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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Remarks by Vice President Al Gore - July 12, 1994 - Chicago, Illinois (6 pages)	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] [4]

ds66

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 advice 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]

Topic:

Problems in Agency Performance:
Refusal to Accept Charges for Processing

Examples Which Can
be Cited in a
Question:

1. Refusing to accept a charge, in general
2. Refusing to accept a charge which has been drafted by an attorney
3. Refusing to accept a charge which contains class-type allegations or allegations of systemic discrimination
4. Refusing to accept a charge which contains allegations which would require more of an effort to investigate
5. Insisting on redrafting a charge drafted by the charging party or an attorney, in order to delete class-type allegations, allegations of systemic discrimination, or allegations which would take more time than usual to investigate

Suggested Themes of Answer:

I have heard that these types of problems may have occurred in some offices. I take these problems very seriously. Such actions harm the Commission's own work, and they can also injure the charging party. An EEOC charge is the charging party's ticket to court, and if he or she has been unable to file a charge with the Commission or if important allegations were excluded from the charge, the court may not allow the charging party to make that claim of discrimination.

At the same time, it is important to keep in mind that many people come to the EEOC with problems which are completely outside our jurisdiction, and which do not involve any claim of discrimination. Commission staff need to be able to explain that the laws we enforce only give the Commission the authority to enquire into problems of discrimination. If there is doubt, or if the person insists on filing a charge, the safest course is to take the charge and then dismiss it if dismissal is warranted. That protects both the interests of the Commission and the rights of the charging party if the Commission employee turns out to be wrong.

If I am confirmed, I will try to develop training programs which will make sure that this kind of problem does not occur again.

Topic:

Problems in Agency Performance:
Poor Quality of Investigations

Examples Which Can
be Cited in a
tion:

1. Issuing "No Reasonable Cause" decisions just to keep the paperwork moving
2. Rating supervisors based on the number of cases they close, without regard to quality of the investigation
3. The General Accounting Office reports on poor-quality charge investigations leading to arbitrary "no cause" determinations
4. The Staff Report of the House Committee on Education and Labor, reaching the same conclusions

Suggested Themes of Answer:

Such problems are unacceptable. It is essential that EEOC investigations not only be of high quality, but that they be seen by both charging parties and respondents as impartial, thorough, and roughly reflective of what the courts would ultimately hold if the matter were brought to court. If we can ever reach this point, we should be able to conciliate more cases and reduce the burden on the courts.

At the same time, it is extremely difficult to prevent such problems from occurring when each investigator has responsibility for about 115 new charges a year. This means that each investigator has an average of a day and a half to work on a new charge, a figure which does not include any time to work on the backlog. It is impossible to perform good-quality investigations of every charge.

The number of charges received annually by the Commission increased by 37% from 1991 to 1993. The total was almost 88,000 charges last year, and they were handled by only 765 [better check this] investigators. Much of the increase was due to charges under the Americans with Disabilities Act, as well as to sharply increased filings of charges of sexual or racial [check national origin] harassment. In addition to the increased numbers, these types of charges require greater staff time to investigate. At the present level of funding, the pressure is likely to increase rather than decrease, particularly because coverage of the ADA this year will extend to employers of 15 or more employees.

If confirmed, I intend to hold discussions with representatives of Congress and of all interested groups, including employers and their counsel, civil rights organizations, and the EEO Committee of the American Bar Association's Labor and Employment Law Section, in order to work together to find the best means of resolving this problem.

Topic:

Problems in Agency Performance:
The Backlog

Examples Which Can
be Cited in a
Question:

1. It can take two or more years before a meritorious charge reaches the stage where it can be referred to the Commission's attorneys for litigation
2. It can take nine months to a year or more before an investigation even starts
3. Charging parties faced with ongoing sexual, ethnic, or racial harassment need immediate relief
4. Charging parties who have not been hired, or who have lost their jobs, cannot afford to wait

Suggested Themes of Answer:

Same as with poor-quality investigations.

QUESTIONS RE: RELIGIOUS HARASSMENT ISSUE

Q:

Tremendous concern has been raised about guidelines proposed by the EEOC last October concerning religious harassment in the workplace. Members of Congress, employers, and thousands of people across the country have protested these guidelines, because they could literally produce "religion-free" workplaces where employees could be forbidden from wearing personal crosses or other religious symbols, or even talking about religion. Yet there is no documented need for religious harassment at all. The Senate has passed a resolution calling for the deletion of religion from the guidelines and the House has approved a similar provision in EEOC appropriations legislation. Do you agree that religion should be deleted from the guidelines?

