

The following plan is the first step in identifying and gathering pertinent information about the EEOC to prepare the nominees for their courtesy calls and for hearings, if any. At this point the plan is quite detailed. This was done for two reasons. First, it is important for the nominees and their handlers to have a thorough understanding of the complex problems facing the EEOC because the principal House and Senate oversight subcommittees are very involved with the agency, to the point of micro-managing at times. This is particularly important because of the length of time that the agency has functioned without leadership selected by this administration. Second, this initial detail is intended to provide some background and context to assist in the development of both a confirmation strategy for the current and future nominees and a long-term plan for the agency.

A. *External Evaluations*

1. Formal Reports on Agency - Prepare short summaries of formal reports on the EEOC, including:

- Transition Report
  - summary of pertinent issues found in appendices
- 1992 Senate Oversight Hearing Testimony (Kristina Zahorik of Simon's staff sending copies) (JP)*
- Review House Oversight Hearings for last five years

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* JP and JD denote Julie Pershan and John Dean, Schedule C's in OCLA/EEOC; SA is Sylvia Anderson, career legislative affairs specialist in OCLA/EEOC.

- GAO reports & testimony from last five years
  - ***EEOC: An Overview***, Testimony before Subcommittee on Select Education and Civil Rights July 27, 1993 (JP and JD)

- ***Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges***, Oct. 11, 1988 (Owens/Cuprill interested in this one)
- JP to collect other pertinent GAO reports

- U.S. Commission on Civil Rights reports from last five years
  - ***EEO Rights for Federal Employees***
  - JP to collect other pertinent USCCR reports

2. Group Surveys - Develop comprehensive list of constituency groups to survey - Solicit input on principal issues of concern to communities/groups affected. Contact list should be representative of communities and interests served.

a. Contact List to include (in alpha):

- African American
- Asian/Pacific American
- Business/Employers
- Hispanic/Latino
- Labor
- Native American
- People with disabilities
- Religious Community - (Catholic, Jewish, Moslem, Protestant)
- Women

b. Survey Protocol - Develop questions to ask and format for response (2-3 page limit); assign contacts to team members.

c. Summarize Responses - Prepare short summaries of principal issues by communities/groups.

B. Internal Issues - Structural, Administrative, Programmatic & Operational

The status of the agency's management and operations will be a critical part of any discussion about the future of the agency and the fulfillment of its mission. Nominees need to have a very good idea of the current problems facing the agency, which may call for the very structure of the agency to be re-examined and redesigned.

1. Summarize agency's structure, enforcement responsibilities, and administrative processes

a. Organizational Structure

- Role of the Commissioners -- Suggest that this issue be addressed by the Administration, rather than leaving it to the incoming Chair,

particularly because of the timing and importance of other Commissioner nominations.

- Critical personnel issues --

i. Vacant SES slots in critical positions that can be filled with political appointees

Key Positions:

- Director, Office of Management
- Associate General Counsel for Systemic Litigation
  (also vacant - Information Resources Management, Office of Management)

ii. Received unconfirmed report of extremely high SES bonuses given recently (e.g., $15,000); based on performance reviews which are tied to charge processing record; rubber stamped by Performance Review Board. This is a problem because the agency is routinely criticized for the inordinately high "no cause" finding/closure rates, but this practice indicates that the agency's leadership emphasizes quantity rather than quality of investigations/charge processing.

- This personnel information is not confidential; talk to Emily Sheketoff at OPM about gather specific data.

iii. Liberal use of non-reimbursable outside "details"; this is a very questionable practice because of the severe staffing shortages in the most important areas of the agencies (investigators); also, some reports of burrowing.

b. Statutory Enforcement Responsibilities

c. Administrative Processes

- Private Sector -- note differences by statute (Title VII v. ADEA)
- Federal Sector

d. Additional Agency Responsibilities

- EEO Surveys - reexamine collection methods and use of data compiled

- Executive Order 12067 - EEOC to coordinate development of federal EEO policy (see Legal Counsel report discussing the need for EEOC to reclaim its primary role)

e. **Identify miscellaneous administrative policy issues affecting performance.**

- Continuation of Thomas' policy of full investigation -- this is critical because many interested parties attribute ever-increasing backlog to this enforcement policy.

- Lack of coordinated policy development plan or process -- policy made on *ad hoc* basis, usually from the ground (field) up, rather than top down

- Lack of systemic litigation strategy -- would affect charge processing from intake forward

2. Compile current performance data

a. **Review existing quarterly and annual reports** -- Summarize status of charge caseload, current and projected problems related to charge processing; OGC - litigation issues; federal sector inventory and issues; management, budget, and planning issues.

b. **Current data on charge and litigation caseload** -- Summarize recent data on receipts, cause/no cause determinations, closures, litigation caseload, systemic litigation caseload, litigation programs or plans (if any).

C. Pending or Upcoming Legislative and Policy Issues

The nominees should be briefed on all legislative issues involving EEOC that are either currently under active consideration by Congress (*e.g.*, the Federal Employees Fairness Act) or that are pending without much activity, but are still important (*e.g.*, Justice for Wards Cove Workers Act and Equal Remedies). Additionally, the nominees should be aware of all pending policy issues within the Commission such as the Consolidated Workplace Harassment Guidelines (that the religious right is mobilizing around because of the inclusion of religion).

1. Preparation of Legislative Update, including current status, EEOC response, available sources of information. SA and JP to prepare.

D. Applicable Administration Directives (Executive Orders, National Performance Review Directives, etc.)

Some activity has occurred within the agency to respond to the various Administration directives that apply to or affect the agency. A summary of applicable items with any agency activity related thereto will be compiled for the nominees.

II. HILL STRATEGY

A. Senate

1. Past Confirmations --

- Review files of past EEOC confirmations -- hearing testimony
- Review Deval Patrick's confirmation for tips (Trasviña)
- Prepare bios for each Senator of the committee -- identify issues of concern from recent inquiries and requests

2. Labor & Human Resources Committee Staff -- Ongoing consultation about their preference for confirmation format, etc.

3. Identify Key Visits

a. Labor & Human Resources Committee Members

- Kennedy
- Kassebaum
- Simon, Chair, Employment and Productivity Subcommittee (Oversight)
- Thurmond, Ranking Minority Member, Employment and Productivity Subcommittee (Oversight)

b. Non-L&HR committee contacts

- Governmental Affairs -- Glen/Roth [Federal Sector Oversight]
- Appropriations/Commerce, Justice, State, The Judiciary & Related Agencies -- Hollings/Domenici

c. Others - (Leadership?)

B. House

1. Identify Key Contacts

- **Major Owens**, Chairman, House Select Subcommittee on Civil Rights and Education, Committee on Education and Labor
  - **Maria Cuprill**, Staff Director of Select Subcommittee (and Owens' wife)
- **Caucuses**
  - Hispanic Caucus
  - Black Caucus
  - Womens' Caucus
- **Other Committees/Subcommittees of Jurisdiction?**
  - Judiciary (Brooks)/Civil & Constitutional Rights (Edwards)
  - Post Office & Civil Service (Clay)/Civil Service (McCloskey) -- [Federal Sector]
  - Appropriations (Obey)/Commerce, Justice, State and Judiciary (Mollohan)

"plan"
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PENDING LEGISLATIVE ISSUES

LEGISLATION TO REFORM THE FEDERAL EEO COMPLAINT PROCESS:

The Federal Employee Fairness Act of 1993, H.R. 2721/S.404

Introduced in the Senate on February 18, 1993 by Senator John Glenn and in the House on July 23, 1993 by Congressman Matthew G. Martinez, the proposed legislation revises the administrative procedures by which federal employees bring employment discrimination claims. Under both the House and Senate proposals, responsibility for administrative review of claims of employment discrimination in the federal sector is transferred from the charged agency to EEOC.

The intent of the proposed legislation is to: 1) eliminate the real and perceived conflict of interest in the current process whereby the agency reviews its own discriminatory conduct; 2) expedite the process by streamlining procedures and providing mandatory time limits for processing; and 3) deter future discriminatory conduct by providing sanctions against federal employees who have discriminated.

The Senate bill, S. 404, was marked-up and approved by the Committee on Governmental Affairs on June 24, 1993; the Committee report was filed on October 27, 1993 (S. Rept. 103-167). The measure is now awaiting consideration by the full Senate.

In the House, H.R. 2721 was jointly referred to the House Committee on Education and Labor and the Committee on Post Office and Civil Service. The bill was marked-up on January 26, 1994 by the Subcommittee on Select Education and Civil Rights and cleared by the full Committee on April 13, 1994. The Civil Service Subcommittee marked-up the bill on April 20, 1994 and it was cleared by the full Post Office and Civil Service Committee on May 11, 1994.

Prior to the mark-up of the bill by the full Committee on Education and Labor, EEOC began working closely with the Office of Management and Budget and other agencies to develop principles to be included in any version of the legislation hoping to gain the Administration's support. Negotiations between the Administration and the staffs of both House Committees of jurisdiction continued through the May 11 mark-up by the Committee on Post Office and Civil Service. See April 13 and May 11 letters from OMB Director Panetta to House Committees on Education and Labor and Post Office and Civil Service.

Preliminary EEOC cost estimates for enforcing provisions such as those contained in S.404 and H.R. 2721 range from $70 million and more than 775 additional staff to $98 million and nearly 1100 additional staff.

AGE DISCRIMINATION IN EMPLOYMENT:

Age Discrimination in Employment Amendments of 1993, H.R. 2722

On March 24, 1993, the House Subcommittee on Select Education and Civil Rights conducted an oversight hearing on two sunsetting provisions of the 1986 Amendments to the Age Discrimination in Employment Act -- scheduled to expire on December 31, 1993 -- which provided exemptions permitting age to be considered in hiring and retiring public safety officials and tenured university faculty.

The 1986 Amendments to the ADEA also charged EEOC and the Department of Labor to conduct a study to determine whether tests were available to replace age as a predictor of job performance. The Congressionally mandated study, Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs, conducted by Penn State University Center for Applied Behavioral Science, was transmitted to Congress in October 1992. The study concluded that valid and job-related tests are viable alternatives to basing hiring and retirement decision on age alone.

Members of the Penn State research team testified at the public hearing on the findings of the study and recommended that the temporary exemptions under the ADEA be allowed to expire.

Witnesses representing police and fire organizations, however, were severely critical not only of the methodology used in the Penn State Study, but also cited the lack of specific tests and guidelines by the EEOC. These organizations supported allowing the public safety exemptions to continue.

Following the public hearing, Congressman Major Owens introduced H.R. 2722 on July 23, 1993.

The proposed legislation would amend the ADEA by permitting all state and local governments to use age permanently as a basis for hiring and retiring law enforcement officers and firefighters. In addition, H.R. 2722 requires that EEOC conduct a study regarding tests that can be used by public safety departments in lieu of age and authorizes $5 million for the study.

H.R. 2722 was marked-up by the Subcommittee on Select Education and Civil Rights on August 5, 1993 and approved by the full Committee on Education and Labor on October 19, 1993. See H-Rept. 103-314. The measure was approved by the full House on November 8, 1993 and received in the Senate and referred to the Committee on Labor and Human Resources on November 9, 1993.

On April 14, 1994, provisions of H.R. 2722 were incorporated into the House crime bill, the Violent Crime Control and Law

Enforcement Act of 1994 (H.R. 4092/H.R. 3355) in the form of an amendment by Rep. Brooks. The crime bill passed the House on April 21 and is currently pending conference between the House and Senate.

On April 19, 1994, the Senate Subcommittee on Labor held a public hearing on H.R. 2722. Subcommittee Chairman Metzenbaum publicly stated his opposition to the measure and vowed that if the bill was attached to the House-passed crime bill in the Senate, he would filibuster for its defeat.

EEOC declined the Subcommittee's request to testify at this hearing, not willing to officially oppose the bill while the Administration maintains no official position on the legislation. In an April 19 letter to the Subcommittee, however, Chairman Gallegos rebutted criticisms levied against the Penn State Study.

If signed into law, H.R. 2722 would undercut years of EEOC litigation (pre-1987) where the agency routinely challenged the use of arbitrary age limitations by police and fire departments. Further, the study required under this bill is impractical and redundant of the recently completed Penn State Study. See EEOC report on H.R. 2722 to House Education and Labor Committee Chairman William Ford dated September 22, 1993.

Currently, no further Committee action has been scheduled on this bill.

Related Legislation:

H.R. 167, Government Organization and Employees, Title 5 USC, Amendment.

Introduced in the House on January 5, 1993 by Congressman John Duncan, Jr., the bill repeals provisions of Title 5 USC which permit federal agencies to establish entry level age restrictions for federal law enforcement officers and firefighters.

The bill was referred to the House Committee on Post Office and Civil Service. No further Committee action has been scheduled on this bill.

H.R. 4227, Government Organization and Employees, Title 5 USC, Amendment.

Introduced in the House on April 14, 1994 by Congressman Thomas Manton, the bill amends Title 5 USC to provide that mandatory retirement age for members of the Capitol Police be made the same as that for law enforcement officers.

The bill was jointly referred to the House Committee on Post

Office and Civil Service and Committee on House Administration. No further Committee action has been scheduled on this bill.

S. 1984, Government Organization and Employees, Title 5 USC, Amendment.

Introduced in the Senate on March 25, 1994 by Senator Howard Metzenbaum, the bill repeals provisions of Title 5 USC permitting mandatory retirement age for federal law enforcement officers and firefighters, Capitol Police, and air traffic controllers.

The bill was referred to the Senate Committee on Governmental Affairs. No further Committee action has been scheduled on this bill.

RELIGIOUS HARASSMENT:

EEOC decided to issue proposed new guidelines on workplace harassment because it believed that it would be helpful to employers and employees to consolidate in one set of guidelines the existing legal prohibitions against workplace harassment on all of the bases covered by laws enforced by the Commission.

The Commission also believed that because of recent public attention on sexual harassment in the workplace, it was particularly important at this time to reemphasize that harassment on all other bases protected by EEOC-enforced laws is equally discriminatory.

Therefore, on October 1, 1993, the Commission published its proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age and Disability in the Federal Register for public comment. When the comment period closed on November 30, 1993, EEOC had received a total 86 comments, of which more than 30 expressed concerns about the effect of the proposed Guidelines on religious freedom guaranteed by the First Amendment.

In December 1993, EEOC began to receive Congressional inquiries on behalf of individuals seeking to remove religion from the proposed Guidelines. In addition, by letter dated February 15, 1994, Congressman Howard (Buck) McKeon and 43 other Members of Congress wrote EEOC expressing concern about the inclusion of religion in the consolidated Guidelines. Congressman Frank Wolf further expressed his concerns at the March 24, 1994, House Appropriations Subcommittee hearing on EEOC's fiscal year 1995 budget.

During this rulemaking process, the Commission has attempted to learn of the concerns of groups opposed to the Guidelines. Toward this end, EEOC has met with Christian legal groups and a

representative of the American Civil Liberties Union, as well as concerned Members of Congress. The Commission has also met with representatives of People for the American Way, the Baptist Joint Committee, the American Jewish Congress, and other religious groups who have stressed the importance of keeping religion in the Guidelines.

EEOC continues to review all comments submitted, but has not made any determinations concerning required changes to the Guidelines. The Commission is carefully studying this issue and will seek expert advice, if necessary, before deciding whether religion should be treated separately from other bases of harassment. Because of the continued concerns expressed on the issue, the Commission recently voted to extend the official comment period on the consolidated harassment Guidelines an additional 30 days. The notice of the extension will be published in the Federal Register on May 13, 1994.

The comments that the Commission has received between the close of the first comment period on November 30, 1993 and the date the comment period is officially reopened on May 13 will be reviewed informally and will be considered in any recommendation made to the Commission on the Proposed Guidelines.

LEGISLATION TO ADDRESS SUPREME COURT DECISION IN ST. MARY'S HONOR CENTER V. HICKS:

The June 25, 1993 decision of the Supreme Court in St. Mary's Honor Center v. Hicks increased the burden of proof on plaintiffs in employment discrimination cases.

The Commission and the United States submitted an amicus curiae brief in Hicks arguing that a showing in a Title VII case that the employer's explanation for its actions is not credible is sufficient to meet the plaintiff's burden of proof. The Supreme Court in Hicks rejected this position.

In a September 28, 1993 response to a request for the Commission's views on the Hicks decision from the House Committees on Education and Labor and the Judiciary, EEOC Chairman Gallegos wrote that the Commission had not changed its position on this issue, and maintained that Hicks was wrongly decided. The letter further stated that the Commission believed the decision would have a negative effect on its enforcement efforts and, therefore, should be overridden by appropriate legislation.

The following bills introduced in the 103rd Congress would restore the standard for proving discrimination to the pre-Hicks standard:

Civil Rights Standards Restoration Act, H.R.3680/S. 1776

On November 22, 1993 Congressman Major Owens introduced H.R. 3680 in the House; the measure was jointly referred to the House Committee on Education and Labor and Committee on the Judiciary.

On the same date, Senator Howard Metzenbaum introduced the Senate companion bill, S. 1776; the bill was referred the Senate Committee on Labor and Human Resources.

Employment Discrimination Evidentiary Amendment of 1993, H.R. 2787

Introduced in the House on July 28, 1993 by Congressman David Mann, the measure was referred to the Committee on Education and Labor.

Disparate Treatment Employment Discrimination Amendment of 1993, H.R. 2867

Introduced on August 4, 1993 by Congressman Alcee Hastings, H.R. 2867 was referred to the House Committee on Education and Labor.

No further Committee actions have been scheduled on these bills.

CIVIL RIGHTS ACT OF 1991 PROVISIONS RELATING TO WARDS COVE V. ATONIO:

Justice for Wards Cove Workers Act, H.R. 1172/S.1037

This legislation amends the Civil Rights Act of 1991 to eliminate the exclusion from coverage of the Act to disparate impact cases filed before March 1, 1975 and decided after October 30, 1983.

Introduced in the House on March 2, 1993 by Congressman Jim McDermott, H.R. 1172 was jointly referred to the Committee on Education and Labor and Committee on the Judiciary. The measure was marked-up on March 17, 1993 by the House Subcommittee on Civil and Constitutional Rights.

In the Senate, S. 1037 was introduced on May 27, 1993 by Senator Patty Murray and referred to the Committee on Labor and Human Resources.

No further Committee actions have been scheduled on these bills.

LEGISLATION TO REMOVE CAPS ON DAMAGES:

Equal Remedies Act of 1993, H.R. 224/S. 17

The legislation removes provisions limiting the dollar amount of damages awarded in cases of intentional employment discrimination.

H.R. 224 was introduced in the House on January 5, 1993 by Congresswoman Barbara Kennelly and jointly referred to the Committee on Education and Labor and Committee on the Judiciary. The Senate companion bill, S. 17, was introduced on January 21, 1993 by Senator Edward Kennedy and was referred to the Senate Committee on Labor and Human Resources.

No further Committee actions have been scheduled on these bills.

LABOR LAW COVERAGE OF FOREIGN VESSELS:

Coverage of Federal Labor Laws to Foreign Vessels, Extension, H.R. 1517/S. 1855

The legislation extends coverage of the National Labor Relations Act and the Fair Labor Standards Act to certain foreign vessels transporting passengers to and from a place in the U.S.

H.R. 1517 was introduced in the House on March 30, 1993 by Congressman William Clay and was referred to the Committee on Education and Labor. The measure was marked-up by the Subcommittee on Labor Standards, Occupational Health and Safety on October 28, 1993 and approved by the full Committee on Education and Labor on April 13, 1994.

The Senate counterpart, S. 1855, was introduced on February 11, 1994 by Senator Harris Wofford and was referred to the Senate Committee on Foreign Relations. No further action has been scheduled.

SEXUAL HARASSMENT:

Sexual Harassment Prevention Act of 1993, H.R. 2829/S. 1979

This legislation requires private, federal and congressional employers to post notices concerning sexual harassment which are approved or prepared by EEOC; to provide annual notices to individual employees containing information to resolve allegations of sexual harassment; and requires that EEOC make model notices and voluntary guidelines for procedures to address sexual harassment allegations.

H.R. 2829 was introduced in the House on August 2, 1993 by

Congressman George Miller and was jointly referred to the House Committees on Education and Labor, Committee on House Administration, and Committee on Post Office and Civil Service.

The Senate companion bill, S. 1979, was introduced on March 24, 1994 by Senator Patty Murray and was referred to the Senate Committee on Labor and Human Resources. No further action has been scheduled.

Harassment-Free Workplace Act, S. 1864

The bill amends Title VII of the Civil Rights Act of 1964 to prohibit sexual harassment by employers of fewer than 15 employees.