A:

Senator, I share your regard for the importance of religious freedom for all Americans. A "religion-free workplace" would itself violate Title VII and no one wants that. It is also important for religious freedom, however, that Americans be protected against religious harassment and discrimination on the job just as they be protected against harassment and discrimination based on race, sex, and other grounds, as Title VII provides. I have not fully studied the

proposed guidelines, and I am hesitant to discuss them in detail since they are a pending matter before the EEOC. But I believe that it should be possible to promulgate guidelines that protect against harassment and preserve religious freedom in a manner consistent with the law as enacted by Congress.

Q:

Without taking a final position now, wouldn't you agree that at the very least, religion should be given special treatment or placed in separate guidelines?

A:

Senator, with due respect, I am hesitant to comment on specific suggestions, since the guidelines are a pending matter before the EEOC and I have not fully studied them or the comments that have been received. I can pledge that I will carefully take into account your concerns, the concerns of other members of Congress, and of all those who have commented to the EEOC on this matter, and will do my best to help produce guidelines that protect against harassment and preserve religious and other freedoms.

[Note: A number of religious and other groups, such as the U.S. Catholic Conference, Baptist Joint Committee on Public Affairs, and American Jewish Congress, have supported retention of religion as a protected category in the guidelines. Neither

the Senate resolution, nor the House provision call for permanent deletion of religion as a protected category from the final workplace harassment guidelines, nor for treating religious harassment under different standards from other forms of harassment; instead, the Senate and House provisions oppose the proposed guidelines in their current form and call for further consideration and review by the EEOC. Several key House members (Ford, Edwards, Fish, and Owens) are circulating a "Dear Colleague" letter which also calls for retention of religion as a protected category in the guidelines.

While some have tried to use this issue to attack Clinton, in fact no Clinton-appointed official played any role in generating the October, 1993 draft guidelines which have been criticized.

While some have suggested that Title VII is protection enough, the EEOC plays an important role in providing guidance and training to employers concerning their legal obligations under Title VII and other federal civil rights laws. This role is important so that employers can address workplace problems before they result in costly litigation and, as relates to this issue, so that employers do not inadvertently suppress non-harassing religious or other expression.

The circulating "Dear Colleague" letter and further background on the issue are enclosed.]

Providing Leadership and Coordination for Federal Agencies' External EEO Programs

Q. EEOC not only is responsible for enforcing the nation's major equal employment laws, it has responsibility under Executive Order 12067 to provide leadership and coordination for all federal agencies' equal employment efforts in programs that they administer. How do you view this area of Commission responsibility?

A. The Executive Order directs the Commission to provide leadership and consistency in the formulation of equal employment policy, to develop uniform standards for investigations and compliance activities; to provide for sharing of findings among agencies, to standardize recordkeeping and reporting, to develop uniform training programs and to take other actions to achieve more effective compliance with, and enforcement of, various equal employment requirements and eliminate unnecessary duplication.

The Commission has taken many actions to implement this mandate; however, I believe it must now assert more vigorous leadership in the Federal establishment. I would promote much more active consultation and coordination with other agencies that have major equal employment responsibilities--including the Department of Justice, Department of Labor, and the Departments of Education and Health and Human Services, not only to assure consistent policies and procedures, but to make more effective, coordinated use of our limited resources in combatting employment discrimination.

Federal Employee Fairness Act

- Q. What are your views on the proposed Federal Employee Fairness Act, which would transfer processing of federal employees' EEO complaints from their own agencies to the EEOC?
- A. The proposed Federal Employee Fairness Act will bring needed reform to the federal sector process. There is an obvious, inherent conflict of interest in requiring an employee to bring a complaint of discrimination by his or her agency to the same agency for initial processing. The agency is, in effect, asked to judge itself. Transferring the processing to the EEOC will provide an impartial forum for resolving such complaints. The Administration has worked closely with the Congress in drafting the terms of the Federal Employee Fairness Act and it is my understanding that the EEOC has been assured that sufficient funding will be made available to enable the Commission to implement the Act when it is passed. It is essential that this assurance be honored.

Policy Statement on Remedies and Relief

- Q. In 1985 the Commission adopted a policy on remedies and relief that set as a standard, achieving full, remedial corrective and preventive relief for individuals where discrimination is found. This policy has been criticized as preventing any resolution of charges that do not obtain full relief, even if the charging party and the respondent are satisfied with the terms offered. To the extent that this policy keeps charges alive even when the parties no longer disagree, it has been alleged that the policy unnecessarily adds to the Commission's case load. What is your view of this policy?
- A. An individual who has suffered discrimination has a right to all the remedies provided by the statute. However, the Commission is required by law to try to resolve discrimination disputes through conciliation. Accordingly, there may be situations where if the charging party and the respondent are satisfied with the terms offered, an agreement to accept less than full relief should be permitted, providing that the parties are informed of their rights, including all available remedies.
- Q. In addition, the policy does not address compensatory and punitive damages. What is your view on whether compensatory and punitive damages are a necessary part of full relief for purposes of settlement or conciliation?
- A. That is a question that the Commission will have to resolve, but inasmuch as they are now an integral part of Title VII and ADA remedies, any resolution of the claim would have to include consideration of the potential for damages.

back log

IMPROVING EEOC SERVICE TO TRADITIONALLY UNDERSERVED COMMUNITIES

- Q. EEOC has been criticized for failure to provide equitable service to traditionally underserved groups, specifically to the Hispanic, Native American and Asian American communities. As Chairman, how would you respond to this criticism?
- A. I am aware of some of these criticisms. As Chairman, I would give the highest priority to assuring that the Commission meets its obligation to provide service to every group protected by every law enforced by EEOC.

My nomination as Chairman represents this Administration's acknowledgement of, and response to, one criticism: that in the past, there has not been sufficient recognition of the Hispanic community in high policy making positions of the EEOC. However, I can assure you that, as Chairman, I will be committed first to learning the specific concerns of every group that believes it has not been served fairly by EEOC, and then acting promptly to improve service to all of these groups.

The Role of the Commission Meetings

- Q. The Commission has been criticized for failing to hold regular open meetings during the previous Administration and for making many decisions privately, by notation vote, without opportunity for the public to hear discussions of policy issues. As Chairman, what would be your policy regarding Commission meetings?
- A. The Government in the Sunshine Act requires that the Commission, except in limited circumstances, conduct open meetings. The purpose of this requirement is to encourage accountability. However, these meetings should not become mere pro forma ratification of positions adopted prior to the meeting. I believe the role of the Commission meetings should be to do the work of the Commission in an open forum, where the Commissioners themselves discuss the issues and seek to reach a consensus.

Enforcement Policy in Cases Against Public Employers

Q. In 1991, the Commission extended its enforcement policy, requiring all cases in which cause is found and conciliation fails to include required Commission litigation authorization for cases involving public employers, before referring such cases to the Department of Justice. Since Title VII and the ADA authorize the Department of Justice, not EEOC to conduct litigation against such employers, do you think this policy should be continued?

A. In recent years, the Department of Justice litigated very few EEOC cases. It is my understanding that the current policy was adopted in the hope that the Department would be more receptive to EEOC cases if they came directly from the five member Commission. In this Administration, with the Department of Justice taking a much more active role in litigating discrimination cases, it may not be necessary to continue to route these cases through the Commission.

Compliance Policy Statement

- Q. In 1986, the Commission adopted a policy requiring that every charge receive a "full investigation" in order to assure the goal of full relief for victims of discrimination. Do you believe that this policy effectively carries out the Commission's mission, and should it be continued?
- A. There are a few different ways to approach your question. Strictly as a matter of law, there is no requirement that EEOC investigate all charges filed under ADEA or EPA. While Title VII, and thus the ADA, require an investigation, the law does not define what must be done nor does it require that a "full" investigation be done of each and every charge.

While I agree with the policy's commitment to thorough, focused and expeditious investigation of charges, I believe that this policy must be modified for the Commission to become more effective. The policy unduly limits the discretion of the Commission's District Directors in the field to determine the scope of investigations. Field Directors' hands-on experience in conducting investigations and their direct access to charging parties and respondents puts them in the best position to determine whether extensive investigation is necessary or whether a narrowly tailored investigation is more appropriate.

Further, the requirement to treat every investigation alike provides no incentive to focus limited investigative resources in the most efficient manner. Field offices should operate under general guidelines, but should be allowed to make judgments about the necessity of taking particular investigative steps.

Since this policy was adopted, the Commission has experienced a significant yearly increase in the number of charges filed, as a result of the Americans with Disabilities Act, the Civil Rights Act of 1994, the national focus on sexual harassment and other causes, with no corresponding increase in staff and resources. The combined result of increased charges and the full investigations policy has been a serious increase in the backlog of charges to be processed. Without a significant increase in staff, some adjustment to the full investigation policy will be necessary.

EEOC's Technical Assistance Role

- Q. Title VII provided in 1964, and the Congress reiterated in the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, Commission responsibilities for providing technical assistance to aid compliance. How do you view the EEOC's role in providing such assistance?
- A. I want to emphasize my belief that EEOC's mandate to eliminate discrimination and to achieve equal employment opportunity requires the Commission to undertake additional, helpful activities, in addition to its enforcement and litigation action. I believe that providing clear and understandable information on legal rights and legal obligations to protected groups and to employers, and technical assistance to aid compliance, through printed materials, training programs, public presentations, response to public inquiries and other positive measures is as essential as enforcement activity to achieve the goals of the anti-discrimination laws.