Introduced in the Senate on February 24, 1994 by Senator Dianne Feinstein, the measure was referred to the Committee on Labor and Human Resources.

Economic Equity Act of 1993

A comprehensive bill to ensure economic equity for American women and their families by promoting fairness in the workplace; creating new economic opportunities for women workers and women business owners; helping workers better meet the competing demands of work and family; and enhancing economic self-sufficiency through public and private reform and improved child support enforcement. The legislation contains the provisions of the Sexual Harassment Prevention Act and the Federal Employee Fairness Act.

Introduced in the House on July 28, 1993 by Congresswoman Pat Schroeder, the bill was jointly referred to the House Committees on Armed Services; Banking, Finance and Urban Affairs; Education and Labor; Foreign Affairs; House Administration; Natural Resources; the Judiciary; Post Office and Civil Service; Rules; Small Business; and Ways and Means. No further action has been scheduled on the bill.

SEXUAL ORIENTATION:

Civil Rights Amendments Act of 1993, H.R. 423

This bill amends the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of sexual orientation.

Introduced in the House on January 5, 1993 by Congressman Edolphus Towns, the measure was jointly referred to the Committee on Education and Labor and the Committee on the Judiciary.

Civil Rights Act of 1993, H.R. 431

H.R. 431 prohibits discrimination on the basis of sexual orientation in employment, education, credit, housing, sale or use of goods or services, or in federally assisted programs.

Introduced in the House on January 5, 1993 by Congressman Henry Waxman, the measure was jointly referred to the Committee on Education and Labor and the Committee on the Judiciary.

ALTERNATE DISPUTE RESOLUTION:

Employment Dispute Resolution Act of 1993, H.R. 2016

This bill amends Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act to provide pre-suit mediation of employment related disputes by the Federal Mediation and Conciliation Service or other mediator.

Introduced in the House on May 6, 1993 by Congressman Steve Gunderson, the measure was jointly referred to the Committee on Education and Labor and the Committee on the Judiciary.

MANDATORY ARBITRATION:

Protection from Coercive Employment Agreements Act, S. 2012

S. 2012 amends Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act; and the Age Discrimination in Employment Act to prohibit employers from requiring employees to submit employment discrimination claims to mandatory arbitration.

Introduced in the Senate on April 13, 1994 by Senator Russell Feingold, the measure was referred to the Senate Committee on Labor and Human Resources.

PAY EQUITY:

Pay Equity Employment Reform Act of 1994, H.R. 3738

(To be completed)

PREFERENTIAL TREATMENT:

Civil Rights Restoration Act of 1993, S. 53

(To be completed)

ATTORNEYS FEES:

Civil Rights Act of 1964, Amendment, H.R. 1215

(To be completed)

5/12/94

DRAFT

PRIVATE SECTOR PROGRAMS

Context: In FY 1980, EEOC received 56,362 new private sector charges to process with a total staff of 3,390. In FY 1993, EEOC received a record-breaking 87,942 charge receipts, with a staff of 2,891 -- 559 fewer than in 1980.

Charge Receipts: EEOC's incoming work (receipts and net transfers/deferral from FEPA[1]) has increased 41 percent from 1990 to 1993. Receipts during FY 1993 were 21.6 percent higher than in FY 1992. In FY 1993, charges filed under the ADA (15,274) or 17.4 percent of total receipts, greatly contributed to the increase.

Despite higher closure rates, current staffing levels cannot keep pace with the increase in charge receipts. EEOC now faces an overall ratio of resolutions to receipts which is significantly less than one-to-one. For every new charge EEOC receives, it resolves only .78 of its existing charges, (.94 in FY 91, .89 in FY 92). This has led to an increasingly higher inventory of pending charges.

Pending Inventory: EEOC had 73,124 private sector charges pending at the end of FY 1993, the highest recorded in more than 10 years and 20,268 more than reported at the end of FY 1992. If EEOC accepted no new charges and productivity levels remained constant, it would take the Commission 12.2 months to resolve this caseload (called "months of pending inventory"). The average EEOC workload equated to 92.8 charges per investigator, up 25.2 cases from the 67.6 average caseload in FY 1992.

Without additional staff these trends are expected to continue. At the end of the second quarter of FY 1994, EEOC's pending workload is 85,212, or 16.6 months of pending inventory. By the end of FY 1994 pending charges are expected to reach over the 100,000 mark, creating 18.6 months of inventory.

Systemics: During FY 1993, EEOC initiated 28 new systemic charges, down from 50 charges in FY 1992. EEOC resolved 41 systemic charges FY 1993 compared to 42 resolutions in FY 1992.

Systemics are increasing in FY 1994. According to preliminary figures, at the end of the second quarter, EEOC approved 31 systemic charges and resolved 19.

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[1] Fair Employment Practice Agencies (FEPAs) are agencies with work-sharing agreements with EEOC.

FEDERAL SECTOR PROGRAMS

Charge Receipts: The increase in federal complaint receipts coupled with the new Regulation 1614 requirements of processing hearings within 180 days strained the Commission's resources during FY 1993 and is continuing to do so during the first five months of FY 1994. EEOC received 8,892 requests for hearings on Federal complaints during FY 1993, a 28.6 percent increase over FY 1992. During the same period, requests for appeals of Federal complaints increased 6 percent over FY 1992, but are showing an even greater rate of increase in FY 1994 (approximately 14 percent increase of the first five months of over the same period in FY 1993). Hearing requests are up by 20 percent for the comparable five-month period.

Pending Inventory: At the end of FY 1993 there were 3,991 pending charges or 5.4 months of inventory. In FY 1994 these figures are expected to rise to 5,064 pending charges and 6.5 months of inventory.

LITIGATION PROGRAM

Tracking: The Office of General Counsel's (OGC) tracking systems are largely inadequate. Therefore, EEOC's data from FY 1993 and early estimates from FY 1994 are preliminary.

Suits Filed: OGC filed 481 suits in FY 1993, a 7.6 percent increase from the 447 suits filed in FY 1992. By the end of FY 1993, OGC experienced a 24.1 increase from FY 1992 in the number (825) of Presentation Memoranda (charges to be considered for litigation) received from the field. The overall increase in charge receipts should result in an increase in the number of cases that field office will submit for litigation consideration in the future.

Class Action Suits: In FY 1993, the agency brought more class action lawsuits (63) than in FY 1992 (47). In the first quarter of this fiscal year, the Commission has brought 24 class action lawsuits.

APPROPRIATIONS

EEOC's budget request for FY 1995 is $245,720,000, a 6 percent increase or $15,720,000 over the fiscal year 1994 authorization of $230 million. This increase includes funding for an additional 170 FTE.

SES Members

Headquarters - 25 slots/6 vacancies
Field - 23 slots/0 vacancies
TOTAL SES 48 slots/6 vacancies

* 1.	Vacant	Chief of Staff	(G)
* 2.	Vacant	(SES slot - no position classified)	
* 3.	Vacant	Director, Office of Communications & Legislative Affairs	(G)
4.	William D. Miller, II	Inspector General	(CR)
5.	James R. Neely, Jr.	Deputy General Counsel	(G)
* 6.	Vacant	Associate General Counsel for Systemic Litigation Services	(G)
7.	Gwendolyn Y. Reams	Associate General Counsel for Appellate Litigation Services	(G)
8.	Philip B. Sklover	Associate General Counsel Litigation Management Services	(G)
9.	Thomasina V. Rogers (Detailed to White House)	Legal Counsel	(G)
10.	Elizabeth M. Thornton	Deputy Legal Counsel	(G)
11.	Nicholas M. Inzeo	Associate Legal Counsel	(G)
12.	Ronnie Blumenthal	Director, Office of Federal Operations	(G)
13.	Deidre Flippen	Director, Federal Sector Programs, OFO	(G)
14.	Hilda Rodriguez	Director, Appellate Review Programs, OFO	(G)
15.	James H. Troy	Director, Office of Program Operations	(G)
16.	Paula Choate	Director, Field Management Programs - West, OPO	(CR)
17.	Godfrey Dudley	Director, Field Management Programs - East, OPO	(CR)
18.	R. Edison Elkins (On IPA)	Director, Operations Research & Planning Program, OPO	(G)
19.	James N. Finney	Director, Systemic Investigations & Review Programs, OPO	(G)
20.	Michael J. Dougherty	Director, Charge Resolution Review Program, OPO	(G)
21.	Polly Mead (Working on TATI)	Special Assistant, OPO	(G)
*22.	Vacant (Billingsley-Acting)	Director, Office of Management	(G)

CR - Career Reserved
G - General

*23.	Vacant	Information Resources Management, OM	(G)
24.	Kassie A. Billingsley	Director, Financial & Resource Management Services, OM	(G)
25.	Patricia Cornwell Johnson	Director, Human Resources Management Services, OM	(G)

Settlements + race conscious remedy

\ type of ~~remedies~~ race conscious remedies ~~or~~ would you seek.

d u lab c' appropriate to have goals + time tables

Jupiter U.

flexible, limited in time, d4 trampel on rights of other **Sup. Ct.**

\ justifies race - conscious remedy

d u lu b c c has been a pattern of discrimination -- "manifest imbalance for voluntary

remedies tied to qualifications

- REVERSE DISCRIMINATION -

Title VII protects all people

All discrimination is wrong

No such thing as reverse discrimination, it just discrimination case - by - case

- HIRING BY THE NUMBERS

? OK to find a violation because does not have percentage ~~have~~ less than the population

\ mr would u need?

\ standard would u use - if u would use more than the numbers

OPPORTUNITY NOT OUTCOME

\ n backlog

reduction of resources

Chiefs lunch

Thursday

Veronica Boyspin

- Tom Sugar

Justice unemployment act 1 '94

Aboriginal - Assister

797-3076

visit by Minister for Aboriginal Affairs

Rep 1 DPC

- Carol

Report 1 + 2

10 am

by Ct remedy

from Ray

Affirmative Action + relative qualifications - hiring by the numbers

\ justifies employing a less qualified over a more qualified person?

Of course I don agree with promoting unqualified person.

Prob is that SRs are tests that don't accurately measure qualifications

Do you know any cases that requires the hiring of a less qualified rather than a more qualified

Do

I thought that the Congress to have fixed that problem w/ its race norming legislat.

~~(It seems that~~

It means that you have to promote people based on test scores

State broad agreement + qualify

Numerical disparity dA win the case

MS also show ER is doing something

☐ Opportunity not outcome

— "Ability" to do the job
("Qualified" is a misunderstood concept)

numbers hiring

should relief be limited to identifiable victims

1 (A) Political Answer

1 (B) Enforcement Answer

In d in think it is appropriate to require for an EA to hire a less qualified applicant over a more qualified applicant.

BUSINESS NECESSITY - Griggs, Waid Case

After showing is made of disparate impact + EE can show a legitimate business purpose for this action that resulted in discriminatory impact,

Congress adopted Griggs standard of business business necessity. (It is not enough to be good faith + lack of discriminatory intent)

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Claire Gonzales to The Honorable Elton Gallegly (partial) (2 pages)	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.

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:
[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

ds56

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]

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

U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman

This is in response to your inquiry dated June 6, 1994, on
b6 behalf of [redacted] regarding his being passed over for a promotion in favor of a woman or minority.

The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., which prohibits discrimination on the bases of race, color, sex, religion, and national origin. As an initial matter, you should note that the Commission cannot assess the validity of employment practices outside the context of a specific charge of discrimination. There is insufficient information in the letter from [redacted] to determine whether the conduct about which he
b6 complained occurred in the context of an EEOC investigation or other resolution of a claim of discrimination. Thus, we are only able to provide general information regarding the circumstances under which an employer may target women or minorities for employment opportunities.

The goal of Title VII is equal employment opportunity. The EEOC and the courts have recognized that, historically, employment practices, especially hiring and promotions, have been skewed against women and minorities. To correct this problem, courts have said that employers may engage in affirmative action measures in which race or gender may be one factor in some employment decisions. Under Title VII, however, race, gender, or national origin cannot be the only basis for selection and rigid quotas are not permissible. An employer may voluntarily adopt an affirmative action plan or may be required by court order to institute an affirmative action plan after litigation or as settlement of a claim of discrimination. See United Steel Workers v. Weber, 443 U.S. 193 (1979), and Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616 (1987).

Three criteria must be met for a voluntary affirmative action plan to be legal under Title VII. See Weber, 443 U.S. 193, and Johnson, 480 U.S. 616. First, the plan must be intended to eliminate a manifest imbalance of women or minorities in the employer's workforce in traditionally segregated job categories. This means an employer must show that there is a disparity between the representation of a targeted group in the employer's workforce and in the relevant labor pool. An employer is not

voluntary affirmative action under Title VII

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required under Title VII to show that it discriminated in the past or that it is responsible for the disparity in its workforce to justify implementing a voluntary plan.

Second, an affirmative action plan cannot unnecessarily trammel the rights of the non-targeted group. Thus, the plan cannot unduly bar non-targeted employees from employment opportunities. For example, an employer cannot require that only women be promoted to management ranks until the number of female managers represents the number of female managers in the relevant labor pool. However, an employer could hire members of the protected group into a percentage of jobs as long as the employer did not restrict hiring to only individuals of the protected group. The courts have required that a targeted individual be qualified for the position at issue, although that person need not be the most qualified individual. Johnson, 480 U.S. at 638.

Finally, an affirmative action plan must be temporary and designed only to attain a balanced workforce, not to maintain a racial balance. The plan need not have a specific termination date when its requirements are flexible. After the goals of the plan have been met, an employer cannot continue the plan to maintain a balanced workforce.

b6 [redacted] should also be aware that employers may be subject to other federal affirmative action requirements, such as those for federal contractors under Executive Order 11246. For further information about affirmative action requirements for federal contractors, he may wish to contact:

Office of Federal Contract Compliance Programs
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 523-9475

We hope this information is helpful to you.

Sincerely,

Claire Gonzales

Claire Gonzales
Director of Communications
and Legislative Affairs

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BRUCE FEIN

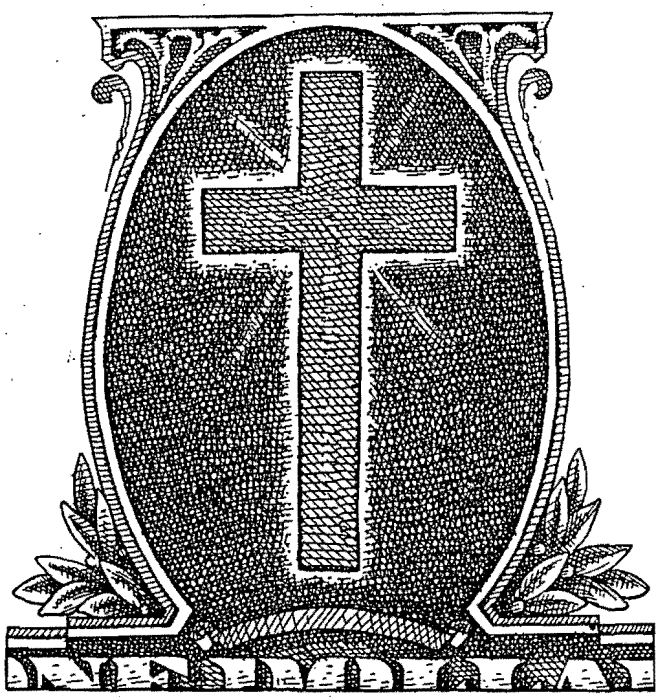
Bankrupting The Religious Freedom Restoration Act

Last April, the U.S. Department of Justice filed a brief urging a pinched and thoroughly unpersuasive interpretation of the Religious Freedom Restoration Act. Signed by President Bill Clinton last year amidst hallelujahs of rejoicing, the act had elicited almost universal support from a panoramic array of religious groups. But the brief submitted before the U.S. Court of Appeals for the 8th Circuit in *Christians v. Crystal Evangelical Free Church*—the maiden expression of the Justice Department regarding the application of the RFRA—seems a betrayal descended from Judas Iscariot, another campaign promise compromised by the Clinton administration.

The facts in *Christians* are simple and undisputed: Bruce and Nancy Young filed a Chapter 7 bankruptcy petition Feb. 3, 1992. During the preceding year, the couple had donated $13,500 to Crystal Evangelical Free Church when they were insolvent. It is undisputed that the gifts were inspired by sincere religious convictions, not by a wrongful intent to shortchange or defraud creditors, and followed the Church's tithing creed.

The trustee in the Chapter 7 proceeding sued the church to recover the $13,500 contribution for the benefit of creditors under §548 of the Bankruptcy Code. That provision empowers the trustee to "avoid any transfer of an interest of the debtor in property . . . that was made or incurred on or within one year before the date of the filing of the petition, if the debtor . . . received less than a reasonably equivalent value in exchange for such transfer . . . and was insolvent on the date such transfer was made . . . or became insolvent as a result of such transfer."

The Bankruptcy Court ruled in favor of the trustee, and the U.S. District Court affirmed. During the pendency of the appeal to the 8th Circuit, President Clinton signed the RFRA, and both parties agree as to its retroactivity to the *Christians* litigation.



PAUL KOLSTI

Misconceived Arguments

The act prohibits government from "substantially" burdening the free exercise of religion unless it proves that the burden is the "least restrictive means" of furthering a compelling government interest. The Justice Department argues that voiding the Youngs' non-fraudulent religious $13,500 contribution satisfies the exacting standards of the law. But its arguments seem wildly misconceived.

The Justice Department concedes that the gifts were made to discharge a sense of religious obligation and were in accord with the church's theology. It insists, nevertheless, that to undo the gifts does not substantially burden the Youngs' free exercise of religion because the sums were not theirs to give; the moneys were an asset to be preserved for creditors.

But tithing was an authentic component of the Youngs' religious creed. To void a tithing is every bit as much a direct burden on religious practice as restraints on political campaign contributions are a burden on the exercise of free speech. Although such burdens may be constitutionally justified by overriding government interests, as the Supreme Court declared in *Buckley v. Valeo*, 424 U.S. 1 (1976), they are nonetheless burdens.

At the time that the Youngs' made their gifts, the sums were held unencumbered and untainted by any wrongdoing. Creditors then had no claim to the donation. Indeed, even after the Youngs declared bankruptcy—which was not an inevitability at the time of the donation—their creditors enjoyed no legal right to recapture the $13,500. Only the trustee of the estate is entitled to sue under §548, and whether to seek avoidance of a transfer is entirely discretionary.

To characterize the Youngs' financial gifts at the time of their making as beneficially owned by their creditors is utter nonsense. The latter would have been summarily laughed out of court if they sued the church immediately after the gifts were made seeking a security or some other property interest in the moneys.

In sum, the trustee's avoidance of the religiously inspired donations of the Youngs did substantially burden their free exercise of religion. Additionally, that financial gambit did not further a compelling government interest in the specific bankruptcy proceeding of the Youngs, which is what the RFRA demands.

The object of §548 is to prevent the 11th hour depletion of a debtor's assets available to creditors through gratuitous transfers. That interest is rational, but far from compelling, at least in regard to the Youngs' bankruptcy. If the $13,500 in dispute is left with the church, the percentage reduction in trustee payments to individual creditors would likely be marginal, and the Justice Department does not contend otherwise. To insist that burdening the free exercise of religion to raise the percentage payment of creditors' claims in a Chapter 7 proceeding from, for example, 20 to 25 seems the epitome of frivolity. Such a trivial financial interest has never been accepted by the Supreme Court as compelling. Thus, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court denied that the government interest in forestalling a drain on its unemployment compensation fund was compelling. Accordingly, the Court concluded that payments could not be withheld from an applicant whose unemployment was attributable to her religiously inspired refusal to work on Saturday. Moreover, the bankruptcy laws, by exempting certain property of the debtor from creditor claims, tacitly acknowledge that the interest in maximizing creditor recoveries falls short of compelling.

The effort by the Justice Department to surmount the compelling government-interest hurdle is sheer effrontery. It likens the Youngs' $13,500 in religious gifts, sums derived from legally irreproachable transactions, to the proceeds of criminality. For instance, the Justice Department urges that avoiding the gifts is no different than requiring forfeiture of property traceable to federal drug or racketeering crimes. But the government interest in punishing and deterring crime through such forfeiture provisions is of far greater urgency than recapturing a few pennies for creditors in the Young bankruptcy proceedings from transfers untouched by any wrongdoing or misconduct. Moreover, even in forfeiture proceedings, the Supreme Court held in *United States v. 92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993), that an owner's lack of knowledge that the disputed property had been purchased from the proceeds of illegal transactions is a defense. In other words, even assuming the $13,500 in church gifts were tainted by crime—an assumption that even the Justice Department does not make—the church's lack of knowledge of the putative wrongdoing that generated the sums would frustrate any attempted forfeiture.