Federal Affirmative Action Requirements

- Q. EEOC is responsible for providing guidance on and monitoring federal agencies' affirmative action programs. The Commission has issued directives requiring agencies to submit reports containing work force data, analyses of employment practices that impede opportunities for underrepresented groups and action steps to improve opportunities. However, reports of the General Accounting Office indicate that the representation of women and minorities in Federal agencies does not reflect their representation in the qualified labor force and is particularly low in middle and upper job levels. The GAO also has criticized EEOC for approving agency plans that do not include the required data or analyses, and generally, for failure to use its authority to require meaningful affirmative action plans. How do you see the Commission's role in this area?
- A. It is my understanding that the affirmative action directives issued by EEOC do require result-oriented actions, not mere reporting of data. However, I also understand that since these directives and reporting requirements were established, EEOC staff responsible for monitoring federal programs has been greatly reduced.

The federal government should be a model equal employment opportunity employer and EEOC must demonstrate leadership and commitment in directing and monitoring meaningful agency programs that are accountable for results, not merely submission of reports.

With the abolition of the Federal Personnel Manual and its numerous restrictions on personnel policies, this is an opportune time to develop innovative personnel practices to achieve Federal affirmative action goals. The Commission should assert strong leadership to help reach these goals.

It is extremely important that the Commission strongly assert its leadership role in the development of federal equal employment opportunity policy. This includes working closely with other federal agencies to coordinate the development of policy priorities and in insuring that those policies are consistently carried out. As Chairman of the Commission, it is important that I personally communicate the importance of the coordination function to other agencies and lend my support when disputes come up that cannot be resolved at the staff level.

1984 Enforcement Policy Statement

Q. In 1984, the Commission adopted an enforcement policy statement providing that the Commission would review every cause determination and finding of violation for potential litigation where conciliation was unsuccessful. The rationale for this policy was that every finding of discrimination was equally worthy for litigation. This policy has been criticized as seriously weakening the impact of the Commission's litigation effort and failing to use limited resources most effectively. What are your views on this policy?

A. First, I would question the premise that every finding of discrimination is equally worthy for Commission litigation. Given its limited resources, the Commission must establish litigation priorities. An important priority should be litigation that in itself, or by setting precedent, will have the greatest impact for the greatest number of people.

I also question whether the Commissioners should be responsible for reviewing every litigation decision. The Commission has Field Office Directors and an Office of General Counsel with Regional attorneys in the field who have day to day experience in litigation. They should be empowered to determine whether or not a particular case should be referred to the Commission. They should only be required to submit those cases that they feel should be litigated, and cases raising novel or complex issues that require the input of the Commissioners.

Allowing discretion in submission of cause cases to the Commission for litigation also will greatly improve efficiency. The present Enforcement Policy requires the General Counsel to submit voluminous documents regarding each case to the Commission. It is virtually impossible for any Commissioner to read all these documents, so Commissioners are usually dependent on a brief summary and staff recommendations on whether or not to approve. If the Commission only had to review case findings where litigation is recommended by the Office of General Counsel and the Regional Attorneys and those raising novel or complex issues, its deliberations would be much more meaningful, and paperwork burdens would be greatly reduced.

Reestablishing Commission Leadership in the Civil Rights Community²⁸

- Q. EEOC has been widely criticized for abandoning its civil rights leadership role during the previous Administrations. As Chairman, how would you address these criticisms?
- A. In order for EEOC to reassert a leadership role in the civil rights community, the Commission must become more effective in enforcing the equal employment laws. It also must become more visible, vocal and responsive.

As Chairman, it will be my responsibility, by personal example, to set the standard. In the past, when the attention of the country has been focussed on issues such as sexual harassment or age discrimination and when the magnitude of the problem of discrimination has been highlighted by clear factual demonstrations, the American people and business have responded. I believe it will be my responsibility to keep equal employment issues in the public eye, to widely disseminate in public forums information people need to know concerning their rights, and to provide effective processing of the increasing charges that inevitably follow as public awareness increases. I will also engage the civil rights community, discuss the strengths and weaknesses of the Commission in serving our customers, and work with them to identify better approaches that will improve the delivery of services.

Each of the Commissioners should welcome public scrutiny and eagerly engage in and invite discussions of controversial issues. The Commission can only regain credibility if its top leadership is willing to articulate its unqualified support for vigorously enforcing the EEO laws, its passionate belief in the justice of those laws, and its tireless commitment to continuous improvement of employment opportunities for all.