As a last resort, the Justice Department embraces an argument that would fit comfortably among the legal whimsies recounted in Aleksandr Solzhenitsyn's *The Gulag Archipeligo*. The department characterizes the Youngs' religious gifts as tantamount to theft—a dissipation of property rightfully owned by their creditors. But if what was done was theft, why do the laws provide neither a criminal nor civil sanction against the Youngs? That neglect would be incomprehensible if the Justice Department's characterization of the donation as thievery came within shouting distance of truth.

The RFRA may be imprudent legislation. But it is law that the Justice Department is constitutionally obliged to enforce. Its brief in the *Christians* appeal defaults on that obligation by seeking an interpretation of the RFRA that would make it as illusory as a munificent bequest in a pauper's will.

It is a sophistry more to be marveled at than imitated.

Bruce Fein of Great Falls, Va., was general counsel to the Federal Communications Commission from 1983 to 1984 and associate deputy attorney general from 1981 to 1982. He is now a partner in Blaustein & Fein, specializing in advising foreign governments in drafting constitutions, and a regular contributor to Legal Times.

Women p 3
Post Civil Rights p. 3
Equal Pay p. 3
Age p. 4
Fed. Sector p. 5

MEMORANDUM

TO: Stephen C. Warnath

FROM: Willie Epps, Jr.

DATE: July 13, 1994

RE: Questions for EEOC Nominees

TITLE VII:

St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), was a major setback for plaintiffs attempting to prove disparate treatment under Title VII of the Civil Rights Act of 1964. In **Hicks**, the Court held that the plaintiff does not necessarily prevail upon the showing of pretext and still maintains the burden of proving that the action in question was discriminatory.

Q1. Do you agree with the Court's holding in **Hicks**?

Q2. Or do you a favor the old scheme announced in **McDonnell Douglas** and **Burdine** where (1) plaintiff has burden to show prima facie case; (2) if plaintiff shows prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; (3) should the defendant carry this burden, the plaintiff must then have the opportunity to prove by preponderance of the evidence that the legitimate reasons offered by the defendant were not true reasons, but were pretext for discrimination?

[Legislation to reverse **Hicks** has been introduced in both the Senate and House. Senators Metzenbaum (principle sponsor), Simon and Wofford are sponsors. There are three bills in all that have been introduced to reverse **Hicks**. The principle bill is Civil Rights Standards Restoration Act, S. 1776 (Metzenbaum)/ H.R. 3680 (Owens).]

Title VII of the Civil Rights Act of 1964, requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race and/or sex. If an employment practice that operates to exclude racial minorities or women cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent.

Q3. As a member of the EEOC, how will you ensure that employer tests are valid and that employer selection procedure is predictive of or significantly correlated with important elements of job performance?

Q4. If you use the Uniform Guidelines on Employee Selection Procedures (UGESP), how will you ensure that its use will not lead to quotas and undermine efforts to improve and emphasize educational achievement?

In July 1993, the 9th Circuit rejected the EEOC National Origin Discrimination Guidelines and held that English-only workplace rules have no significant adverse impact on bilingual workers because the bilingual workers could comply with the rule.

Q5. What role, if any, should English-only rules have in the American workplace?

Q6. Do you believe that the EEOC should continue to enforce the National Origin Discrimination Guidelines -- that state that English-only rules are prima facie discriminatory -- despite the 9th Circuit's decision?

[On June 1, 1994, the Solicitor General, together with the EEOC, filed an *amicus* brief in support of granting certiorari in the case. Cert was denied on June 20, 1994.]

As you know, **Gilmer v. Interstate/Johnson** is a 1991 Supreme Court decision which held that courts can compel arbitration of Federal discrimination claims brought by a broker against his or her employer pursuant to the mandatory arbitration policy of a stock exchange.

Q7. As a member of the EEOC, will you support the use of non-collectively bargained corporate personnel policies which compel employees to arbitrate claims under an employer's established procedures rather than using the administrative and judicial procedures established under federal equal employment statutes?

[Legislation to reverse **Gilmer** and address the use of mandatory arbitration is a high priority for AARP and other aging organizations.]

It is well documented that discrimination on multiple bases is a serious problem. For example, an employer may hire African American and Hispanic men and Anglo women, but no African American or Hispanic women. That employer may have a defense to either a race or a sex claim under a traditional view of the law (i.e., he hires racial minorities and women and is, therefore, not liable under Title VII).

Q8. What types of policies should the EEOC implement to address problems of multiple discrimination which cut across statutes (i.e., race and disability or gender and age)?

WOMEN'S ISSUES UNDER TITLE VII:

Q9. Should the EEOC set aside sexual harassment for separate treatment on the grounds that sexual harassment "raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus may warrant separate emphasis?"

Q10. Do you agree or disagree with the Supreme Court holdings in **Harris v. Forklift Systems** (1993) and **Meritor Savings Bank v. Vinson** (1986) which provided that the same standards for determining liability and remedy should be applied to all types of hostile work environment harassment, both sexual and non-sexual harassment?

Q11. Should employers have the right (and do they have the responsibility) to bar fertile women from jobs in which they would be exposed to toxic substances that could harm the fetuses that women might carry?

POST-CIVIL RIGHTS ACT '91 ISSUES:

The Civil Rights Act of 1991 placed caps on damages for intentional discrimination.

Q12. Do you support legislation to remove the caps on damages for intentional discrimination as provided in the Civil Rights Act of 1991?

Q13. Do you support legislation to delete special exemption in the Civil Rights Act of 1991 for the **Wards Cove** case, which affects primarily Asian Pacific Americans who previously worked or are now employed by Wards Cove Packing Company?

As you know, the Civil Rights Act of 1991 amended only Title VII and the ADA. Application to the ADEA was not addressed. This means that expert witness fees are not available under ADEA.

Q14. Do you support legislation that would make the Civil Rights Act of 1991 applicable to ADEA?

Q15. Should the Civil Rights Act of 1991 be applied retroactively to cases arising prior to passage of the Act?

EQUAL PAY ACT:

The Equal Pay Act prohibits unequal pay for equal or "substantially equal" work. In the past, the enforcement of this Act has not been a priority for the Commission.

Q16. As a member of the EEOC, will you make EPA enforcement a priority?

Q17. Will you work with other agencies to encourage compliance with the EPA?

Q18. Do you support using the concept "comparable worth" when determining whether an employer has complied with the Equal Pay Act?

Q19. What do you say to critics who argue that "comparable worth" ignores market forces such as supply and demand?

Q20. Do you think that "comparable worth" focus too much on equal results rather than on equal opportunity?

Q21. Is "comparable worth" workable in practice?

Q22. Can jobs be evaluated by fixed standards?

Q23. Is "worth" determined by wages or is it subject to changes in competition, consumer preferences and new technology?

Q24. Do you support legislation that prohibits pay discrimination on the basis of sex, race, or national origin in jobs of **equivalent value**?

Q25. Is it legitimate to determine "equivalent value" by comparing the skills, effort, responsibility, and working conditions required of the jobs?

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA):

Age discrimination in employment continues to plague those older Americans who want to continue to be productive members of society in their later years. Too often employers base their hiring and retirement decisions on age alone when valid and job-related tests are viable alternatives.

Q26. Do you support calls for further study on the use of testing in place of age?

Q27. What tests are available to replace age as a predictor of job performance?

Q28. Should state and local governments be permitted to use age as a basis for hiring and retaining law enforcement officers and firefighters?

Q29. Should there be a mandatory retirement age for federal law enforcement officers and firefighters, Capitol Police, and air traffic controllers?

Q30. How will you ensure that older employees are not treated differently or unfairly when employers reduce their workforce?

Q31. Should the EEOC continue to apply the disparate impact theory under the ADEA?

OLDER WORKERS BENEFIT PROTECTION ACT:

Q32. In your opinion, does ADEA permit early retirement incentive offering an incentive only to persons under a specified age ("Capriano" plans)?

MORE NEEDED

FEDERAL SECTOR ENFORCEMENT

Many in the Senate are concerned with the Federal EEO complaint process. Since Executive Order 12067 gives EEOC lead coordinating responsibility for all federal EEO programs and activities...

Q33. What can be done to eliminate real and perceived conflict of interest in the current process whereby the agency reviews its own discriminatory conduct?

Q34. Do you support efforts to both streamline complaint procedures and provide mandatory time limits for processing as ways to improve the complaint process?

Q35. How can EEOC best deter future discriminatory conduct by federal employees who have discriminated in the past?

Q36. How costly will the reform of the Federal EEO complaint process be for the American taxpayer?

Q37. What can the EEOC do to eliminate discrimination in federal employment on the basis of sexual orientation?

TESTERS:

As you know, testers have been used for many years in the housing area, and there is well established case law on the validity of tester standing in fair housing cases. Now there is talk of using testers in the employment area.

Q38. Do you support the concept of a "tester" in the employment discrimination context?

Q39. Who would generally use testers when attempting to establish that discrimination exists in a certain workplace?

Q40. Have testers been used intensively in the employment area thus far?

Q41. During your tenure at EEOC, do you anticipate the intensive use of testers in the employment area?

Q42. Since the concept of testers in the employment area is still unsettled, do you believe testers should have standing to file charges of employment discrimination against employers, employment agencies and/or labor organizations which have discriminated against them because of their race, color, religion, sex or national origin?

Q43. Should standing under Title VII be broadly constructed?

Q44. Should EEOC field offices accept charges from "testers" and/or civil rights organizations filing charges on behalf of testers?

Q45. Should EEOC administer an enforcement program which includes the use of testers by private and "substantially equivalent" state/local government fair employment agencies?

ISSUES INVOLVING COMMISSION OPERATIONS

Q46. As a member of the EEOC, will you attempt to provide more adequate multicultural/sensitivity training for the EEOC staff?

Q47. Will you require staff members to attend additional training sessions in the areas of intake, investigation and complex litigation?

Q48. What will you do to make your staff more accessible to minorities, physically and mentally disabled people, and those with limited reading skills?

Q49. What types or partnerships, if any, will you create with civil rights and advocacy organizations?

Q50. What insights, if any, do you have regarding improving the frequency, format and content of Commission meetings?

The Commission has been characterized as a "reactive" and closed organization.

Q51. What will you do to make the Commission's policymaking process more centralized and proactive?

Q52. What steps can the Commission take to make sure good policy is not undercut in implementation and that policy is made in the open?

RELIGIOUS FREEDOM:

Q53. How will you ensure that EEOC Guidelines on Harassment do not interfere with religious freedom as guaranteed by the First Amendment?

S.2238 BY *KENNEDY, EDWARD (D-MA) -- Employment Non-Discrimination Act of 1994

CURRENTLY: 26 Democrats
3 Republicans
---
29 Cosponsors

AKAKA (D-HI)	As Introduced 06/23/94
*BINGAMAN (D-NM)	As Introduced 06/23/94
BOXER (D-CA)	As Introduced 06/23/94
BRADLEY (D-NJ)	As Introduced 06/23/94
CHAFEE (R-RI)	As Introduced 06/23/94
*DODD (D-CT)	As Introduced 06/23/94
FEINGOLD (D-WI)	As Introduced 06/23/94
FEINSTEIN (D-CA)	As Introduced 06/23/94
GLENN (D-OH)	As Introduced 06/23/94
*HARKIN (D-IA)	As Introduced 06/23/94

Type next command, NEW or HELP:

INOUYE (D-HI)	As Introduced 06/23/94
*JEFFORDS (R-VT)	As Introduced 06/23/94
KERRY, JOHN (D-MA)	As Introduced 06/23/94
LAUTENBERG (D-NJ)	As Introduced 06/23/94
LEAHY (D-VT)	As Introduced 06/23/94
LEVIN, CARL (D-MI)	As Introduced 06/23/94
LIEBERMAN (D-CT)	As Introduced 06/23/94
*METZENBAUM (D-OH)	As Introduced 06/23/94
*MIKULSKI (D-MD)	As Introduced 06/23/94
MOSELEY-BRAUN (D-IL)	As Introduced 06/23/94
MOYNIHAN (D-NY)	As Introduced 06/23/94
MURRAY (D-WA)	As Introduced 06/23/94
PACKWOOD (R-OR)	As Introduced 06/23/94
*PELL (D-RI)	As Introduced 06/23/94
RIEGLE (D-MI)	As Introduced 06/23/94
ROBB (D-VA)	As Introduced 06/23/94
SARBANES (D-MD)	As Introduced 06/23/94

Type next command, NEW or HELP:

*SIMON (D-IL)	As Introduced 06/23/94
*WELLSTONE (D-MN)	As Introduced 06/23/94

* Members of Labor & Human Resources

Questions And Answers For Public Schools On The Religious Freedom Restoration Act

1. Q. What is the purpose of the Religious Freedom Restoration Act (RFRA)?

A. The Act's purpose is to restore the standard for protection of religious liberty that existed before the 1990 Supreme Court decision in Oregon v. Smith. In Smith, the Supreme Court repudiated long-established First Amendment doctrine to hold that the government no longer needs a compelling reason when its laws or regulations substantially burden religious practices. After Smith, governmental laws or practices of general applicability which substantially burdened or restricted religious practices were constitutionally permissible as long they were rational and did not expressly target religion. For example, outside the public school context, the ruling in Smith would allow a law banning alcoholic beverages to be applied so as to forbid communion, as long as that law did not single out the *religious* consumption of wine for prohibition. By federal statute, RFRA effectively restores the pre-Smith standard for protecting religious freedom.

2. Q. What was the rule of law before Oregon v. Smith?

A. Under the Supreme Court's long-established interpretation of the Free Exercise Clause of the First Amendment, if a government law or practice substantially burdened a person's religious practice, it was valid only if the government could show that (1) there was a compelling governmental interest in applying the law to the religious practitioner and (2) it was the least restrictive way for the state to pursue its compelling interest. This test, which involves balancing the government's interest against the individual's religious liberty interest in a particular case, is restored under the Religious Freedom Restoration Act.

3. Q. Did the pre-Smith rule apply to school districts as well?

A. Yes. Where courts found that government actions substantially burdened religious freedom, the courts applied the compelling interest balancing test to school districts and other government entities. In some cases, the courts ruled that school-related government actions were unconstitutional as applied to particular religious adherents, as in Wisconsin v. Yoder, where the Supreme Court ruled that the Amish should be exempted from laws requiring school attendance beyond eighth grade. In other cases, the courts have upheld government activities related to the schools. For example, in Fellowship Baptist Church v. Benton, a federal appellate court upheld an Iowa state teacher certification requirement as applied to private religious schools, even assuming that the requirement substantially burdened religious freedom. A list of a number of other cases where the courts have considered free exercise claims concerning the public schools is enclosed.

4. Q. How will the Religious Freedom Restoration Act affect public schools?

A. It will simply restore the legal test that applied for decades before 1990 in evaluating claims that general school laws or rules should not apply to particular students or teachers because of their religion. Just as they did before Smith in 1990, such claimants would have to prove that the law or rule substantially burdens their own exercise of religion. If so, then the compelling interest balancing test would be used to determine whether the law or rule could be applied to them.

5. Q. How will the courts determine whether applying public school or other government laws or rules violates the Religious Freedom Restoration Act?

A. In the same way that they determined whether the First Amendment guarantee of religious liberty was violated before Smith. As the Act's legislative history states, the courts should look to pre-Smith freedom of religion cases for guidance in determining whether religious exercise has been substantially burdened and whether the compelling interest test has been met. Although the Act does not approve or disapprove of the results in any particular pre-Smith court decision, it is clear that the pre-Smith legal standard should be applied.

6. Q. Is a court likely to throw out completely a school law or rule because it infringes on religious freedom under the Religious Freedom Restoration Act?

A. No. Under RFRA, religious practitioners could claim that a general rule or law should not apply to *them* because it violates *their* religious freedom, as the Amish did successfully in Yoder. Their claim would not affect application of the law or rule to *other* people whose religious practices are not substantially burdened. In other words, the remedy under RFRA, where a remedy is appropriate, would be an exemption from the rule, as in Yoder.

7. Q. Doesn't enactment of the Religious Freedom Restoration Act mean that all kinds of strange, ostensibly religious complaints would be successfully raised against otherwise unobjectionable government laws or rules?

A. No. This simply has not been a problem in the past, as Justice O'Connor observed in her concurring opinion in Smith. To be subject to RFRA at all, an individual's objection must be grounded in a sincerely held religious belief, a requirement which has and will continue to screen out many complaints. However, we live in a religiously pluralistic society. When government laws or rules truly restrict religious liberty, Congress has determined that it is not asking too much for the government to justify that restriction by showing it has a compelling state interest to protect. Congress overwhelmingly enacted RFRA because it believed the First Amendment was intended to protect the individual right to free exercise of religion from all government action which substantially burdens that right without proper justification.

8. Q. Will the Act make it easier for advocates to ban books or curricular materials from the schools on religious grounds?

A. No. Under pre-Smith law, it was clear that a student's *own* religious freedom was not substantially burdened if *other* students read particular books. Such advocates can claim that their *own* children should not be required to use certain books or materials on free exercise grounds, but not that books or curricula should be banned altogether. In some cases, pre-Smith courts — rightly or wrongly — ruled that simply requiring that standard books be read by students in public schools did not constitute a substantial burden on religion at all.

9. Q. How about parents' requests that their children be allowed to opt out of classroom instruction or assignments that are religiously objectionable to them?

A. As would have been the case prior to Smith, if parents can prove that assignments or instruction substantially burden their religious free exercise, and if a school cannot meet the compelling interest balancing test, then RFRA would require an opt-out or

other satisfactory accommodation of their religious objections. If no substantial burden can be proven or if a school can meet the compelling interest balancing test, then a claim under RFRA would fail.

10. Q. What about requests to conduct religious activities at school, such as prayer at graduation, Bible clubs, and distribution of religious literature?

A. RFRA should not cause any change in these areas, because these issues are generally governed by the Establishment Clause, the federal Equal Access Act, and the free speech protections of the First Amendment. The legislative history of RFRA specifically states that where religious exercise involves speech, as in distribution of literature, reasonable time, place and manner restrictions continue to be acceptable. As to graduation prayer, the Supreme Court has ruled in Lee v. Weisman that school-sponsored prayer at graduation is unconstitutional, and while lower courts are split on so-called student-initiated prayer at graduation, the Act is not likely to affect that issue. Religious clubs will continue to be governed primarily by the Equal Access Act.

11. Q. How about requests by school employees for accommodation of their religious practices in the employment context?

A. RFRA's legislative history makes clear that it would not affect religious accommodation and other issues under Title VII of the 1964 Civil Rights Act.

12. Q. What kinds of laws and rules would be affected by the Religious Freedom Restoration Act?

A. Only laws and rules that substantially burden religious practice and fail the compelling interest balancing test. For example, prior to RFRA, one court ruled in Church of God v. Amarillo Independent School District that a school district policy which limited the number of excused absences for religious holidays to two days per year and provided that students be given a zero for all classwork and tests on days when they had unexcused absences for religious holidays substantially burdened the free exercise of religion. Since the school district could not meet the compelling interest test, the policy was ruled unconstitutional as applied to students whose religion required more absences from school. Similar analysis would be utilized in evaluating such a policy under RFRA.

13. Q. Does the Religious Freedom Restoration Act permit school officials to promote religion or religious practices?

A. No. The Act specifically states that it does not in any way affect the Establishment Clause of the First Amendment, which prohibits school officials from promoting religion or religious practices. Thus, for example, school employees would still be barred from proselytizing students or engaging in similar religious activities with students during the school day.

14. Q. Where can I get more information on how RFRA applies to public schools?

A. In addition to consulting with your attorneys, a number of national education and other groups have prepared materials or are available to help answer questions, including the organizations sponsoring this analysis. A list of these groups is enclosed.

Examples Of Free Exercise Decisions Concerning The Public Schools Prior To Oregon v. Smith

Wisconsin v. Yoder, 406 U.S. 205 (1972)(ruling that parents have the right to direct the education and religious upbringing of their children and that the interest of Amish parents in the Amish way of life, which includes an adequate alternative mode of continuing informal vocational education, warranted exemption from state's compulsory education law on free exercise grounds).

Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987)(upholding an Iowa state teacher certification requirement and yearly student attendance reporting requirements, as applied to private religious schools, and ruling that 'Amish exemption' from compulsory education law should not be extended to fundamentalist Baptist students).

Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988)(upholding State's requirement that home-schooled children take standardized tests against parents' free exercise challenge).

People v. DeJonge, 501 N.W. 2d 127 (Mich. 1993)(post-Smith)(ruling that state requirement that parents who conduct home schooling for their children provide state-certified instructors violated free exercise rights of parents whose religious convictions prohibited the use of such instructors).

Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988)(upholding school requirement that all students read the same Holt basic reading series against free exercise challenge).

Church of God v. Amarillo Indep. School Dist., 511 F. Supp. 613 (N.D. Texas 1981), aff'd, 670 F.2d 46 (5th Cir. 1982) (ruling that school district policy which limited number of excused absences for religious holidays to two days per year and provided that students be given zeros for any classwork or tests on days when they had unexcused absences for religious reasons violated free exercise rights of religious students).

Roberts v. Madigan, 702 F. Supp. 1505 (D.Colo. 1989), aff'd, 921 F.2d 1047 (10th Cir. 1990), cert. denied, 120 S.Ct. 3025 (1992)(rejecting free exercise challenge by teacher to decisions to remove religiously-oriented books from the classroom and to stop the teacher from reading the Bible silently at his desk based on establishment clause).

Grove v. Mead School Dist., 753 F.2d 1528 (9th Cir. 1985), cert. denied, 474 U.S. 826 (1985)(ruling that school board's refusal to remove book from its curriculum did not result in a burden on free exercise rights, where student was given permission to avoid classroom discussions of the offensive book and was assigned an alternative book).

Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972)(holding that rule requiring either ROTC participation or physical education classes as applied to school which chose not to offer physical education classes violated free exercise rights of conscientious objector).

Lewis v. Sobol, 710 F.Supp. 506 (S.D.N.Y. 1989)(ruling that school officials violated free exercise rights of parents by refusing to allow unimmunized child to attend kindergarten, where state law allowed other religious exemptions to immunization requirement).

Moody v. Cronin, 484 F.Supp. 270 (C.D. Ill. 1979)(ruling that requirement of coeducational physical educational classes in which 'immodest apparel' was worn violated free exercise rights of United Pentecostal students since less restrictive means were available to the school to further the State's interest in physical education).

Text Of The Religious Freedom Restoration Act, Public Law No. 103-141

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ",and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION.—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Questions And Answers For Public Schools On The Religious Freedom Restoration Act Is Sponsored Jointly By:

American Association of School Administrators
1801 North Moore Street
Arlington, VA 22209
(703) 528-0700

American Civil Liberties Union
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Washington, DC 20002
(202) 544-1681
Contact: Bob Peck

American Jewish Committee
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Washington, DC 20005
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Contact: Richard Foltin

American Jewish Congress
15 E. 84th Street
New York, NY 10028
(212) 360-1500
Contact: Marc Stern

Americans United for the Separation of Church and State
8120 Fenton Street
Silver Spring, MD 20910
(301) 589-3707
Contact: Steve Green

Anti-Defamation League
1100 Connecticut Avenue, N.W.
Suite 1020
Washington, DC 20036
(202) 452-8320
Contact: Michael Lieberman

Baptist Joint Committee
200 Maryland Avenue, N.E.
Washington, DC 20002
(202) 544-4226
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Christian Legal Society
Center for Law and Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

Church of Scientology International
400 C Street, N.E.
Washington, DC 20002
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Lutheran Office for Governmental Affairs, ECLA
122 C St., N.W., Suite 125
Washington, DC 20001

National Association of Evangelicals
1023 15th St., N.W., Suite 500
Washington, DC 20005
(202) 789-1011
Contact: Forest Montgomery

National Jewish Community Relations Advisory Council
443 Park Avenue South, 11th Floor
New York, NY 10016
(212) 684-6950
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People For the American Way
2000 M Street, Suite 400
Washington, DC 20036
(202) 467-4999
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2027 Massachusetts Avenue, N.W.
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CONFIRMATION ISSUES OUTLINE
(7/12/94)

Title VII

Use of Circumstantial evidence

- *St. Mary's Honor Center v. Hicks* - June 1993 Supreme Court decision that made proof of disparate treatment under Title VII based on circumstantial evidence more difficult. Previously, the Court had set out a burden shifting approach to govern the proof of disparate treatment where there was no direct proof of intent. In such cases, the plaintiff had the burden of making out a *prima facie* case, whereupon the burden of production shifted to the defendant to present a legitimate non-discriminatory reason. If the plaintiff could show that the proffered reason was pretextual, the plaintiff satisfied his/her burden and prevailed.

  In *Hicks*, the Court held that the plaintiff does not necessarily prevail upon the showing of pretext and still maintains the burden of proving that the complained of action was discriminatory. Legislation to reverse *Hicks* has been introduced in both the Senate and House; Metzenbaum (principal sponsor), Simon, and Wofford are sponsors. There are three bill in all that have been introduced to reverse *Hicks*. The principal bill is the Civil Rights Standards Restoration Act, S.1776 (Metzenbaum)/H.R.3680 (Owens).

  [For briefing material see Post-Civil Rights Act Issues I. (C)]

English-only

- *Garcia v. Spun Steak* - July 1993 9th Circuit decision holding that English-only workplace rules have no significant adverse impact on bilingual workers because the bilingual workers could comply with the rule; therefore, such rules do not violate Title VII. Further, the 9th Circuit rejected the EEOC National Origin Discrimination Guidelines, which state that English-only rules are *prima facia* discriminatory, as *ultra vires*.

  In considering whether to grant cert in the case, the Supreme Court solicited the position of the Administration. On June 1, 1994, the Solicitor General, together with the EEOC, filed an *amicus* brief in support of granting cert. Cert was denied on June 20, 1994.

  ① continue to enforce
  ② review

  NOTE: This issue is of great importance to language-minority communities, particularly the Latino and Asian Pacific American communities. It is a concern not only because of the underlying principle, but also because language discrimination is occurring with great and growing frequency. The Congressional Hispanic Caucus and the new Congressional Asian Pacific American Caucus are considering developing legislation to address the issue. [See attached briefing material]

- *Gilmer*/Protection from Coercive Employment Agreements Act of 1994 (Introduced by Senator Feingold) - Amends Title VII, ADEA, and ADA to prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration. This legislation is in response to the 1991 Supreme Court decision in *Gilmer v. Interstate/Johnson*, which held that courts can compel arbitration of Federal discrimination claims brought by a broker against his employer pursuant to the mandatory arbitration policy of a stock exchange.

  The issue for the EEOC is the use of non-collectively bargained corporate personnel policies which compel employees to arbitrate claims under an employer's established procedures rather than using the administrative and judicial procedures established under federal equal employment statutes. It also ties in to the encouraged use of Alternative Dispute Resolution, which is generally viewed favorably.

  In March, Congressman William Ford, Chairman of the House Education and Labor Committee, and Congressman Major Owens, Chairman of the House Ed & Labor Subcommittee on Select Education and Civil Rights, requested that the GAO conduct a study on the use of these policies.

  NOTE: *Gilmer* was an ADEA case and has implications on the waiver provisions of OWBPA/ADEA. Legislation to reverse the decision and address the use of mandatory arbitration is a high priority for AARP and other aging organizations.

  [See additional briefing material in section on ADEA.]

- Uniform Guidelines on Employee Selection Procedures (UGESP) - UGESP were adopted in 1978 by the EEOC, DOL, and DOJ as a uniform set of principles for evaluating tests and other selection procedures which are used as a basis for any employment decision and which have or may have a disparate impact against members of a protected class. There is a substantial body of caselaw interpreting the Guidelines and, as is true with other Guidelines, some courts have been more inclined to follow them than others.

  One of the principal points of UGESP is that tests or other employee selection practices must be ***valid***, that is empirical data should be available that demonstrates that the selection procedure is predictive of or significantly correlated with important elements of job performance.

- UGESP - cont.

  UGESP have long been controversial. Opponents -- conservative business groups and ideological conservatives, including former EEOC Chairs Thomas and Kemp -- argue that they are based on impermissible group preferences, lead to quotas, and undermine efforts to improve and emphasize educational achievement (by restricting employers ability to rely simply on educational credentials). Proponents -- the civil rights and employee-advocate communities -- argue that UGESP go a long way toward providing workable standards to evaluate employment selection devices.

  There have been a series of efforts, none to date successful, to have the EEOC and the other agencies review and revise UGESP. While no one argues that they cannot be improved, there is substantial concern that if the Guidelines are opened up to revision, it will be extremely difficult, as a political matter, to control the process and come up with anything better.

- Coordination between EEOC & OFCCP - Several civil rights and women's groups are urging the EEOC and OFCCP to develop a Memorandum of Understanding (MOU) that would designate OFCCP as the EEOC's agent when OFCCP discovers intentional discrimination by federal contractors in violation of Title VII in the course of a compliance review. This would allow OFCCP to seek appropriate compensatory and punitive damages (as provided by the Civil Rights Act '91) in its negotiation and conciliation efforts involving intentional discrimination. There is already such a MOU between EEOC and OFCCP regarding claims of disability discrimination against federal contractors. This coordination would be appropriate for all covered bases of discrimination.

- Guidance Needed on Intersection of Bases -- Race/National Origin & Gender and/or Disability and/or Age - It is well-documented that discrimination on multiple bases is a serious problem. For example, an employer may hire African American and Hispanic men and Anglo women, but no African American or Hispanic women. That employer may have a defense to either a race or a sex claim under a traditional view of the law (*i.e.*, he hires racial minorities and women and is, therefore, not liable under Title VII).

  There are, however, several cases which have found that the particular problems facing racial and ethnic minority women are cognizable under Title VII. *See, e.g., Jefferies v. Harris County Community Action Association,* 615 F.2d 1025 (5th Cir. 1980) (Black women constitute a protected class under Title VII). No cases or policy have addressed problems of multiple discrimination which cut across statutes (*i.e.*, race and disability or gender and age). Civil rights and women's groups have advocated the adoption of policy and a litigation strategy to develop these legal theories.

WOMEN'S ISSUES UNDER TITLE VII-

- Sexual Harassment Issues -

  - EEOC's Proposed Consolidated Guidelines on Harassment - Women's groups support the proposed consolidated guidelines, but argue against the Commission setting sexual harassment aside for separate treatment on the grounds that sexual harassment "raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus may warrant separate emphasis."

    These groups cite the Supreme Court's decisions in *Harris v. Forklift Systems* (1993) and *Meritor Savings Bank v. Vinson* (1986) as providing that the same standards for determining liability and remedy should be applied to all types of hostile work environment harassment (as opposed to *quid pro quo* harassment), both sexual and non-sexual harassment.

    This view is important in the context of the debate over the inclusion of religion in the Proposed Consolidated Guidelines on Harassment. Opponents of the inclusion of religion argue that the same standards used in sexual harassment cases are inappropriate for and, therefore, should not be used in religious harassment cases.

  - **NOTE:** *Harris v. Forklift Systems* was only the second case interpreting the law of sexual harassment heard by the Supreme Court. In an unanimous decision, the Court ruled that a woman does not have to prove she suffered psychological injury to successfully challenge a sexually hostile work environment. The Court held that a woman can establish illegal sexual harassment "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive." The lower courts ruled that sexually degrading behavior was not bad enough to be considered unlawful, in large part because the victim did not show that she suffered psychological damage as a result of the harassment.

  - Coordination between EEOC and OFCCP on standards for employers - OFCCP's guidelines on sex discrimination have not been revised for 15 years. Women's groups urge that the OFCCP guidelines be updated to reflect regulatory and legal developments such as the enactment of the Pregnancy Discrimination Act and the EEOC's Guidelines on Sexual Harassment.

    Additionally, EEOC and OFCCP are encouraged to work together to develop clear standards for employers regarding sexual harassment in the workplace.

- Pregnancy Discrimination Act of 1978 (PDA) [@ §701(k) of Title VII] - PDA amended the Civil Rights Act of 1964 to prohibit discrimination against pregnant women. In pertinent part, PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other person not so affected but similar in their ability or inability to work."

  In recent years, one of the most important issues involving pregnancy discrimination has arisen from employer policies that have excluded women of child-bearing age from certain jobs in which they might be exposed to toxic substances. Employers defend these policies as protections for the fetuses that women **might** carry. Women's rights groups argue that because these policies are based on women's ability to become pregnant, they violate Title VII as amended by the PDA.

  The most significant recent Supreme Court decision regarding the PDA is *International Union, UAW v. Johnson Controls* (1991). In an unanimous opinion, the Court held that the company's fetal protection policy (which barred all fertile women from jobs in which they would be exposed to lead above a certain level) violated Title VII as amended by the PDA and stated that the policy "explicitly discriminates against women on the basis of their sex. The policy excludes women with child-bearing capacity from lead-exposed jobs and so creates a facial classification based on gender." In 1991, the EEOC issued policy guidance in accordance with the holding in *Johnson Controls*.

  [For additional detail, see briefing material on *Johnson Controls*]

- Pregnancy Discrimination Act of 1978 (PDA) - cont.

  - Abortion Exception - In a recent case, *Turic v. Holland,* 1994 U.S. Dist. LEXIS 4997 (W.D. Mich., Mar. 7. 1994), a federal district court held that discharging an employee because she is considering having an abortion is a violation of the PDA. These cases are rare, but women's groups believe this is a good example of how the PDA can apply to abortion.

Civil Rights Act of 1991 -

- Summary of Principal Provisions of Civil Rights Act of 1991 - [See attached briefing material]

POST-CIVIL RIGHTS ACT '91 ISSUES - [See attached briefing material]

Pending Legislation:

- Equal Remedies Act of 1993 - Legislation to remove the caps on damages for intentional discrimination as provided in CRA'91. Janet Reno testified in support of ERA at her confirmation hearing and Deval Patrick has indicated that he will testify in support of the bill at Senate hearings expected in the fall.

  ♦ **Formal Administration Position yet?**

- Justice for Wards Cove Workers Act - Legislation to delete special exemption in the CRA '91 for the *Wards Cove* case, which affects primarily Asian Pacific Americans who previously worked or are now employed by Wards Cove Packing Company. The Administration has already taken a position in support of the legislation, as evidenced by a 1993 letter from President Clinton.

Suggested Legislation:

- Make CRA '91 Applicable to ADEA - CRA '91 amended only Title VII and the ADA; application to the ADEA was not addressed. Experts witness fees not available under ADEA; fix for *Lorance* on challenge to seniority system not applicable under ADEA. [Refer to summary of CRA '91]

- Retroactivity -- Effect of *Landgraf v. USI File Products* - April 1994 Supreme Court decision that the damages provision of CRA '91 cannot be applied retroactively to cases arising prior to passage of the Act.

Continuing Policy Issues:

- Discriminatory Tests and Prohibition of "Race Norming" - Need to determine the effect of the race norming prohibition in CRA'91 on use of separate physical ability and psychological tests for different genders.

- EEOC Policy not to inform CPs of availability of damages and not to negotiate damages in settlement - Based on theory that settlements allow for "no fault" and, therefore, there can be no **intentional** discrimination for which damages can be recovered.

Equal Pay

Equal Pay Act (EPA)

- EPA Summary - EPA prohibits unequal pay for equal or "substantially equal" work. It does not prohibit pay differences "based on factors other than sex," such as seniority, merit, or systems that determine wages based on the quantity or quality of work. The term "factors other than sex" has been interpreted broadly by the courts to include factors such as prior salary and profitability.

  In the 1981 Supreme Court decision *County of Washington v. Gunther*, the Court held that Title VII goes beyond the EPA to prohibit discrimination not only in pay between jobs that are equal, but also between jobs that are different. *Gunther* has been interpreted very narrowly. Most courts in non-equal pay for equal work wage discrimination cases have required the plaintiff to prove discriminatory intent by the employer and have required much stronger evidence of this intent than in other kinds of Title VII cases.

  NOTE: Equal pay for equal work must be distinguished from the controversial issue of "comparable worth," which will be discussed below.

- EEOC's Record on EPA - During the last 14 years, the EEOC has had a dismal record on EPA enforcement. In 1980 under Eleanor Holmes Norton, the EEOC brought 79 EPA cases compared to only 2 that the Commission brought in 1992.

- Recommendations - The EEOC is urged by women's groups to make EPA enforcement a priority, particularly in its systemic litigation efforts. EEOC is also encouraged to work with OFCCP to include EPA compliance in OFCCP's compliance reviews of federal contractors.

  [See attached briefing material prepared by WLDF, includes use of Title VII in wage discrimination cases.]

Equal Pay Act (EPA) - cont.

- Comparable Worth - Some of the arguments against "comparable worth" include:

  - It ignores market forces/factors such as supply and demand; wage controls disrupt the market and would adversely affect employment

  - Worth is not determined by wages; worth is subject to changes in competition, consumer preference, new technology; income is based on society's valuation of what is produced

  - Focuses on equal results not equal opportunity; seen as radical departure from established anti-discrimination law -- group preferences rather than equal opportunity for individual

  - Concept is not workable in practice; jobs cannot be evaluated by fixed standards

  [See attached briefing material for further detail on arguments in opposition to comparable worth.]

  - **Fair Pay Act of 1994 (FPA)** to be introduced soon by Eleanor Holmes Norton. The FPA amends the Fair Labor Standards Act to prohibit pay discrimination on the basis of sex, race, or national origin in jobs of **equivalent value**. Whether work is of "equivalent value" is determined by comparing the skills, effort, responsibility, and working conditions required of the jobs.

    [See attached briefing material prepared by WLDF]

  - The Women's Bureau of DOL is actively involved in this issue and with this legislation. Karen Nussbaum, Director of the Women's Bureau, has asked us to proceed with caution in this area so that their long term plans will not be compromised. Administration coordination is needed.

Age Discrimination in Employment Act (ADEA)

Age

[Briefing material is provided for each of the following issues]

- Charge Processing - AARP argues that there is no statutory requirement of "cause" determination under the ADEA. The EEOC processes age charges the same way it does Title VII charges with the overwhelming majority of charges dismissed through "no cause" finding.

- Age Discrimination Amendments of 1993 (H.R. 2722) - Police and firefighters exemption from the ADEA thereby allowing the use of mandatory retirement age; sponsored by Owens, opposed by Metzenbaum. The bill seeks to extend permanently the temporary exemption to ADEA granted to police and firefighters in 1987. Owens has attached the bill to the Crime Bill, which is stuck in conference. Metzenbaum has threatened (promised) to filibuster the Crime Bill if the amendment stays on. (This is the one issue that Metzenbaum and Thurmond are in complete agreement on.)

A

  - **Administration Position** - (articulated in letter from DOJ on the Crime Bill, excerpt of letter is attached) Calls for further study on the use of testing in place of age and includes a compromise 4-year temporary extension of the law allowing mandatory retirement age.

- Effect of Reductions in Force (RIFs) on Older Workforce - Many ADEA charges are related to RIFs. While the ADEA clearly prohibits targeting groups on the basis of age or treating members of protected age group differently in a RIF, the issue becomes more complex when "proxies for age" are used. The 1992 Supreme Court decision in *Hazen Paper* has complicated the matter because it held that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature **other** than age, even when the factor used is empirically correlated with age.

- Disparate Impact Theory under ADEA - While the EEOC and most courts of appeals have applied disparate impact theory under the ADEA, there is no Supreme Court decision on the issue. The Court's decision in *Hazen Paper* may be a signal that it would **not** support the use of disparate impact theory under ADEA. A legislative fix is being considered by AARP.

- Pension Benefit Accruals under the ADEA - ADEA was amended in 1978 to raise maximum age limit from 65 to 70 and to forbid mandatory retirement under pension plans. The legislative history for the amendment indicated that pension plans could stop benefit accruals at normal retirement age. In 1986, Congress amended ADEA, the Internal Revenue Code, and ERISA in the Omnibus Budget Reconciliation Act of 1986 (OBRA 86) to require pension accruals **regardless** of age and required EEOC, IRS, and DOL to coordinate regulatory efforts.

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OLDER WORKERS BENEFIT PROTECTION ACT - [See attached background memos]

- **OWBPA Rulemaking Options** - NOTE: On July 8, 1994, OCLA received verbal approval from OMB to proceed with negotiated rulemaking **provided that** the agency would not proceed without the approval of or until the arrival of the new leadership.

- **Effect of Title I of OWBPA on:**

  - **Early Retirement Incentives** - OWBPA authorized many qualifying voluntary early retirement incentive plans. The issue remains whether ADEA, after OWBPA, permits early retirement incentive offering an incentive only to person under a specified age ("Cipriano" plans). EEOC has opposed an age-capped plan in litigation (*amicus* brief).

  - **State and Local Government Disability Retirement Plans** - there is substantial need for guidance in this area because many public employers apparently use a disability retirement plan that may now violate ADEA. (The plan calculates disability retirement benefits by projecting years of service until normal retirement age, which operates to the disadvantage of older individuals.)