Relationship with the Fair Employment Practices Agencies (FEPAs)

- Q. EEOC provides a substantial amount of funding to State and local fair employment agencies to assist in processing employment discrimination charges. There has been criticism regarding the lack of effective monitoring and quality control to assure that these agencies follow consistent policy and procedures in processing charges. As Chairman what steps would you take to address these criticisms?
- A. Clearly, with the increased volume of discrimination charges and limited resources, it is essential that the Commission give priority to improving its partnership with these agencies. The present system should be evaluated and problems identified. There may be need to audit some agencies' operations. The Commission should try to provide guidelines and training for these agencies, to assure consistent policies and procedures in investigations. The current payment system also might be evaluated, to see if a more effective system could be developed.

Coordination Between EEOC and OFCCP

- Q. What kind of coordination has taken place between the Commission and the Office of Federal Contract Compliance Programs (OFCCP)?
- A. The Commission and OFCCP have worked very closely together. Strong working relationships have been developed between EEOC and OFCCP staff at headquarters and in the field offices of both agencies. In 1981, the two agencies entered into a memorandum of understanding to coordinate the processing of charges filed with OFCCP. Under the terms of the MOU, individual charges of discrimination that are also covered by Title VII are referred to the Commission for processing under Title VII. OFCCP retains systemic cases for processing. The MOU has been instrumental in facilitating ongoing communication between the two agencies.

Family and Medical Leave, ADA and Title VII

Q: Does a disabled employee who needs disability-related medical leave have to elect between the FMLA and the ADA, or is s/he entitled to the protections of both laws at the same time?

A: The ADA continues to apply in full force along with the FMLA, so eligible/qualified employees are entitled to the protections of both laws. Among other things, this means that an employee working part-time under the FMLA also is entitled to reasonable accommodations to perform the part-time job under the ADA.

Family and Medical Leave, ADA and Title VII

Q: Does the FMLA's 12-week annual allotment of medical leave mean that employers may deny requests for more than 12 weeks' leave under the ADA, because it would be an undue hardship to the employer?

A: NO. It is not automatically an undue hardship to give more than 12 weeks of leave in one year as a reasonable accommodation. Employers must make an independent determination of undue hardship under the ADA, considering the total leave request (14 weeks, 16 weeks, etc.). Employers may consider the cost and disruption of leave already taken under the FMLA as one of many factors relevant to undue hardship under the ADA.

Family and Medical Leave, ADA and Title VII

Q: For purposes of maternity leave, does Title VII offer some protections that may exceed FMLA?

A: YES. Title VII requires employers to treat pregnancy and related conditions like any other short-term disability. If an employer provides paid short-term disability leave, it must also do so for pregnancy. Similarly, if an employer in practice gives short-term disability leave to individuals employed less than one year, it also must do so for pregnant women. Under the FMLA, leave is available only to individuals employed at least 12 months, and leave may be unpaid.

Family and Medical Leave, ADA and Title VII

Q: Which employers will be covered by the FMLA, the ADA, and Title VII?

A: Only those employers with 50 or more employees are covered by all three laws. The FMLA covers employers with 50 or more employees, and Title VII and the ADA (after July 26th) cover employers with 15 or more employees.

Family and Medical Leave, ADA and Title VII

Q: Shouldn't the EEOC be coordinating with the Department of Labor about the overlap between the FMLA, the ADA and Title VII?

A: YES. It is my understanding that the EEOC has coordinated with the Department of Labor from the start of the FMLA rulemaking process. During the Spring of 1993, the EEOC commented on position papers and a draft of the FMLA interim final rule, and also met with Department of Labor representatives. In December, 1993, the EEOC filed formal written comments about the interim final rule, and followed up with another meeting and a short letter. That coordination will continue. I also plan on looking into the feasibility of issuing an enforcement guidance discussing ADA and Title VII issues in relation to the FMLA.

Issue: The ADA and Collective Bargaining Issues Under the National Labor Relations Act

- Q. There are some potential conflicts between the National Labor Relations Act (NLRA), in terms of what might be required under a collective bargaining agreement (CBA), and certain requirements under the ADA. What do you see as the primary areas of conflict between these two statutes?
- A. One potential conflict involves reasonable accommodations required under the ADA that are inconsistent with the terms of a collective bargaining agreement. The ADA requires employers to make reasonable accommodation to the known physical or mental limitations of qualified individuals with disabilities unless it would be an undue hardship to do so. Under the NLRA, however, an employer cannot change working conditions of employees without bargaining with the union, nor can it unilaterally change the terms and conditions of employment contained in a CBA without the union's consent.