  - **Severance and Pension Integration** - OWBPA provides that severance pay can be offset by (1) additional pension benefits made available to an employee, or (2) the value of certain retiree medical benefits. The issue remains whether OWBPA is dispositive of all questions dealing with pension/severance integration. EEOC guidance is needed.

  - **Ending retiree health coverage at medicare eligibility** - OWBPA does not address this issue, which will likely be the subject of litigation because employer-provided retiree health benefits are often more generous than Medicare.

    - ♦ **Administration position?**

- **Title II of OWBPA -- ADEA Waivers** - Title II provides that unsupervised waivers may be valid and enforceable if they meet several requirements and are otherwise knowing and voluntary.

  - **Must Consideration be Returned to Challenge Waiver** - Remaining issue is whether an individual may challenge a waiver while retaining the consideration given in return for signing agreement. Courts and the Congress are split on the issue.

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- **Title II of OWBPA -- ADEA Waivers** - cont.

  - **Arbitration Agreements under ADEA/OWBPA (*Gilmer*)** - Title II of OWBPA, which became effective after *Gilmer*, prohibits prospective waivers of rights or claims under ADEA and it requires that waiver agreements be supported with valuable consideration to which an individual is not already entitled. Issue remains for Commission whether Title II applies to mandatory arbitration agreements.

Americans With Disabilities Act (ADA) - Title One

[Briefing material is attached for each of the following issues]

- ADA Fact Sheets on:

  - **Definition of Disability**
  - **Employment Provisions**
  - **Coverage of Drub and Alcohol Users**
  - **Remedies**

- Existing EEOC ADA Guidances:

  - **Preemployment Disability-Related Inquiries and Medical Examinations under the ADA**

  - **Interim Enforcement Guidance on the Application of ADA to Disability-Based Distinctions in Employer Provided Health Insurance** - States that a different level of benefits in an employer-provided health insurance plan for "mental/nervous" conditions is not a "disability-based distinction" that violates ADA.

- Future EEOC ADA Guidances Currently Under Development :

  - **Definition of the Term "Disability"** - A draft EEOC Compliance Manual section is in the final stages of development. The draft provides an analytical framework for determining whether an individual has a "disability" as defined by the ADA.

    ADA protects a qualified individual who: (1) has a physical or mental impairment that **substantially limits a major life activity**, (2) has a **record** of such an impairment, or (3) is **regarded as** having such an impairment.

- Future Guidances/**Definition of the Term "Disability"** - cont.

  The draft EEOC Compliance Manual section on this issue includes several provisions addressing psychiatric disabilities, including listing mental activities as examples of major life activities; a statement that episodic disorders may be substantially limiting; and a statement that mental disabilities that may be ameliorated with medication may still be substantially limiting.

  - **The ADA and Psychiatric Disabilities** - [Summary attached]

  - **Reasonable Accommodation and Undue Hardship** - A draft EEOC Compliance Manual section is being reviewed within OLC. Outstanding issues include reasonable accommodation for people with mental disabilities, which may involve "significant difficulty" rather than "significant expense."

- Unresolved Issues:

  - **"Mental/Nervous" Distinctions in Long Term Disability (LTD) Plans (wage replacement)** - LTDs usually limit benefits for "mental/nervous" conditions to two years, but do not similarly limit benefits for physical conditions. Does this violate ADA as a "disability-based distinction" unless shown not to be a subterfuge to evade the Act? Unlike health insurance which provides for treatment, LTD is wage replacement and is available only to people with actual disabilities. An options paper is being developed on this issue by OLC.

  - **Interaction Between ADA Reasonable Accommodation Requirements and Collective Bargaining Agreements** - Is it an undue hardship for an employer to provide a reasonable accommodation that is inconsistent with the terms of the applicable collective bargaining agreement? This issue includes the conflict between issues related to seniority and reasonable accommodation. Employers are caught in the middle.

- Coordination of the ADA and the Family and Medical Leave Act (FMLA) - The ADA and FMLA both impose leave-related obligations on covered employers. The EEOC has been working with DOL during its FMLA rulemaking to coordinate implementation of both laws. When DOL issues its final FMLA rule, EEOC's OLC will finalize an enforcement guidance on the ADA/Title VII and FMLA.

- Coordination of the ADA and the Family and Medical Leave Act (FMLA) - A hot political issue in the DOL FMLA rulemaking was/is whether an employee entitled to leave under both ADA and FMLA must take FMLA and ADA leave sequentially or is entitled to simultaneously enjoy the best of both laws.

- Coordination of the ADA and the Family and Medical Leave Act (FMLA) - cont.

  Senators Harkin and Dodd wrote to the EEOC in November 1993 to express their strong support for permitting employees to enjoy the best of both laws. DOL has indicated that it will follow this path in its final rule.

- Relationship Between Section 501 of the Rehabilitation Act of 1973 (Federal Sector) and the ADA - Section 501 prohibits federal sector discrimination based on disability and also requires the federal government to engage in affirmative action based on disability. In 1992, the Rehab Act was amended to apply ADA legal standards in complaints alleging non-affirmative action employment discrimination. The change to ADA standards changes the usual federal sector practices, particularly regarding disability-related inquiries and medical examinations. This may be opposed by federal law enforcement agencies.

Civil Rights Issues in Health Care Reform

This issue is included because of an amendment proposed by Senator Kassebaum during the L&HR Committee's consideration of the health care reform legislation, which would have eliminated much of the civil rights protections in the bill. Senator Kassebaum argued that the protections were duplicative and unnecessary because of existing civil rights protections. Since health care is so closely tied to employment, some felt the issue may come up.

- For a short summary of the issues see the attached **Questions and Answers About Civil Rights Issues in Health Care Reform**; for more detail, see the attached **Gaps in Existing Civil Rights Laws**.

  [See attached briefing material for summary of Kassebaum amendment]

Federal Sector Enforcement

[Please refer to briefing material previously distributed]

- Part 1614 - New EEOC federal sector equal employment opportunity complaint processing regulations, issued pursuant to Section 717 of Title VII. Part 1614 attempts to make the process more fair and timely by, among other things, limiting to 180 days the length of time in which the complaint is solely within the agency, thereby reducing the dominance of the agency in the process.

- Federal Employee Fairness Act (FEFA) - S. 404 (Glenn)/H.R. 2721 (Ed & Labor/Post Office & Civil Service) - Legislation to change the federal sector complaint process by significantly reducing the authority of federal agencies over internal eeo complaints and by transferring the majority of the process to the EEOC. This legislation is in response to many years of Congressional concern and discussion about the unfairness of allowing federal agencies to retain jurisdiction over the processing of eeo complaints brought by their own employees. Issues of fairness, due process, and timeliness are the principal issues raised from time to time by Congress about the federal sector eeo process.

  EEOC estimates that the increase in responsibilities would cost between $60 to $100 million. Additionally, EEOC has pre-conditioned its approval of the legislation on the requirement that there be no "transfer of function," which is a required transfer of staff from agency giving up responsibility to agency gaining new responsibility. EEOC's view is that the proposed legislation does not involve a transfer of function. (In the past, transfers of functions have been used to dump bad staff.)

  ♦ **Administration Position** - See attached May 11, 1994, letter to Chairman William Clay, House Committee on Post Office and Civil Service, from Leon Panetta, then Director of OMB, setting forth the Administration's position on H.R. 2721.

Federal Sector EEO Leadership Responsibilities - Executive Order 12067

Executive Order 12067 gave EEOC lead coordinating responsibility for all federal EEO programs and activities. The EEOC is also charged with reviewing and approving the affirmative employment plans which Section 717 of Title VII requires all federal agencies to keep.

Most interested parties -- civil rights community, business community, and good EEOC staff -- urge the Commission to resume its leadership role to allow for coordination, uniformity, and action in federal sector eeo matters.

[See attached briefing material]

Miscellaneous

- Affirmative Action/Quotas -

  [Briefing material is attached for each of the following issues]

  - The Current State of the Law on Affirmative Action, including:

    - **Voluntary Affirmative Action Plans under Title VII**
    - **Court-Ordered Affirmative Action under Title VII**
    - **Voluntary Affirmative Action under the Equal Protection Clause**
    - **Court-Ordered Affirmative Action under the Equal Protection Clause**

  - Case Summaries of Pertinent Supreme Court Decisions Affecting Affirmative Action in Employment, including:

    - *McDonald v. Santa Fe Trail Transp. Co.* (1976)
    - *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979)
    - *Firefighters Local Union No. 1784 v. Stotts* (1984)
    - *Local 28 of Sheet Metal Workers v. EEOC* (1986)
    - *Local Number 93, Internat'l Assoc. of Firefighters v. City of Cleveland* (1986)
    - *Johnson v. Transportation Agency, Santa Clara County* (1987)
    - *Martin v. Wilks* (1989)
    - *Regents of the Univ. of California v. Bakke* (1978)
    - *Fullilove v. Klutznick* (1980)
    - *Wygant v. Jackson Board of Education* (1986)
    - *U.S. v. Paradise* (1987)
    - *City of Richmond v. J.A. Croson Co.* (1989)
    - *Metro Broadcasting, Inc. v. F.C.C.* (1989)

  * Also refer to previously distributed Q&A's used by Deval Patrick

- Inclusion of Religion in the Proposed Consolidated Harassment Guidelines

  [See attached EEOC oral testimony presented at the June 9, 1994, Senate Hearing]

  *** Additional briefing material will be provided as needed based upon our discussion of the appropriate response to the issue**

- Religious Harassment Guidelines - cont.

  - Religious Freedom Restoration Act of 1993 (RFRA) - Many members of Congress have expressed concern about the interaction between RFRA and the Religious Harassment Guidelines. Generally, RFRA provides that the government may not **substantially burden** free exercise, even by a neutral rule, unless the government has a **compelling interest** and does so using the least restrictive means. Many of the principal sponsors of RFRA do not think that the Religious Harassment Guidelines conflict in any way with RFRA.

- Employment Non-Discrimination Act of 1994 (ENDA) - Legislation introduced June 23, 1994, by principal sponsors Senator Edward Kennedy and Representatives Gerry Studds and Barney Frank, prohibits discrimination in employment on basis of sexual orientation.

  [See attached briefing material - fact sheet on ENDA and copy of the bill]

  ♦ Any indication of Administration position? According to representatives of the G & L community, there have been positive discussions with WH Counsel.

- EEOC's Policy on the Use of Testers in Enforcement - In 1990, the EEOC issued a policy guidance on the standing of "testers" to file charges under Title VII. "Testers" are defined by the guidance as individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices. The EEOC's position is that "testers are aggrieved parties under Title VII where they have been unlawfully discriminated against when applying for employment."

  Administration Position/Activities involving the use of testers - DOJ and HUD currently have or are contemplating programs using testers. EEOC's OMB Examiner, Daryl Hennessy, called CEG on 7/8/94 to inquire about EEOC's use of or plans to use testers in enforcement programs. Daryl said that Chris Edley has advised that resources are available to launch an aggressive civil rights enforcement effort using testers. (Edley has been a strong supporter of testing for a long time and Peter Edelman was formerly the Chair of the Fair Employment Council, the leading civil rights organization in the development of employment testing.) Cheryl Cashin of the National Economic Council has also talked to Edley about developing an interagency effort using testers.

- Use of Testers - cont.

  Currently, HUD has a $9 million private enforcement program which includes the use of testers by private and "substantially equivalent" state/local government fair housing agencies. (Testers were first used, and granted standing to sue, in the fair housing context.) Kerry Scanlon, Deputy Assistant AG for Civil Rights, has discussed with OMB a $500,000 testing program for the FY'96 DOJ budget.

  [See attached briefing material summarizing the area of employment testing]

- EEOC's Responsibilities Under Immigration Reform and Control Act of 1986 (IRCA) -

  *** Memo on Memorandum of Understanding between EEOC and DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices in Process**

- Glass Ceiling - This issue is of particular concern to women's groups and the Asian Pacific American community (especially Japanese Americans). Information is needed on the current status of Administration's efforts within federal government, specifically the Glass Ceiling Commission at Labor.

Issues involving Commission Operations -

This section is provided primarily for reference and as an outline for discussion; briefing material not provided.

- Charge Processing - The current EEOC policy of full investigation of all charges is principally responsible for the huge backlog of cases. The Commission is urged by all interested parties (civil rights community, business community, Congressional oversight committees) to develop an innovative approach to dealing with the backlog and making the administrative process more effective and efficient. Some suggestions include:

  - ADR - An ADR pilot program was conducted by the EEOC in FY 93 and is currently being evaluated.

  - Triage - e.g., Identify strong cases or cases with potential for broad impact early (like Eleanor Holmes Norton's Early Litigation Identification program); identify cases for early mediation by neutral party

  - "Opt out" alternative - NELA suggestion allowing Title VII CPs to opt out after 60 days instead of 180 days, as with ADA.

Issues involving Commission Operations

- Charge Processing - cont.

  - Variation of Rapid Charge Processing (RCP) and Early Litigation Idenitification (ELI) -

- Commonly Cited Problems with Charge Processing -

  - The Charging Party (CP) must verify her/his statement; the respondent's statement does not have to be sworn to

  - Lack of training, including multicultural/sensitivity training, of intake and investigation staff; cannot address complex cases and, therefore, discourage CPs from filing them

  - Royko Issues - Mike Royko has written a series of articles criticizing the EEOC's administrative process, particularly the confidentiality restrictions (Medici ADEA case) which prevent the parties from seeing the file during the investigation, and the failure to screen out apparently meritless charges (the microchip in the molar case).

  [Briefing material previously provided]

- Accessibility Issues - discouraging obstacles routinely encountered in the administrative process by language minorities (monolingual and limited-English-proficient), physically and mentally disabled people, those with limited reading skills, and those without access to legal counsel

- Systemic Litigation - need to develop and bring major impact cases early to send message; need coordination with other civil rights agencies with regard to targeting

- Roles/Relationships of Chair, Commissioners, General Counsel

- Commission Meetings - frequency, format, content

- Policymaking Process - currently no formal process, no centralization; tends to be reactive, in response to issues arising in the field; any good policy is undercut in implementation; policy is not made "in the sunshine."

Issues involving Commission Operations - cont.

- Controversial Enforcement Policies -
  - **Full Investigation**
  - **Full Relief** (v. lesser voluntary settlements)
  - **Emphasis of Individual Charges over Systemic/Class**
- Mission of the Agency - current view is solely law enforcement focus, no education /outreach focus and no assertion of federal eeo leadership role
- Jurisdiction/Autonomy of Field Offices - all litigation decisions have to be made by HQ, field offices cannot proceed on their own
- State & Local FEPA Worksharing Contracts - Under Title VII, the EEOC must contract with qualifying State and Local Fair Employment Practices Agencies (FEPAs) to process charges within the FEPAs jurisdictions. The quality of FEPA performance is a constant issue in Congressional oversight. As noted in the Transition Report, new FEPAs charge that contracts are not awarded competitively and, therefore, there is little incentive for the FEPAs with contracts to perform well. Those FEPAs in turn charge that they are provided with inadequate resources to perform their responsibilities.

  *** [MEMO ON FEPAs TO COME]**
- Tribal Employment Rights Organizations (TEROs) - EEOC contracts with TEROs, which are akin to FEPAs, to process charges on Indian Reservations. The program is relatively new and small, with little attention having been given to it until Acting Chairman Gallegos.

  [See attached memorandum on TEROs]
- Computer Capacity - Charge/Litigation Tracking Systems -

  [See attached memorandum on EEOC's Computer Systems]

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002. report	Confirmation Issues Outline (partial) (1 page)	7/12/1994	P5

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COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:
[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

ds56

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.
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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]

Issues involving Commission Operations - cont.

- Performance Reviews/Awards - Chairman Major Owens' staff has complained about the reportedly large performance awards given to favored Commission staff, despite record poor performance by the agency.

- Improving Commission Service to Traditionally Underserved Communities - Refer to Serrano Amendment of the Civil Rights Act of 1991, which mandates that the EEOC conduct an education and outreach program for historically underserved communities.

- Commission's Technical Assistance Role - The Technical Assistance Revolving Fund was authorized in 1992 to establish a revolving fund to finance the cost of providing education, technical assistance, and training. The Fund's corpus was authorized through a transfer of $1,000,000 from the Commission's Salaries and Expenses appropriation. The activities sponsored by the Fund for a fee are meant to supplement basic informational materials and services provided free by the EEOC. The Fund became operational in FY 1993 and supported over 40 Technical Assistance Program Seminars (TAPS). These seminars were targeted almost exclusively to the employer community.

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Religious Harassment

pray mtgs +

\ s our view of the role of religion in the workplace.

Age

Sexual orientation pending legislation

affirmative action

race - norming

Broad brush

- affirmative action did become quotas
  \ k u d to
  guidelines - ~~[illegible]~~ rampant

A quota, do you do for an affirmative action -

k u ever be an employer

\ experience / employment law have you had?

- leadership

ADA - functional

obesity, smokers - Q about frivolous

Backlog + testers

Y d we need fake employer claims

[redacted] operation fix

become model employer at EEOC

intergovernmental

education + outreach

reclaim rightful role as

Senator Edward M. Kennedy (MA),
Chair; member of Subcommittee on Labor

Senator Kennedy will be concerned with any issues related to the Civil Rights Act of 1991 -- Equal Remedies Act, which seeks to eliminate the caps on damages; Justice for Wards Cove Workers Act, which seeks to eliminate the special interest exemption for the Wards Cove case from CRA'91; the *Landgraf* decision on the retroactive application of CRA'91.

Kennedy is more interested in the substantive policy questions than in the operational issues at the Commission.

RECENT ISSUES:

- As Chair of the Technology Assessment Board (a joint Senate and House body), Kennedy requested that the Congressional Office of Technology Assessment (OTA) conduct a study to assess the effect of the Americans with Disabilities Act (ADA) on individuals with psychiatric disabilities. From January through March 1993, OTA collected data and information from EEOC on the effect of the ADA on increasing employment opportunities for individuals with psychiatric disabilities; OTA issued its report in March 1994.

- In 1992, Kennedy expressed concern about the legality of the 1992 Massachusetts Police Consolidation bill that reduced mandatory retirement age of police officers from 65 to 55. This is the central issue of the **Age Discrimination Amendments of 1993**, the police and firefighters exemption from the Age Discrimination in Employment Act (ADEA) that Owen and Metzenbaum are fighting over.

  (There was EEOC litigation involving this legislation; we will provide update.)

- In a November 23, 1993, letter to the EEOC cosigned by Senators Metzenbaum and Dodd, discussed potential gender bias of weight standards for airline flight attendants and stressed the need for any standards to be gender neutral and job related.

  (On April 7, 1994, the EEOC announced the settlement of a lawsuit against USAir that included the elimination of flight attendant weight standards for a three-year period. The proposed settlement also provides a total of $90,000 in damages to certain female flight attendants and applicants for flight attendant positions. The suit, filed on May 6, 1992 in Greensboro, N.C., alleged that Piedmont and USAir's weight standards violated Title VII and the ADEA.)

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Kennedy- cont.

- During 1990 reconfirmation of Commissioner Silberman, questioned the agency's interpretation and administration of ADEA policy issues, including: cost as a factor in employee benefit plans under the ADEA; EEOC/FEPA relationship in monitoring and safeguarding federal suit rights under the ADEA; and measures for avoiding future confrontation on ADEA issues on which the Committee and the agency differ.

- In Clarence Thomas' 1986 reconfirmation hearing and 1990 nomination to D.C. Circuit Court, Kennedy brought up the following issues:

  - Strengthening Title VII remedies in cases of intentional discrimination.
  - EEOC enforcement in disparate impact cases.
  - Use of statistics in disparate impact cases and revision of the Uniform Guidelines on Employee Selection Procedures.

PERTINENT LEGISLATION:

Civil Rights Act of 1991 (CRA '91)

- Kennedy was a principal sponsor of the CRA '91. He is, therefore, very concerned about the **Equal Remedies Act of 1993 (S. 17)**, which would remove the cap on damages provided under the Civil Rights Act of 1991, and, to a lesser extent, the **Justice for Wards Cove Workers Act (S. 1037)**, which would delete the special exemption for the Wards Cove case from coverage of CRA 1991 (this is a principal civil rights issue for the Asian/Pacific American community).

  Kennedy would also be a principal sponsor of any legislation to address the recent ***Landgraf*** decision, which held that the damages provision of CRA '91 are not applicable to pre-CRA '91 cases.

Miscellaneous

- Kennedy was a principal sponsor of the **Religious Freedom Restoration Act of 1993,** passed November 16, 1993. RFRA is being used by opponents of the inclusion of religion in EEOC's Proposed Harassment Guidelines.

Senator Paul Simon (IL)
Chair, Subcommittee on Employment and Productivity*

Senator Simon is interested in both substantive policy issues and operational/service issues. As Chair of the Subcommittee with primary oversight authority, he has been active in monitoring the agency's performance. The nominees should be prepared to speak about specific problems at the agency such as the large and growing inventory (or "backlog") and ways in which it can be addressed, the need for a systemic litigation plan, and the need for a comprehensive evaluation of the organization and operations of the agency.

NOTE: Senator Simon's staff is very well acquainted with EEOC's Chicago District Office and very supportive of its Director Jack Rowe. There is some negative history between Rowe and Jim Troy, Director of Program Operations (perhaps the most powerful non-political position in the agency). Simon's office is well aware of this.

RECENT ISSUES:

- June 7, 1994, request that EEOC testify at a June 21, 1994 Subcommittee on Employment and Productivity oversight hearing. At the 1992 EEOC oversight hearing, Simon had promised to hold regular agency oversight hearings. The Subcommittee had initially scheduled a hearing for April 12, 1994. That hearing was cancelled, however, in anticipation of confirming a new agency chair.

- January 26, 1994, inquiry on behalf of constituent who believed that the Commission's lawsuit against the Sheraton Chicago Hotel was frivolous. EEOC filed suit against the Hotel for failing to accommodate the religious beliefs of a receptionist -- as required under the religious accommodations provisions of Title VII -- whose religious beliefs (Jehovah's Witness) prohibited her from answering the employer's phone with a holiday greeting prescribed by the employer.

  The employer forced the employee into five weeks of involuntary layoff for refusing to offer the holiday greeting. The case was resolved on December 15, 1993 through a consent decree which resulted in an accommodation of the employee's religious beliefs.

- November 4, 1993, letter requesting that EEOC prohibit the use of weight standards as a measure of job performance, or as an appearance requirement because such practices constitute sexual stereotyping.

Simon - cont.

- November 9, 1992, letter requesting EEOC's assistance in assuring that gypsies are

recognized as a minority eligible for protections guaranteed by laws enforced by EEOC.

- On October 22, 1992, EEOC sent a copy of the Executive Summary of the Penn State Study on the use of chronological age for public safety positions to Members of the Committee on Labor and Human Resources. A copy of the complete 8-volume study was hand-delivered to the Committee Chairman and Ranking Minority Member.

  On June 11, 1992, Simon requested a copy of the Penn State report for himself, as well as a constituent.

- 1992 EEOC Oversight Hearing on General EEOC Operations

  On January 22, 1992 Chairman Simon requested data and information as part of the Subcommittee on Employment and Productivitiy's oversight responsibility for EEOC. Information requested included charge data for FY 1989 through 1991; copies of charges filed by testers; explanation of EEOC/state and local agency worksharing agreements and contracts; copies of all policy guidance relating to enforcement and a list of developing and planned guidance.

  February 11, 1992 follow-up request for copies of documents from 90 no-cause charges processed by EEOC and State and local agencies.

  On March 10, 1992 copies of all Chairman Kemp's testimony and speeches provided to Subcommittee, as requested by staff.

  March 10, 1992 request that EEOC testify at April 28, 1992 oversight hearing before the Subcommittee on Employment and Productivity.

  April 7, 1992 Subcommittee request for information in preparation for the April 28 hearing. Issues included:

  1. Potential EEOC revisions to the Uniform Guidelines on Employee Selection Procedures.

  2. Charge data regarding UGESP violations

  3. Charge and litigation data on cases raising fetal protection issues (UAW v. Johnson Controls).

  4. Charge and litigation data on Pregnancy Discrimination Act disparate impact cases.

5. Charge and litigation data on sexual harassment cases.

6. Charge data on cases filed by testers.

7. Breakdown of systemic charge and litigation data.

8. Information on open and closed Commission meetings and notice and hold vote decisions.

On May 15, 1992, June 3, 1992 and June 11, 1992 submission of additional information for inclusion in April 28 hearing record. Issues included glass ceiling charges, EEOC funding, Kemp Commissioner charges, EEOC annual reports, early retirement incentives under the ADEA, RIFs under the ADEA, EEOC's advance rulemaking on the Older Workers Benefit Protection Act.

- November 19, 1991 letter on behalf of Joann De Grosa who contacted Simon following a hearing he conducted on women and the workplace. Requested status of EEOC v. Yellow Freight Systems.

- October 4, 1990 letter on behalf of constituent Michael Welbel, President of Daniel Lamp Co. regarding EEOC's investigation of charge filed against the Daniel Lamp Co. EEOC subsequently filed suit against the company.

No pertinent legislation sponsored by Simon that relates to EEOC.

Senator Tom Harkin (IA)

Chair, Subcommittee on Disability Policy*; member of Subcommittee on Employment and Productivity, and Subcommittee on Labor

Senator Harkin's principal issues of concern will be the ADA and matters related to disability.

RECENT ISSUES:

- During the agency's development of guidance on the relationship of the Family and Medical Leave Act (FMLA) and the ADA, Harkin joined Dodd in a November 22, 1993 letter to the EEOC to clarify the intent of Congress in applying overlapping provisions of the two laws. Harkin stressed that Congress intended to allow the statute providing the greatest coverage or protection to govern in such instances.

  EEOC's response assured Dodd and Harkin that the agency is coordinating with Labor during the rulemaking on FMLA to ensure that existing ADA/Title VII rights are preserved. Additionally, EEOC indicated that it will issue **enforcement guidance** on the issues related to ADA, Title VII, and FMLA after discussions with Labor.

- Harkin joined seven other senators, including Mikulski, in a November 12, 1993, letter urging the EEOC to prohibit the use of weight standards by employers as a measure of flight attendant performance or appropriate appearance.

  (On April 7, 1994, the EEOC announced the settlement of a lawsuit against USAir that included the elimination of flight attendant weight standards for a three-year period. The proposed settlement also provides a total of $90,000 in damages to certain female flight attendants and applicants for flight attendant positions. The suit, filed on May 6, 1992 in Greensboro, N.C., alleged that Piedmont and USAir's weight standards violated Title VII and the ADEA.)

- To evaluate EEOC's progress in implementing employment provisions of the ADA, Harkin made a November 3, 1992 request for documents and data, including ADA charge data, technical assistance materials developed, text of all ADA speeches, and a narrative summary of EEOC's implementation efforts from enactment.

  Harkin did not intend the request to lead to an oversight hearing or a formal report. The request was simply for use by the Subcommittee in tracking ADA implementation.

- February 22, 1991, letter to President Bush requesting reconsideration of funding levels for implementing the ADA.

Harkin - cont.

PERTINENT LEGISLATION:

Rehabilitation Act Amendments of 1993 (P.L. 103-73, passed 8/11/93). The Act amended the Rehabilitation Act of 1973 and the Education of the Deaf Act of 1986 to make technical and conforming amendments, making them conform to the ADA.

Senator Barbara A. Mikulski (MD)

Chair, Subcommittee on Aging*; member of Subcommittee on Employment and Productivity

OCLA review found no special issues of concern. Mikulski has been at the forefront of the issue involving the Architect of the Capitol's discriminatory hiring patterns and she is usually very vocal on women's issues.

RECENT ISSUES:

- Mikulski joined Eleanor Holmes Norton in a May 19, 1994, letter to the President expressing concern about lack of appointment for EEOC Chair, particularly because of EEO problems in federal government agencies. The letter notes that sexual and racial discrimination are widespread throughout the federal government and that the Senators have received numerous requests for assistance from federal employees complaining of discrimination and harassment.

- Mikulski joined with seven other senators, including Harkin, in a November 12, 1993, letter urging the EEOC to prohibit the use of weight standards by employers as a measure of flight attendant performance or appropriate appearance.

  (On April 7, 1994, the EEOC announced the settlement of a lawsuit against USAir that included the elimination of flight attendant weight standards for a three-year period. The proposed settlement also provides a total of $90,000 in damages to certain female flight attendants and applicants for flight attendant positions. The suit, filed on May 6, 1992 in Greensboro, N.C., alleged that Piedmont and USAir's weight standards violated Title VII and the ADEA.)

Senator Howard M. Metzenbaum (OH),
Chair, Subcommittee on Labor*; member of Subcommittee on Aging and Subcommittee on Disability Policy.

Senator Metzenbaum has been very supportive of the EEOC on almost every issue. He is especially particularly interested in **age** and **religion.**

RECENT ISSUES:

- Metzenbaum made a strong statement in support of EEOC's proposed harassment guidelines (particularly the inclusion of religion in the guidelines) at June 9, 1994, hearing before Senate Judiciary Subcommittee on Courts and Administrative Practices (Heflin/Grassley).

- Metzenbaum is adamantly opposed to mandatory retirement ages for public safety officers and to extending the exemption provided to public safety officers in the 1986 Amendments to the ADEA. The Age Discrimination in Employment Act Amendments (H.R. 2722), for which Major Owens is principal sponsor and which passed in the House last fall, would permanently extend the exemption.

  Metzenbaum's Labor Subcommittee held a hearing on April 19, 1994, on the legislation; Owens joined the panel. Metzenbaum and Pryor were involved in the 1986 compromise that provided for a temporary exemption to allow state and local governments additional time to comply with the ADEA.

  Owens was successful in attaching H.R. 2722 to the Crime Bill. Metzenbaum feels so strongly about this issue that he threatened to filibuster the Crime Bill rather than let H.R. 2722 pass.

- In a November 23, 1993 letter to EEOC, Metzenbaum expressed his opposition to allowing weight standards for flight attendants.

- **Older Workers Benefit Protection Act (OWBPA):**

  * SEE ATTACHMENT FOR SUMMARY OF OWBPA

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* **Subcommittee with Oversight Authority over EEOC (either full or limited)**

Relevant Metzenbaum/EEOC Activity on OWBPA -

September 1, 1992, letter cosigned by Senators Metzenbaum and Pryor and Representatives Matthew Martinez, Edward Roybal, Pat Williams and William Ford requesting that EEOC provide guidance to the Coalition on State and Local Employee Pension and Benefit Issues in complying with provisions of OWBPA.

May 13, 1992, letter from Senate Subcommittee on Employment and Productivity Chairman Simon submitting ADEA questions from Senator Metzenbaum to EEOC (e.g., data on lawsuits filed involving early retirement incentive programs; RIFs under the ADEA; EEOC's Advance Notice of Proposed Rulemaking under OWBPA).

On December 4, 1989, EEOC transmitted draft language to the Labor Subcommittee for tolling the ADEA's statute of limitations for employee benefit claims, as requested by Metzenbaum at the Subcommittee's hearing on **S. 1511, Older Workers Benefit Protection Act of 1988**, legislation to address the Supreme Court decision in *Betts*.

On September 27, 1989, EEOC Vice Chairman Silberman and General Counsel Shanor testified at a joint hearing before the Senate Labor Subcommittee and Special Committee on Aging on S. 1511 and S. 1293.

On September 11, 1989, EEOC provided its views on questions relating to S. 1511 in response to an August 18, 1989 request from Senators Metzenbaum, Pryor and Jeffords.

On April 19, 1989, in response to request from Metzenbaum, EEOC provided suggested language changes to **S. 54, the Age Discrimination in Employment Waiver Protection Act of 1989** (introduced by Metzenbaum), for the committee's report on the legislation, as well as options for EEOC supervision of waivers under the bill.

On March 16, 1989, EEOC Chairman Thomas testified at the Senate Labor Subcommittee hearing on S. 54.

* SEE ATTACHED FACT SHEET ON WAIVERS

- December 11, 1987, letter expressing concern about EEOC's delay in conducting study mandated under the 1986 Amendments to the ADEA signed by Senators Metzenbaum, Kennedy, Bradley. Heinz, Melcher and Wendell Ford.

Metzenbaum - cont.

- During 1990 reconfirmation of Commissioner Silberman, Metzenbaum questioned the agency's interpretation and administration of ADEA policy issues, including cost as a factor in employee benefit plans under the ADEA; EEOC/FEPA relationship in monitoring and safeguarding federal suit rights under the ADEA; and measures for avoiding future confrontation on issues where the Committee and the agency differ.

- Issues raised during 1986 reconfirmation hearing of Thomas as EEOC Chair and 1990 nomination hearing for district court judge:

  - Lack of EEOC regulations implementing the accrual of pension benefits beyond normal retirement age. (SEE ATTACHED FACT SHEET ON PENSION ACCRUAL)
  - EEOC's handling of lapsed ADEA charges, including EEOC/FEPA relationship.
  - Waivers under the ADEA.
  - Early Retirement Incentive programs under the ADEA.

PERTINENT LEGISLATION:

S. 1776 Civil Rights Standards Restoration Act, addresses the Supreme Court decision in St. Mary's Honor Center v. Hicks.

S. 1984 Government Organization and Employees, Title 5 U.S.C., Amendment, repeals provision of Title 5 which permits mandatory retirement age for federal law enforcement and other federal safety positions.

Senator Clairborne Pell (RI)
Member of Subcommittee on Aging

OCLA review of files finds no issues of concern and few constituent inquiries. Senator Pell has not expressed much interest in the agency, but, because of his membership on Aging Subcommittee, he is likely to be attentive to ADEA and aging issues.

Senator Christopher J. Dodd (CT)

Member of Subcommittee on Aging and Subcommittee on Labor

RECENT ISSUES:

- Joined Kennedy and Metzenbaum in November 23, 1993, letter to EEOC concerning weight standards for flight attendants and urging that EEOC prohibit the use of such standards.

- During the agency's development of guidance on the relationship of the Family and Medical Leave Act (FMLA) and the ADA, Dodd joined Harkin in a November 22, 1993 letter to the EEOC to clarify the intent of Congress in applying overlapping provisions of the two laws. Dodd stressed that Congress intended to allow the statute providing the greatest coverage or protection to govern in such instances.

  EEOC's response assured Dodd and Harkin that the agency is coordinating with Labor during the rulemaking on FMLA to ensure that existing ADA/Title VII rights are preserved. Additionally, EEOC indicated that it will issue **enforcement guidance** on the issues related to ADA, Title VII, and FMLA after discussions with Labor.

Senator Jeff Bingaman (NM)

Member of Subcommittee on Disability Policy and Subcommittee on Employment and Productivity

OCLA review finds no issues of concern and limited constituent inquiries. May note that the Albuquerque, NM, office was expanded from an Area Office to a District Office in January 1994.

NOTE: Because of Bingaman's large Hispanic and Native American constituencies, it is likely that he will be concerned with language-minority issues, such as the *Spun Steak* case involving the EEOC's national origin guidelines and the prohibition of "speak-English-only" rules; Tribal Employment Rights Organizations (TEROs), which are similar to state and local fair employment practices agencies; and access/service issues.

Senator Paul D. Wellstone (MN)

Member of Subcommittee on Labor.

NOTE: Wellstone is also on Committee on Indian Affairs

OCLA review finds no issues of concern. Some constituency inquiries dealing with poor/delayed service and effect on employees claims if company is sold to foreign interests. (No EEOC reply yet to last issue.)

- In January, 1994, Minneapolis EEOC office was expanded from Local Office to Area Office, indicating greater caseload.

Senator Harris Wofford (PA)

Member of Subcommittee on Aging and Subcommittee on Employment and Productivity

OCLA review finds no issues of concern. In connection with a constituent inquiry, Senator Wofford raised his own questions about protections afforded by federal anti-discrimination laws for permanent residents.

Senator Nancy L. Kassebaum (KS),
Ranking Minority Member; member of Subcommittee on Labor

Senator Kassebaum will probably most interested in operational/service issues at the Commission.

RECENT ISSUES

- Only correspondence has been constituent inquiries, no requests for information or discussion of specific issues.

- In the April 28, 1992, oversight hearing before Simon's subcommittee, Kassebaum mentioned the following:

  - Lack/poor quality of agency's responsiveness to charging parties. Expressed great frustration with the EEOC's lengthy administrative process and that her constituents feel "lost" in it.

    Kassebaum was particularly concerned with a case dually filed with the Kansas Human Rights Commission and the EEOC in 1987, voluntarily withdrawn later that same year, and yet it was not until 1991 that the parties were notified by the EEOC of its disposition.

    Kassebaum asked about the poor coordination between EEOC and the state and local Fair Employment Practices Agencies (FEPAs) with which it contracts to process charges. She was told by EEOC that State and Local programs had just been raised to the division level within the agency, so it would receive more attention. Improvement expected by 1993.

Senator Strom Thurmond (SC)

Ranking Minority Member, Subcommittee on Employment and Productivity*; member of Subcommittee on Labor

Senator Thurmond has been a bit more involved than most other senators in his constituent inquiries, so service issues may be a concern to him. There is also correspondence from former Chair Kemp to Thurmond acknowledging the Senator's support for the elimination of **preferential policies** in the workplace.

Senator Dave Durenberger (MN)

Ranking Minority Member, Subcommittee on Disability Policy*; member of Subcommittee on Aging

OCLA review found no specific issues of concern. Senator Durenberger has usually been supportive of Civil Rights legislation.

RECENT ISSUES

- The only correspondence of note was letter from Kemp to Durenberger regarding a Durenberger, Kemp, and Silberman meeting, at which the following issues were discussed:

  - Heavy investigator workload and need for additional resources.
  - Federal Employee Fairness Act of 1992 (FEFA) and the lack of additional resources necessary to implement transfer of responsibilities to EEOC.

- In January 1994, Minneapolis EEOC office was expanded from Local Office to Area Office, indicating greater caseload.

Senator Judd Gregg (NH) - [elected 1992]

Ranking Minority Member, Subcommittee on Aging*; member of Sucommittee on Employment and Productivity

OCLA review finds no issues of note. The Senator has been in office only about a year and a half.

Senator Orrin G. Hatch (UT)

Ranking Minority Member, Subcommittee on Labor*; member of Subcommittee on Disability Policy, and Subcommittee on Employment and Productivity.

OCLA review finds no issues of note in either individual correspondence file or in the Subcommittee on Labor file. There is correspondence from former Chair Kemp to Hatch acknowledging the Senator's support for efforts to eliminate **preferential policies** in the workplace.

RECENT ISSUES

- Hatch participated in the April 9, 1994, hearing on the inclusion of Religion in the Proposed Consolidated Harassment Guidelines. Most of his statements addressed the Justice Department's first brief filed on the application of the Religious Freedom Restoration Act of 1993 (RFRA). Hatch believes that Justice has adopted an extremely low standard for RFRA.

- Hatch was a key player in the negotiations on the Civil Rights Act of 1991. He would, therefore, be important on any "clean up" legislation related to CRA'91 (Equal Remedies, Justice for Wards Cove Workers, Retroactivity).

Senator James M. Jeffords (VT) -

Member of Subcommittee on Disability Policy and Subcommittee on Labor.

Senator Jeffords is concerned with the ADEA and older workers issues. He was also very involved and helpful on the Civil Rights Act of 1991.

RECENT ISSUES

- OCLA review found that last correspondence from Jeffords to the Commission was in 1991. His most recent substantive correspondence was in 1989 and involved the ADEA.

- In June 1989, Jeffords proposed an amendment to **S. 54, the Age Discrimination in Employment Waiver Protection Act of 1989,** which would require employers seeking waivers of ADEA rights or claims in connection with group termination programs to reimburse employees for "reasonable" attorneys fees for advice on whether to accept or reject. Jeffords suggested that EEOC establish standards for "reasonableness" to limit amounts paid by employers.

- Concerned about protecting older workers from age-based discrimination in the area of employee benefit plans. Jeffords joined Pryor and Metzenbaum in August 1989 letter to Commission inquiring about agency's views on **Older Workers Benefit Protection Act** and the ***Betts*** decision.

- It appears that Jeffords' concerns with ADEA waivers and pension benefits were addressed in the Older Workers Benefit Protection Act.

Senator Dan Coats (IN)

Member of Subcommittee on Aging and Subcommittee on Employment and Productivity

OCLA's review found only one item in Coats' file -- a draft of a letter from Evan Kemp regarding a meeting between Coats, Thurmond, Kemp, and a "steering committee" to discuss EEO issues. Kemp mentions Coats' offer to support efforts to eliminate **preferential policies** in the workplace.

PHOTOCOPY
PRESERVATION

The Older Workers Benefit Protection Act of 1990

In Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), the Supreme Court interpreted the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 et seq., with regard to the legality of employee benefit plans.

One major effect of the Betts case was the rejection by the Court of longstanding interpretations (developed by the Department of Labor and adopted by the Commission) relating to employee benefit plans. In 1979, the Department of Labor issued an Interpretive Bulletin (I.B.) on employee benefit plans and the ADEA, and the Commission adopted the I.B. when it took over enforcement of the ADEA in 1979. The I.B. stated that it is permissible to offer a lower level of employee benefits to older workers as long as the lower level of benefits is justified by age-related cost considerations. (If, for example, life insurance cost twice as much for a 60-year-old as for a 55-year-old, it is permissible to give the older worker half as much insurance as the younger worker).