Certain accommodations, such as providing a ramp or an interpreter, would not effect a "material, substantial or significant" change in working conditions, and thus could be unilaterally implemented by an employer. However, requested accommodations that conflict with established employment practices, such as seniority systems or defined job classifications, would more likely be considered a change in terms and conditions of employment that must be bargained over. Failure to do so could give rise to an unfair labor practice charge under the NLRA.

The legislative history indicates that the terms of a CBA are relevant to but not determinative of whether an accommodation will constitute an undue hardship under the ADA. This is a complex area, and EEOC will be studying how to best harmonize and resolve these conflicting statutory requirements.

A second potential conflict involves the ADA's confidentiality requirements regarding medical information and an employer's obligation under the NLRA to provide the labor organization with the information necessary to enable it to effectively carry out its collective bargaining responsibilities. In situations where a union is bargaining over the implementation of a reasonable accommodation, a union may have need for certain medical information that is considered confidential under the ADA. Specifically, the ADA statutorily prohibits an employer from releasing medical information except to a list of certain designated individuals which does not include unions. While competing legal arguments can be made, the position that arguably best harmonizes these conflicting statutory requirements is to allow a union to be given the minimum amount of confidential information necessary for bargaining over a reasonable accommodation. EEOC will be further considering this issue.

Issue: The ADA and Collective Bargaining Issues Under the National Labor Relations Act

- Q. In attempting to resolve the arguably conflicting requirements of the ADA and the NLRA, has the EEOC been working with the National Labor Relations Board (NLRB)? Has the EEOC also sought input from other affected groups such as labor organizations or unionized employers?
- A. Yes, it is my understanding that EEOC staff have had discussions with the NLRB. EEOC staff have recently been in contact with them again about the possibility of a jointly issued document that would address how the conflicts between the NLRA and the ADA can be resolved. If the NLRB does not choose to pursue this type of agreement, the EEOC will likely develop a regulation on its own stating how it will resolve charges raising these types of conflicts.

The EEOC received many comments about the ADA and collective bargaining issues from employers, unions and advocacy groups when it was developing its ADA regulations in 1991. In light of the complexity of the issues and the need for further study, the ADA regulations did not attempt to provide detailed guidance on this subject area. Various groups have subsequently expressed their desire for more detailed guidance on these issues and their willingness to provide EEOC with their views and concerns. EEOC will be seeking the input of all affected groups.

Issue: Coordination and Overlap between Section 102 of the Immigration Reform and Control Act of 1986 and Title VII's Prohibitions against National Origin Discrimination

Q. There is some overlap between Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), which prohibits discrimination based on citizenship and national origin, and Title VII's prohibition against national origin discrimination. What type of coordination or joint efforts are there between EEOC and Department of Justice's Office of Special Counsel on these issues?

A. EEOC has worked closely with the Office of Special Counsel (OSC), which is the office responsible for enforcing IRCA's anti-discrimination provisions, from the beginning. In brief, EEOC has jurisdiction over national origin discrimination charges involving employers with 15 or more employees (this includes citizenship requirements that have the purpose or effect of discriminating on the basis of national origin). OSC has jurisdiction over charges of citizenship discrimination involving employers with four or more employees and charges of national origin discrimination involving employers with between 4 and 14 employees. EEOC and OSC have entered into a Memorandum of Understanding (MOU) making each agency the agent of the other for purposes of receiving discrimination charges and providing for interagency coordination of charge processing activities. This ensures that charges that are mistakenly filed with the wrong agency will be forwarded to the correct agency with jurisdiction. The MOU also allows for the coordination of investigations in certain circumstances where both agencies may have jurisdiction (for example, when EEOC receives a charge involving citizenship discrimination that also appears to have the purpose or effect of discriminating on the basis of national origin, EEOC would retain jurisdiction over the national origin component, while referring the citizenship component to OSC for processing).

EEOC is a member of the Interagency Antidiscrimination Outreach Task Force, and thus has been involved in ongoing efforts to educate both workers and employers of their rights and responsibilities under IRCA. Since 1991, EEOC has assisted the Office of Special Counsel with its grant programs by reviewing grant applications by organizations seeking appropriated funds to perform IRCA outreach and education. EEOC staff has also spoken on several occasions about EEOC's enforcement of the national origin provisions of Title VII at the IRCA Discrimination Training Seminars sponsored annually by the Office of Special Counsel.

ADEA

Q. Do you favor the issuance of "no cause" letters under the ADEA? Don't such letters prejudice the rights of charging parties?

A. It is my understanding that "no cause" letters are not required by law. The Commission could as a matter of discretion simply advise individuals that it is terminating its proceedings.