In Betts, the Supreme Court determined, among other things, that the "equal cost or equal benefit" interpretation set forth in the I.B. was not consistent with the ADEA, and was an incorrect interpretation of the ADEA's "subterfuge" provision.

The Court further declared in Betts that employee benefit plans were exempt from the purview of the ADEA as long as such plans were not a method for discriminating in non-fringe benefit aspects of employment. The effect of this decision was to permit virtually any age-based differential in treatment in the area of fringe benefits; for example, an employer could decide to deny sick leave or vacation pay for persons over the age of 50, as long as the decision was not taken to force such persons to retire or to retaliate for prior EEO activity.

Congress decided that the ruling in Betts warranted a legislative response. On October 16, 1990, the Older Workers Benefit Protection Act of 1990 (OWBPA) became law, amending the ADEA in significant detail. In brief, OWBPA (Title I) overturned the legal analysis in Betts with regard to employee benefit plans and (Title II) addressed the minimum criteria necessary for a "knowing and voluntary" waiver of ADEA rights or claims.

In principal part, Title I of OWBPA took the following steps:

(1) OWBPA amended section 11 of the ADEA to make it clear that "employee benefits" would be included in the definition of "compensation, terms, conditions, or privileges of employment" in section 4(a)(1) of the ADEA.

(2) OWBPA amended section 4(f)(2) to incorporate the equal cost or equal benefit principle embodied in the regulations at 29 C.F.R. § 1625.10, as in effect on June 22, 1989, and stated that the provisions of section 4(f)(2) constitute an affirmative defense, with the employer bearing the burden of proof under that section.

(3) OWBPA provided exceptions and "safe harbors" for voluntary early retirement plans, severance pay plans, and long-term disability plans.

(4) OWBPA addressed special concerns of State and local governments regarding potential cost increases in two ways: (a) by providing for a two-year delayed effective date; and (b) by allowing current employees to elect to retain their present long-term disability coverage when a new plan is implemented even though such present coverage may not comply with the ADEA.

Title II of OWBPA amended section 7 of the ADEA by adding subsection (f) concerning waivers of rights or claims under the Act. Title II expressly provides that unsupervised waivers may be valid and enforceable if they meet certain enumerated requirements and are otherwise knowing and voluntary.

On March 27, 1992, the Commission published a Request for Comments in the Federal Register, 57 FR 10628 (March 27, 1992). The Commission received approximately 40 comments from members of Congress and from the public. Among the commentors were Senators Pryor, Metzenbaum, and Hatch; Representatives Goodling, Martinez, Roybal, Clay, and Ford; the American Association of Retired Persons; the Equal Employment Advisory Council; and the Coalition on State and Local Employee Pension and Benefit Issues (Coalition).

FACT SHEET
Waivers and Releases of Private Rights
under the Age Discrimination in Employment Act

The Equal Employment Opportunity Commission adopted a final rule on July 30, 1987 which set forth guidance for employers and employees entering into waiver agreements and settlements of ADEA rights without supervision and approval by EEOC. Waivers may release the employer from liability under the ADEA in exchange for money or other benefits. An amendment to Public Law 100-202 states ". . . the final rule regarding unsupervised waivers under the Age Discrimination in Employment Act . . . shall not have effect during fiscal year 1988." The amendment further provides that no Commission funds could be used during fiscal year 1988 to give effect to any policy or practice pertaining to unsupervised waivers under ADEA. Congress extended the suspension of the EEOC rule for another year as part of the EEOC's fiscal year 1989 appropriation bill. The same suspension language has been attached to EEOC's fiscal year 1990 appropriation bill currently awaiting House and Senate conference.

- The EEOC has never supervised ADEA waivers on a routine basis.

- In promulgating the waiver rule, the EEOC acted to promote the interests of the vast majority of older workers for whom private, voluntary and expeditious ADEA settlements are desirable. At the same time the rule protects any worker who wishes EEOC supervision. The rule provides safeguards against coerced waivers and allows EEOC to focus its resources on waivers that are challenged as not knowing and voluntary.

- The rule requires that all unsupervised waivers must be knowing, voluntary, supported by consideration, and not waive prospective rights.

- The EEOC rule on unsupervised waivers furthers the goals of the ADEA. An employee can always ask for government help before or after the signing of a waiver. Under the rule all challenged waivers will be closely scrutinized by the Commission. No waiver can prevent an employee from coming to the Commission, and employees are protected from retaliation if they seek to challenge a waiver.

- The Commission retains its right and its responsibility to enforce the ADEA.

- Requiring routine supervision of private, voluntary ADEA waivers and settlements made each year would impose needless bureaucratic oversight and delay even when such waivers are in the mutual interests of employees and employers.

  Government supervision would at best delay -- and more likely discourage -- employers from providing valuable benefits or additional compensation to older employees who freely choose to release their rights or claims. It is likely government supervision would discourage employers from offering enhanced benefits to older workers altogether.

over

- Six circuit courts of appeals have decided that voluntary, unsupervised waivers under the ADEA are permissible. The EEOC's rule is in accord with these decisions, provides additional safeguards that waivers be knowing and voluntary and is intended to extend this protection to other circuits.

- Title VII of the Civil Rights Act permits unsupervised knowing and voluntary waivers. Title VII and the ADEA both seek to promote voluntary and expeditious resolution of disputes. The EEOC's rule therefore applies the same Title VII standard to the ADEA.

- The ADEA and the FLSA are silent on the issue of waivers. Yet opponents of the EEOC's rule argued that case law under the Fair Labor Standards Act requiring government supervision of waivers should apply to the Age Act because the Age Act incorporates the FLSA's enforcement provisions.

  This argument has in effect been rejected by six circuit courts of appeals. In Runyan v. NCR Corp., the initial case on ADEA waivers, the Sixth Circuit, sitting en banc, held that unsupervised waivers are permitted where there are bona fide factual disputes. Notably, it found significant differences between the purposes of ADEA and the wage and hour protections afforded by the FLSA.

- Through suspension of EEOC's waiver rule during fiscal years 1988 and 1989 and the introduction of two bills limiting the use of waivers under the ADEA, Congress has indicated its interest in exploring alternative approaches to the EEOC rule. S. 54, the "Age Discrimination in Employment Waiver Protection Act of 1989", introduced by Senator Howard Metzenbaum (D-Ohio), would prohibit the use of waivers without supervison of EEOC or a court, except in settlement of a bona fide claim under the ADEA. A similar measure introduced by Rep. Augustus Hawkins (D-Calif.), H.R. 1432, prohibits the use of waivers except as part of a settlement of a bona fide claim of age discrimination made by a worker against the employer. Both bills await floor action.

FACT SHEET ON PENSION BENEFIT ACCRUALS

* 1967 - The Age Discrimination in Employment Act is passed. Exception in section 4(f)(2) permitted an employer to "observe the terms of a bona fide employee benefit plan....which is not a subterfuge to evade the purposes of the Act."

* 1978 - The ADEA is amended to increase age cap from 65 to 70 and expressly prohibit involuntary retirement.

* May 1979 - The Department of Labor issues an interpretive bulletin stating that the ADEA does not require pension accruals for employees working past normal retirement age.

* July 1979 - Jurisdiction over the ADEA is transferred to EEOC.

* April 1980 - EEOC approves proposed regulations to reverse the position taken by DOL on pension accruals.

* Sept. 1980 - Proposed final regulations to amend DOL interpretive bulletin are removed from EEOC agenda.

* May 1982 - Clarence Thomas becomes chairman.

* Dec. 1982 - Chairman Clarence Thomas decides to reopen the question of replacing interpretive bulletin.

* March 1985 - EEOC approves proposed rules to mandate the continuation of pension accruals beyond normal retirement age.

* Feb. 1986 - The American Association of Retired Persons (AARP) files petition asking EEOC to rescind interpretive bulletin and issue final rules. Petition is denied June 29, 1986.

* June 1986 - AARP files suit against EEOC alleging unreasonable delay in promulgating regulations.

* Oct. 1986 - Public Law 99-905 (OBRA) adds new section 4(l) to ADEA requiring pension accruals regardless of age.

* Nov. 1986 - EEOC votes to terminate prior rulemaking project and devote agency resources to promulgating regulations under OBRA.

* Feb. 1987 - District court rules against EEOC in AARP suit and orders Commission to issue final rules. EEOC appeals.

* July 1987 - EEOC wins appeal.

* Nov. 1987 - EEOC approves notice of proposed rulemaking under OBRA.

* Jan. 1988 - EEOC, with concurrence of DOL and Treasury (IRS), develops final regulations under OBRA but final vote postponed at request of IRS.

* Jan. 1989 - EEOC publishes public notice on final regulations under OBRA in accordance with public notice issued by IRS. Notices indicated that final regulations of the two agencies regarding the effective date of OBRA would provide that noncontributory defined benefit plans would be required to count all years of credited service, regardless of whether such years occurred prior to 1988.

* EEOC final regulations under OBRA are awaiting action by IRS, the lead agency under OBRA.

QUESTIONS FROM SENATOR THURMOND FOR THE EEOC:

1. Although it was not required by law, it seems clear that the comment period for the proposed guidelines has been vital to air issues of great concern to a large segment of Americans. If the EEOC substantively modifies the proposed guidelines, will you commit to providing another period for comments on the modifications before issuing final guidelines?

2. If an employer requires a "religion free" workplace, do you think that the EEOC would challenge that position as violating employees' rights to religious freedom?

3. If it is true that the EEOC intends to maintain separate guidelines for sexual harassment, does that indicate that requests for individualized guidelines for religious harassment are not unreasonable, especially given that religious freedoms are specifically protected by the Constitution?

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

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HOWARD M. METZENBAUM, OHIO
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SHARON PROST, MINORITY CHIEF COUNSEL

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 15, 1994

Douglas A. Gallegos
Executive Director
Equal Employment Opportunity Commission
1801 L Street, N.W.
10th Floor
Washington, D.C. 20507

Dear Mr. Gallegos:

Thank you for testifying on June 9, 1994, at the Senate Judiciary Subcommittee on Courts and Administrative Practice's hearing on EEOC Proposed Guidelines to Religious Harassment. Your testimony was very helpful to the Subcommittee's understanding of this complex issue. On behalf of the members of the Subcommittee I wish to express our appreciation for your participation in this hearing.

Sincerely,

Howell Heflin

P.S. Attached are written questions which I would appreciate your answering and returning to me by FAX at (202) 224-3149. I will distribute them to the appropriate Senator when you respond. Please FAX your responses to me by Friday, June 24, 1994.

HH/cc

Enclosure

U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, NW, Room 9024
Washington, DC 20507
FAX # (202) 663-4912

FAX TRANSMITTAL FORM

DATE : 6/28/94 TIME: _____

TO : Steve Warnath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Claire Gonzales

CHECK ONE:

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DOCUMENT: _____

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 3

SPECIAL INSTRUCTIONS:

Steve - This is just for your information - follow-up questions from Sen. Thurmond. If you would like to see our responses before they are sent back, just let me know. Thanks, Claire

Please telephone the appropriate office above if you do not receive all documents.

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. memo	Peter Yu to Robert Rubin re: Affirmative Action & Procurement Reform (2 pages)	9/28/1993	P5

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.

COLLECTION:
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FOLDER TITLE:
[Equal Employment Opportunity Commission Confirmation Briefing Materials] [2]

ds56

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]

EEOC's Attorney-of-the-Day

Both OLC and OFO offer an "Attorney-of-the-Day" as a resource for EEOC field and headquarters staff. The Attorney-of-the-Day program operates in each office on a daily basis and is staffed by attorneys according to a rotating schedule. Occasionally, inquiries from the public may also be referred to the Attorney-of-the-Day for response.

Attorneys-of-the-Day answer calls according to the jurisdiction of their office. OLC's Attorney-of-the-Day addresses questions on all EEOC-enforced statutes. OFO's Attorney-of-the-Day responds to inquiries about the federal EEO process.

PHOTOCOPY
PRESERVATION

WHAT HAPPENS TO CHARGING PARTIES[1]

A potential charging party calls, writes, and/or visits. His/her first point of contact is the Investigative Support Assistants (ISAs)[2] in the Charge Receipt/Technical Information Unit who screen the matter to determine whether EEOC has jurisdiction. If EEOC does not, they refer the individual elsewhere. If EEOC has jurisdiction, the ISA discusses the merits of the case with the individual. At that point, some individuals will choose not to file. Individuals who choose to file and who have walked in are then seen by an investigator who is rotated to the intake process, generally on a weekly basis.[3]

An investigator drafts a charge and affidavit for the charging party's signature. ISA's draft these documents for the charging parties who call or write in; they will also draft charges and affidavits for walk-ins when the investigators are overwhelmed. The charging party leaves the office with a copy of his/her charge, a fact sheet, and a copy of a Privacy Act statement. EEOC sends the respondent a Notice of Charge within ten days of the filing. In most instances, EEOC is required to defer charges to state or local human rights agency meeting federal standards if they have jurisdiction. Either EEOC or the deferral agency will process the charge.

If EEOC is processing the charge, the case is usually assigned to the enforcement team to which the investigator belongs. Currently, unless the case is a priority, it is assigned to the enforcement team supervisor while awaiting assignment to an investigator.[4] Other than the notification to the respondent and occasional requests for information, the investigative process is not begun until the case is assigned to an investigator. Typically, the charge is eventually assigned to the investigator who took it. Priority cases may be assigned within a few weeks.[5] Generally, cases are not assigned for several months.

Once the case is assigned, it is actively investigated or settled. An investigation may include Requests for Information (RFIs), On-Site Interviews, and Witness Interviews. After the evidence has been analyzed, the investigator conducts a Pre-Determination Interview (PDI), typically with the charging party in those cases in which a "no cause" finding is likely

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[1] There is some variation among field offices.

[2] Positions and salary levels for ISAs range from GS-5 to GS-7.

[3] There are no specific hiring requirements for incoming investigators. Applicants are evaluated based on educational training and/or work experience. Position levels for investigators range from GS-5 to GS-12. Supervisory investigators range from GS-13 to GS-15.

[4] Because of his/her existing workload, the investigator taking the charge is not immediately assigned the new charge. The enforcement supervisor holds all new charges and later distributes them equally among all the investigators as dictated by workload levels.

[5] Priority status is given to charging parties who are terminally ill or who are experiencing harassment or retaliation. EPA cases where the statute of limitations is running are also prioritized.

and with the respondent in those cases in which a finding of "cause" is likely. During the PDI, the party interviewed has the opportunity to provide additional evidence. Once the PDI is completed, the investigator writes an Investigator Memorandum (IM) for the approval of the Supervisory Investigator. Based on the IM and the analysis of the secured evidence, the Office Director issues a Letter of Determination to the charging party and respondent. Where there is a "no cause" determination in a Title VII, ADEA[6] and/or ADA case, the charging party also receives a Notice of Right to Sue. Because of statutory differences, in EPA cases complainants are reminded of their private suit rights.

In cases in which "cause" is found, conciliation is attempted. If conciliation fails, the field office submits the case to headquarters with a recommendation regarding litigation. In Title VII, ADEA[7], and ADA cases where conciliation is unsuccessful and the Commission does not authorize an EEOC law suit, a Notice of Right to Sue is issued to the charging party. In EPA cases, complainants are reminded of their private suit rights.

See Appendix A for a flow chart of EEOC's charge process.

See Appendix B for a list of documents given to charging parties in the Washington, D.C. Field Office.

Revised 7/13/94:JP

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[6] In ADEA cases, the charging party receives a letter with similar language to the Notice of Right to Sue required by Title VII and ADA.

[7] See Footnote 5.

Appendix A

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGE PROCESS

TITLE VII - Prohibits discrimination on basis of race, color, sex, national origin and religion

AGE DISCRIMINATION IN EMPLOYMENT ACT
ADEA - Prohibits discrimination on basis of age—protects 40 and older

AMERICAN WITH DISABILITIES ACT
ADA - Prohibits discrimination against individual with a disability

EQUAL PAY ACT
EPA - Prohibits discrimination in payment of wages based on sex

ACTS OF DISCRIMINATION PROHIBITED:
Hiring, Assignment, Promotion, Discipline, Wages Layoffs, Discharge, Benefits, and Terms and Condition of Employment

180 days
(Jurisdiction without FEPA)

300 days
(Jurisdiction with FEPA)

Employee, Former Employee or Job Applicant
FILES CHARGE

[redacted] → deferred to → State or Local Fair Employment Practice Agency

(If EEOC Processes)

Notify Respondent
(Employer, Union, Employment Agency)
Within 10 Days of Charge

Interview Charging party and CP Witnesses

Send Respondent Request for Information → Possible On-site Interview

Analyze Respondent's Documents and Interview Respondent's Witnesses → Possible Subpoena of Respondent for Information

Investigator analyzes all Evidence and drafts Investigative Memoranda Summarizing Evidence

OVER

APPENDIX B

The following documents are given to charging parties at the Washington D.C. Field Office:

Attachment A: Preliminary Information for Intake (walk-ins only)

Attachment B: Form 283 (English and Spanish versions)

Attachment C: Fact Sheet and Privacy Act Statement

Attachment D: Letter sent to the Charging Party after the case is assigned to an investigator

Attachment E: Letter sent to the Charging Party after the case is assigned to an investigator

A

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

1400 L Street, N.W., Suite 200
Washington, D.C. 20005
PH: (202) 275-7377
TDD: (202) 275-7518
FAX: (202) 275-6834

Please Read this Memo Before Filling out the Attached Form

Welcome to the Washington Field Office of the U.S. Equal Employment Opportunity Commission. In order for us to assist you quickly and effectively, please completely fill out the questionnaire that you received from the receptionist. Once you have completed the questionnaire, one of our staff members will conduct a preliminary interview to determine whether your employment problem is one which falls within the jurisdiction of the Commission. If ours is not the appropriate agency, we will attempt to refer you to the appropriate agency or organization, if any. If the problem you describe appears to be within our jurisdiction, an investigator will conduct a more detailed interview with you in order to determine whether a charge of discrimination is warranted.

Please be patient, as all interviews are conducted on a first-come first-served basis. Because other persons may have arrived before you, you may have to wait for an interview. Be prepared to spend up to three hours here today if you proceed to the final step of filing a charge of discrimination. This is only an estimate. It is not possible to predict how long the process will take in your particular case. For this reason, we ask that you refrain from asking the receptionist or any other staff member when you will be interviewed or how much longer you will have to wait.

While you are waiting, please keep in mind that you will be given the same careful attention that those persons ahead of you are receiving.

Thank you for your cooperation and patience.

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

EEOC USE ONLY
Name (Intake Officer) B

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.

(Please Print)

NAME _____ DATE _____
(First) (Middle Name or Initial) (Last)

ADDRESS _____ TELEPHONE NO. (Include area code) _____

CITY _____ STATE _____ ZIP CODE _____ COUNTY _____

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you.

NAME _____ RELATIONSHIP _____ TELEPHONE (Include area code) _____

ADDRESS _____ CITY _____ STATE _____ ZIP CODE _____

What action was taken against you that you believe to be discriminatory? What harm, if any, was caused to you or others in your work situation as a result of that action? (If more space is required, use reverse.)

_____

_____

_____

Do you believe this action was taken against you because of: (Check the one(s) that apply and specify your race, sex, age, religion or ethnic identity.)

☐ RACE ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ AGE ☐ RETALIATION ☐ COLOR
☐ DISABILITY ☐ OTHER, EXPLAIN BRIEFLY BELOW

I WAS DISCRIMINATED AGAINST BY: (Check the one(s) that apply)

☐ EMPLOYER ☐ UNION (Give Local No.) ☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

NAME _____ NAME _____

ADDRESS _____ ADDRESS _____

CITY, STATE, ZIP _____ (Phone) _____ CITY, STATE, ZIP _____ (Phone) _____

APPROXIMATE NUMBER EMPLOYED BY THIS EMPLOYER

WHAT WAS THE MOST RECENT DATE THE HARM YOU ALLEGED TOOK PLACE?

Are you now employed by the Employer that harmed you? Answer below.

YES, FROM _____ (date) NO, I APPLIED FOR _____ (position) OR I WAS EMPLOYED AS _____ (position)

CURRENT POSITION _____ ON _____ (DATE) UNTIL _____ I WAS _____ (LAID OFF, FIRED, ETC.)

Normally, your identity will be disclosed to the organization which allegedly discriminated against you.
Do you ☐ consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source?

☐ No ☐ Yes (*if answer is yes, complete below*)

NAME OF SOURCE OF ASSISTANCE DATE

RESULT, IF ANY:

Have you filed an EEOC Charge in the past? ☐ NO ☐ Yes (*If answer is yes, complete below*)

APPROX. DATE FILED ORGANIZATION CHARGED CHARGE NUMBER (IF KNOWN)

SIGNATURE

DOB: SS#:

CUESTIONARIO

La información solicitada en este cuestionario será utilizada como parte de la investigación. Por favor lea la declaración de la Ley de Privacidad en el revés de esta página antes de llenar el cuestionario.

USO EXCLUSIVO DE EEOC

NOMBRE DEL ENTREVISTADOR:

Por favor conteste las siguentes preguntas, describiendo brevemente como ha sido discriminado en su empleo. Un investigador de la Comisión lo entrevistará cuando haya completado este cuestionario.

(Por favor use letra de imprenta)

NOMBRE _____ FECHA _____
(Primer Nombre) (Segundo Nombre) (Apellido)

DIRECCION _____ NUMERO DE TELEFONO (____) _____

CIUDAD _____ ESTADO _____ ZONA POSTAL _____ CONDADO _____

Por favor provea el nombre de una persona a quien llamar si usted no se encuentra:
NOMBRE _____ RELACION _____ NUMERO DE TELEFONO (____) _____

DIRECCION _____ CIUDAD _____ ESTADO _____ ZONA POSTAL _____

Describa brevemente las acciones que usted cree fueron discriminatorias. Incluya ejemplos de las personas que según su criterio recibieron un trato mejor.

_____

_____

_____

Creo que fui victima de discriminación a causa de mi: (Solamente marque los que sean aplicables)

☐ RAZA ☐ SEXO ☐ RELIGION ☐ ORIGEN NACIONAL _____ (país)

☐ EDAD ☐ REPRESALIA ☐ COLOR ☐ IMPEDIMENTO FISICO ☐ OTRO, explique brevemente:

FUI DISCRIMINADO POR: (Marque los que sean aplicables)
☐ EMPLEADOR ☐ UNION (Provea el numero local) ☐ AGENCIA DE EMPLEO ☐ OTRO (Especifique)

NOMBRE _____ TELEFONO (____) _____
DIRECCION _____
CIUDAD _____ ESTADO _____ CODIGO POSTAL _____

NÚMERO APROXIMADO DE PERSONAS EMPLEADAS POR SU EMPLEADOR:

LA FECHA(S) DE LA DISCRIMINACION ALEGADA:

¿Sigue usted trabajando con el mismo empleador que lo discriminó? Conteste abajo:
SI, DESDE _____ (fecha) NO, YO APLIQUE PARA _____ (posición) O: FUI EMPLEADO COMO: _____ (posición)
Posición actual: _____ en _____ (fecha) hasta _____ Fui _____ (suspendido temporalmente, despedido, etc.)

Usualmente esta oficina notifica a la organización su identidad. ¿Usted autoriza que se comunique su identidad a la organización? Autorizo ☐ o No autorizo ☐

¿Ha consultado a un abogado con referencia a este problema o ha registrado una queja con otro grupo o agencia?
☐ No ☐ Sí
NOMBRE DEL ABOGADO O AGENCIA: FECHA:

RESULTADO:

¿Ha registrado una querella con nuestra oficina anteriormente? ☐ NO ☐ SI
LA FECHA DE LA QUERELLA: CONTRA: EL NÚMERO DE LA QUERELLA:

FIRMA

Fecha de nacimiento Número de seguro social

C

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974, Public Law 93-579: Authority for requesting the personal data and the uses are given below.)

1. FORM NUMBER/TITLE/DATE. EEOC Form 5, CHARGE OF DISCRIMINATION, March 1984.

2. AUTHORITY. 42 U.S.C. § 2000e-5(b), 29 U.S.C. §211, 29 U.S.C. § 626.

3. PRINCIPAL PURPOSE(S). The purpose of the charge, whether recorded initially on this form or in some other way reduced to writing and later recorded on this form, is to invoke the jurisdiction of the Commission.

4. ROUTINE USES. This form is used to determine the existence of facts which fall within the Commission's jurisdiction to investigate, determine, conciliate and litigate charges of unlawful employment practices. Information provided on this form will be used by Commission employees to guide the Commission's investigatory activities. This form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. A copy of this charge will ordinarily be served upon the person against whom the charge is made.

5. WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. Charges must be in writing and should identify the parties and action or policy complained of. Failure to have a charge which identifies the parties in writing may result in the Commission not accepting the charge. Charges under Title VII must be sworn to or affirmed. Charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to provide the requested information.

6. [ ] Under Section 706 of Title VII of the Civil Rights Act of 1964, as amended, this charge will be deferred to and will be processed by the State or local agency indicated. Upon completion of the agency's processing, you will be notified of its final resolution in your case. If you wish EEOC to give Substantial Weight Review to the agency's findings, you must send us a request to do so, in writing, within fifteen (15) days of your receipt of the agency's finding. Otherwise, we will adopt the agency's finding as EEOC's and close your case.

NOTICE OF NON-RETALIATION REQUIREMENTS

Section 704(a) of the Civil Rights Act of 1964, as amended, and Section 4(d) of the Age Discrimination in Employment Act of 1967, as amended, state:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed a practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

The Equal Pay Act of 1963 contains similar provisions. Persons filing charges of discrimination are advised of these Non-Retaliation Requirements and are instructed to notify EEOC if any attempt at retaliation is made.

LEY DE PRIVACIDAD

(Este formulario está comprendido por la Ley de Privacidad de 1974, Ley Pública No. 93-579: La facultad para requerir datos personales y su utilización se describen a continuación)

1. FORMULARIO NUMERO/TITULO/FECHA. EEOC Form 5, Querella de Discriminación, Marzo 1984.

2. AUTORIDAD. 42 U.S.C. § 2000e-5(b), 29 U.S.C. §211, 29 U.S.C. §626.

3. PROPOSITOS PRINCIPALES. El propósito de la querella, tanto transcrita inicialmente en este formulario o escrita de cualquier otra manera y luego transcrita en este formulario, es invocar la jurisdicción de la Comisión.

4. USO RUTINARIO. Este formulario se usará para determinar la existencia de hechos que entran dentro de la jurisdicción de la Comisión para investigar, emitir decisiones, conciliar y litigar querellas de practicas de empleo ilegales. La información proporcionada en este formulario será usada por empleados de EEOC para guiar las actividades investigativas de la Comisión. El contenido de este formulario puede ser divulgado a otras agencias estatales, locales y federales según sea apropiado o necesario para el cumplimiento de las funciones de la Comisión. Una copia de esta querella será normalmente notificada a la persona contra quien se formuló la querella.

5. CARACTER OBLIGATORIO O VOLUNTARIO DE LA DIVULGACION Y CONSECUENCIAS PARA LOS INDIVIDUOS QUE NO PROVEEN LA NECESARIA INFORMACIÓN. Las querellas deberán hacerse por escrito y deberán identificar al querellante y al querellado y la acción o política presuntamente discriminatoria. La omisión del nombre de las partes en la querella puede resultar en la no aceptación de la querella por la Comisión. Todas las querellas bajo Título VII deberán hacerse bajo juramento o promesa. Las querellas iniciadas bajo la Ley de Discriminación en el Empleo por Edad (ADEA) normalmente deberán ser firmadas por el querellante. Las querellas pueden ser clarificadas o ampliadas posteriormente mediante enmiendas. El uso de este formulario no es obligatorio para proporcionar la información requerida.

6. Bajo la Sección 706 del Título VII de la Ley de Derechos Civiles de 1964, enmendada, esta querella podrá ser transferida y procesada por la agencia estatal o local correspondiente. Al finalizar el procesamiento de la querella, usted será notificado de la resolución final de su caso. Si usted desea que la Comisión (EEOC) efectúe una Revisión Substancial de las conclusiones de la agencia, usted deberá enviar una solicitud escrita a la Comisión dentro de quince (15) días del recibo de la resolución de la agencia. De lo contrario, la Comisión adoptará la resolución de la agencia y cerrará su caso.

AVISO SOBRE LA PROHIBICION DE REPRESALIAS

La Sección 704(a) de la Ley de Derechos Civiles de 1964, enmendada, y la Sección 4(d) de la Ley de Discriminación en el Empleo por Edad de 1967, enmendada, establecen:

Será una práctica de empleo ilegal para los patronos discriminar contra cualquiera de sus empleados o solicitantes de empleo, para una agencia de empleo discriminar contra cualquier persona, o para una organización laboral discriminar contra cualquier miembro o solicitante, porque se hayan opuesto a una práctica ilegal de empleo establecida por este título o por haber iniciado una querella, testificado, asistido, o participado de cualquier manera en una investigación, procedimiento, o audiencia bajo este título.

La Ley de Igualdad en el Pago de 1963 contiene similares provisiones. Las personas que inician querellas por discriminación son notificados de esta Prohibición de Represalias y se les explica que deberán notificar a EEOC si son sujetos a cualquier acción de represalia.

INFORMATION SHEET FOR CHARGING PARTIES (DOV ON OR AFTER 11/21/91)

EEOC PROCEDURES:

The EEOC will investigate the allegations you have made. Our investigator will ask you questions, will ask the respondent questions, may ask witnesses questions, and may review records. Based on the evidence gathered, the investigator will prepare a recommendation for the Office Director on whether discrimination has occurred. You and the respondent you have named will be given a Letter of Determination which will say whether there is reason or not to believe that discrimination has occurred. If you filed a complaint rather than a charge, or if you had a charge filed on your behalf, your identity as a complainant will be kept in confidence throughout EEOC's handling of your case.

- If the Director believes that the allegations in your charge are supported by the evidence, the Letter of Determination will say this and will ask the respondent to meet with EEOC to reach an agreement which will provide relief for the harm caused by the discrimination. If an agreement cannot be reached, the investigation will be reviewed in EEOC Headquarters and EEOC (or the Department of Justice if your charge is against a state or local government) will either sue on your behalf or notify you of your right to sue (see information on reverse side about Your Private Suit Rights).

- If the Director believes that the allegations in your charge are not supported by the evidence, the Letter of Determination will say this. The letter will also notify you of your right to sue. You can then decide if you want to file a private lawsuit to enforce your rights in court (see reverse side about Your Private Suit Rights).

YOUR RESPONSIBILITIES:

Please inform EEOC of any prolonged absence or change of address. Please claim any certified mail which EEOC may send you. If EEOC cannot locate you, or if EEOC asks you to do something necessary to its investigation and you decline, EEOC may discontinue the investigation and notify you of your right to sue. You may retain a lawyer while EEOC investigates your charge, but you are not required to do so.

YOUR PRIVATE SUIT RIGHTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT:

A Title VII charge preserves your right to sue the respondent named in your charge. Upon receipt of a notice of right to sue, aggrieved persons can sue for backpay, compensatory and punitive damages, appropriate make-whole relief or other injunctive relief, and attorneys' fees (including expert fees) and costs.

There are a number of circumstances in which we will give you a Notice of Right to Sue. You must then file a lawsuit in U.S. District Court within 90 days from the Notice if you wish to to enforce your rights in court. Once this 90-day period is over, your right to sue is lost. EEOC may give you a Notice to Sue in the following circumstances:

- If You Ask for a Notice of Right to Sue. You may not wish to wait for EEOC to complete its investigation or you may have retained an attorney who is recommending that you sue now. You can obtain a Notice of Right to Sue by asking the Office where you filed your charge to issue a Notice to you, even though we have not completed the investigation. EEOC will issue a Notice to you 180 days after you filed your charge. (In some cases, if you ask, we can issue the Notice to you earlier, if we know the investigation will take a long time to complete.)

- If EEOC Finds No Violation with Respect to the Allegations in Your Charge. Before this happens, we will give you an opportunity to provide additional evidence. When the investigation is over, the Director may issue a Letter of Determination stating that there are no violations. This Letter will notify you of your right to sue within 90 days.

- If EEOC Finds a Violation, Cannot Obtain Relief, and Decides Not to Sue on Your Behalf. When EEOC finds a violation and does not succeed in obtaining relief from the respondent, the investigation is reviewed by EEOC's Commissioners to determine whether a suit will be filed. Sometimes the Commissioners decide that a lawsuit will not be filed, in which case you will be given notice of your right to sue within 90 days.

- If Your Charge is Dismissed. EEOC Regulations require a charge to be dismissed when the law does not apply to your case or when it is not possible to continue due to an inability to locate you, because you did not cooperate in some way necessary to the case, or you did not accept a settlement offer which afforded you full relief for the harm you alleged. EEOC's dismissal letter will notify you of your right to sue within 90 days.

YOUR PRIVATE SUIT RIGHTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA):

If you filed a charge within 180 days of the alleged discrimination (300 days in states with a state age discrimination law), you may file a lawsuit at any time 60 days after you filed your charge until 90 days after you receive a notice from EEOC (Ninety-day Notice) that it has completed processing of your charge. Any person aggrieved covered by the charge may sue for recovery of backpay, an equal amount as liquidated damages, appropriate make-whole relief or injunctive relief, and attorneys' fees and court costs.

ONCE 90 DAYS HAVE PASSED FROM YOUR RECEIPT OF A NINETY-DAY NOTICE, YOUR RIGHT TO SUE IS LOST. The reasons described above under "TITLE VII SUIT RIGHTS" as to why you might receive notice of your suit rights apply to ADEA charges, except for the first one, "If you ask for a right to sue" (this one does not apply to ADEA -- you may sue as early as 60 days after filing your charge -- no "right to sue" letter is needed.)

(If you filed a complaint rather than a charge, or if your charge was filed after the 180 or 300 day period referred to above, your right to sue was not preserved.)

YOUR PRIVATE SUIT RIGHTS UNDER THE EQUAL PAY ACT (EPA):

If you have a claim under the EPA, you must file suit within 2 years of the alleged discrimination (3 years in cases of willful violations) to enforce your rights in court. Backpay you believe is due for work performed more than 2 years ago may be uncollectible. You may bring suit on your own behalf and on behalf of other similarly situated employees for the amount of wages underpaid, an equal amount as liquidated damages, plus attorneys' fees and court costs. You do not have to wait for EEOC to act before you sue.

If you have any questions, please call the EEOC office which last handled your case and refer to your charge number. If you file your own lawsuit, please notify the EEOC office which last handled your case by sending a copy of your court complaint.

D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office
1400 L Street, N.W., Suite 200
Washington, D.C. 20005
PH: (202) 275-7377
TDD: (202) 275-7518
FAX: (202) 275-6834

July 5, 1994

Charge Number: 100 94 0000
Jane Doe
vs.
XYZ Company

Jane Doe
1 Main Street
Washington, D.C. 20009

Dear Charging Party:

This is to notify you that the organization against whom you filed your charge (Respondent) has been advised of your allegations. Your charge of discrimination has been assigned to my unit for investigation. This office currently has a pending inventory of approximately 1200 cases, and, with few exceptions, we must investigate charges in the order they are received. Therefore, your case will be placed on hold temporarily until I am able to assign it to an investigator. You will be informed in writing when we begin the investigation.

If the Respondent offers a settlement directly to you, and you wish to withdraw the charge or you wish to file suit in federal court, please contact us. Otherwise, we ask that you refrain from calling our office for status reports. The high volume of phone calls received detracts from the time available for processing cases.

If you have any additional information, documentation, or witness statements that you wish to provide in the interim regarding your charge, please send such material to my attention at the address shown above. Please include the charge number with any documents you submit.

Be assured that our agency understands the importance of each charge and will strive to complete the investigation of your charge in the most timely manner possible. Thank you for your patience.

Sincerely,

Denise C. Anderson
Enforcement Supervisor
Enforcement Team II

E

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office
1400 L Street, N.W., Suite 200
Washington, D.C. 20005
PH: (202) 275-7377
TDD: (202) 275-7518
FAX: (202) 275-0831

Charge Number: 100-95-0000
Jane Doe
vs.
XYZ Company

Jane Doe
1 Main Street
Washington, D.C. 20010

Dear Charging Party:

This is to notify you that I have been assigned the investigation of your charge of discrimination.

If you have any additional information, documentation, or witness statements that you wish to provide regarding the charge, please send it to my attention at the address shown above. Please include the charge number with any information you submit.

You may call me at telephone number (202) 275-2222 between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday. If I am not available when you call, please leave your name, telephone number, and the time(s) when you may be reached at that number, so I can return your call.

Sincerely,

Investigator

OMB eyes revising ethnic categories

Some Americans just don't fit

By Gregory Lewis
SAN FRANCISCO EXAMINER

SAN FRANCISCO — The government doesn't know what to make of Michele Smawley.

"I've been identified as Jewish, Cuban, Puerto Rican, black, white, Italian, Greek and Eskimo," said Miss Smawley, an unemployed 26-year-old television producer from Hollywood.

When it's time to apply for aid or fill out a census form, Miss Smawley — like countless other Americans — finds that she doesn't fit neatly into the federal government's five official racial categories.

Last week more than 40 people — white, black, Hawaiian, Creole, Arab American, Mexican-American, American Indian — testified in San Francisco that the U.S. Office of Management and Budget (OMB) should expand, eliminate or alter the racial and ethnic categories used by the federal bureaucracy.

Racial pride, billions of dollars in government assistance and the accuracy of the 2000 census could be at stake.

It has been 17 years since the government revised the rules for designating race and ethnicity in federal records. The categories are used in the census, in civil rights enforcement, in distributing federal aid and in calculating health data.

The San Francisco hearing was the third conducted across the country by the OMB. A final hearing is planned in Hawaii.

Speakers here, in Boston and in Denver called for:

- Creating a "multiracial" category.
- Adding Hispanic to the list of races.
- Changing the term black to African-American.
- Eliminating all racial distinctions.

Miss Smawley said she is angry that government statistics don't take her heritage into account.

"I have a white mother and a black father," she said. "There were 13 categories for various Asian and Pacific Islanders, but not one I could choose from."

The OMB's Directive No. 15, issued in 1977, fails to reflect the diversity of the U.S. population, critics say.

"If I stand in the mirror of Directive No. 15, I don't see myself reflected," said Kendra Wallace, a biracial woman who was adopted by a multiracial family in Boston. "I identify myself as black and white. What is confusing to others is clear to me. That's what I am."

Such comments reflect a body of thinking in the United States that emphasizes ethnicity. Blacks have become African-Americans. Some whites want to be identified by their European roots.

Many Hawaiians do not want to be lumped with Pacific Islanders and are calling on the government to include a "native Hawaiian" designation.

Some labeled by the government as "American Indians" say the term doesn't work.

"Indian has become too ambiguous to use," said Jack Forbes, chairman of the native American studies department at the University of California at Davis. "It belongs to the people who are native to the country India. [Those who live in the United States] are the Indian-Americans."

Mr. Forbes suggested the government introduce the term "pre-Columbian Americans."

Native Hawaiians, American Samoans and Chamorros native to the Mariana Islands, near the Philippines, argued Thursday for classifications separate from the catchall "Asian/Pacific Islander."

"I am here to tell you we exist, we exist, we exist," said Kawahine Kamakea-ohelo of Waimanalo, Hawaii, who dates her family's history on the islands to 1778. "We want to be recognized as native Hawaiians, native people, indigenous people to the land."

Gerhard Holford of the Conference of Americans of Germanic Heritage suggested that the "white" category be eliminated, replaced in his case with the term "Germanic."

Americans of European heritage have disavowed the term "white" as part of their identity, he said.

"We believe this trend may in part be due to the common stereotype that anyone who does identify him or herself as white is latently or potentially a white supremacist," Mr. Holford said.

"White is a color, not a racial designation," he said. "As a consequence of genetic condition of albinism, a person of any race can be white. . . . White is a political idea or a state of mind."

Gilbert Martin, a Louisiana Creole — "the oldest multiracial group this side of the globe," in his words — said Creoles are "invisible Americans" to the government.

"We just want you to recognize us as a people," said Mr. Martin, a member of the French Creole Cultural Society.

Christine Totah, an Arab American, said a separate designation for Arab Americans might result in more federal money to study health issues, such as infant mortality among Arab Americans.

The OMB, at 725 17th St. NW, Washington, D.C. 20503, will take written comments until Sept. 1.

• *Distributed by Scripps Howard*

OFFICIAL RACIAL AND ETHNIC TERMS

The Office of Management and Budget established five categories in a 1977 directive:

- American Indian/Eskimo/Aleut
- Asian/Pacific Islander
- White
- Black
- Hispanic origin

The Washington Times

PHOTOCOPY PRESERVATION

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