There may be good reasons for issuing "no cause" letters however: (i) the simple notion of fairness in advising parties of cause or "no-cause"; (ii) having consistent procedures under all EEOC-enforced statutes; (iii) assisting charging parties in determining whether litigation is warranted; (iv) cause letters are given more credence when employers know we also issue "no-cause" letters--this in turn facilitates our efforts at voluntary resolution.

I would, however, certainly give serious thought to revising our process if charging parties are in fact prejudiced by the issuance of "no-cause" letters. After all, charging parties are supposed to receive a de novo proceeding in court under the federal employment discrimination laws. Perhaps there is some middle ground that would both protect the interests of charging parties and preserve EEOC's image as an impartial and objective enforcement agency.

ADEA

Q. What would you do about the FAA's Age-60 Rule if you were Chairman?

A. My understanding is that EEOC has consistently urged the FAA to reconsider its position on requiring certain airline pilots to retire from piloting at age-60. I have not had an opportunity to learn in detail why the FAA has so far retained its position. It is my understanding, however, that there may be other ways of addressing airline safety than through the use of arbitrary age limits. If that is the case I would take every opportunity to persuade the FAA to change its position.

ADEA

- Q. In Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993), the Supreme Court discussed the circumstances under which adverse employment actions taken on account of an employee's years of service would violate the ADEA. What is your opinion regarding the impact of the Hazen Paper case on ADEA enforcement?
- A. The Court in Hazen Paper concluded that when an employer acts on factors correlated with age, even those that are empirically correlated with age such as pension status or seniority, that does not necessarily equate with disparate treatment on account of age.

At this juncture, it can't be determined what impact the Hazen decision will have on ADEA enforcement. That assessment will depend in large measure on how the lower courts interpret Hazen. It is safe to say, however, that Hazen has not made a plaintiff's burden in an age case any easier.

While I would want to further familiarize myself with all aspects of the Hazen decision, my tentative belief is that the Commission should issue its view of the decision in the hope that the lower courts will be influenced thereby.

ADEA

Q. What has been the effect of the expiration of section 12(d) of the ADEA relating to mandatory retirement at age 70 for tenured faculty?

A. Section 12(d) was enacted in 1986 when mandatory retirement was made illegal for most employees. Section 12(d) made it permissible for an institution of higher education to require tenured faculty to retire at age 70. By statute, section 12(d) expired at the end of 1993.

A study was performed by the National Research Council in 1991 to determine whether the provisions of section 12(d) should be reenacted in 1994. The study determined that there was no need for mandatory retirement in higher education, as long as the institutions were permitted to offer attractive early retirement packages to induce faculty to retire voluntarily.

Over the past six months, some colleges and universities have stated that the expiration of section 12(d) will have a significant adverse effect upon higher education. Specifically, they argue that: (1) older faculty will continue to work long beyond age 70, preventing younger faculty from attaining tenured status; and (2) older faculty are far less productive than younger faculty.

The arguments raised by the colleges and universities are identical to the arguments raised by private industry in 1986 when the age 70 cap on the ADEA was being eliminated. It is clear that, at least in private industry, no such ossification of the workforce has occurred. Recent studies have demonstrated that the most productive employees (except in manual labor jobs) are usually the older, more mature employees.

Some have contended that very few employees actually want to work even one day longer than they need to. Once retirement finances are secured, most people stop working.

Finally, significant alternatives to mandatory retirement exist, such as enhanced voluntary early retirement programs and voluntary part-time (or emeritus) status for older professors who want the status of professorial employment without the burdens.

ADEA

Q. Should the Commission issue regulatory guidance under the Older Workers Benefit Protection Act (OWBPA)? What is your position on specific OWBPA issues such as the extent to which early retirement plans, severance pay plans, retiree health plans, or long term disability plans can pay lower levels of benefits to older workers than to younger workers?

A. In Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), the Supreme Court rejected longstanding EEOC interpretations relating to employee benefits and determined 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 the Betts decision was to permit virtually any age-based differential in treatment in the area of fringe benefits. Congress passed OWBPA to overrule Betts.

Title I of OWBPA, dealing with employee benefits, for the most part restored the law to its pre-Betts state. Title II of OWBPA enacted specific rules for determining the legality of waivers of ADEA rights.

While the Commission solicited public comment on OWBPA issues in 1992, no regulatory guidance under OWBPA has to date been issued despite comments made by then Chairman Roybal of the House Select Committee on Aging urging the Commission to issue guidance for the benefit of older workers and employers. In my view when a statute is as complex as OWBPA, the public likely needs and would no doubt benefit from EEOC guidance. Accordingly, I would raise this issue with my fellow Commissioners in the hope of obtaining a consensus on issuing public guidance.

With regard to the specific issues raised, OWBPA is an extremely complicated statute, taking into account ERISA law as well as EEO law. I would want to study the issues involved in great detail before developing a specific position. OWBPA analysis will be a high priority for me at EEOC.

ADEA

- Q. Would an employer's harassment of an older employee constitute a violation of the ADEA? For example, would remarks such as "old people are slow and lazy" or "you can't teach old dogs new tricks" give rise to an ADEA claim?
- A. An employer is not permitted to harass an employee based upon age (or, indeed, any of the other characteristics protected by civil rights laws). Whether any particular words violate the ADEA would depend upon the context of the statements, the supervisory authority of the speaker, and the frequency of the harassment.

ADEA

Q. Should the EEOC continue to exclude apprenticeship programs from the ADEA?

A. I have been informed that in recent years the Commission has received several inquiries relating to this issue and it appears that there remains a belief by some that exempting such programs from coverage equates with blatant age discrimination. There are policy implications on either side of the apprenticeship issue. Changing technologies and market conditions are leaving older workers not only without jobs, but often without prospects for future jobs. Their skills have become obsolete. Additionally, many women seek to enter or reenter the workplace after having raised a family or because there is a need for additional family income. Such persons may often be deprived of an apprenticeship opportunity solely because of an age barrier. On the other hand, young persons who cannot afford higher education, frequently minorities, look to the Commission interpretation as a way of assuring that there is a viable means of job training that may lead to meaningful employment.

This is obviously a very important issue and one that I think warrants further consideration by the Commission.

ADEA

Q. What is your position on adverse impact theory under the ADEA?

A. Discrimination can result under the adverse impact theory from neutral employment policies and practices, which are applied uniformly to all employees and applicants, but which have the effect of disproportionately excluding or otherwise adversely affecting certain groups. This is known as the adverse or disparate impact theory of discrimination. Both the Commission, in 29 C.F.R. § 1625.7(d), and numerous lower courts have applied the adverse impact theory to cases arising under the ADEA. However, the Supreme Court in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993), recently noted that it has never addressed the specific question of whether the theory applies to cases under the Act. This decision may signal that the Court will disapprove the use of the adverse impact theory under the ADEA.

In my view, the Commission should restate its support for the theory and continue to apply it unless the Supreme Court holds to the contrary.

ADEA

- Q. Sections 9201-9204 of the Omnibus Budget Reconciliation Act of 1986 (OBRA 86) amended ERISA and the Internal Revenue Code, and added section 4(i) to the ADEA, making it illegal in most cases for pension plans to deny pension benefit accruals on account of age. EEOC published proposed OBRA 86 regulations on November 27, 1987 and the Department of the Treasury published proposed OBRA 86 regulations on April 11 1988. When will final regulations be promulgated?
- A. OBRA 86 gave lead regulatory authority to the Department of the Treasury. Section 9204(d) of OBRA 86 mandated that final regulations of EEOC, Treasury, and the Department of Labor be consistent with each other. (Labor has indicated that it will not issue OBRA 86 regulations).

It is my understanding that the Commission has been ready since early 1988 to issue final regulations, and has been urging the Department of the Treasury since 1988 to develop its final regulatory guidance on OBRA 86. In light of the OBRA 86 language on coordination and consistency of regulations, it would seem impossible for the Commission to issue final regulations until Treasury is ready to issue its own regulations. If confirmed, I will make every effort to encourage action by Treasury.

ADEA

- Q. Is it permissible for employers to deny pension plan participation to persons who are hired at a later age (e.g., within five years of the pension plan's normal retirement age)?
- A. ADEA regulations at 29 C.F.R. § 1625.10(f)(1)(iii)(A), promulgated in 1979, state that an employer is permitted to exclude from participation persons hired within five years of normal retirement age. Further, the regulation states that pension plans exempt from ERISA, such as governmental plans and church plans, are permitted to exclude from participation persons hired more than five years before normal retirement age if such exclusion is justified by age-related cost considerations.

When OBRA 86 was passed (see Q&A on pension benefit accruals), section 9203 amended ERISA and the Internal Revenue Code to delete the "five year rule" on pension plan exclusion. The ADEA, however, was not amended in this regard. In the Commission's November 27, 1987 NPRM, the Commission indicated that the regulation covering participation was no longer valid. Therefore, it has been the Commission's view since the end of 1987 that it is never permissible for a pension plan to exclude a person from participation based upon age.

ADEA

Q. Please discuss in detail your views on the technical provisions of the ADEA with regard to early retirement incentive plans, severance pay plans, long term disability plans, and retiree health benefits.

A. A significant number of employers have used voluntary early retirement incentive plans to lessen the number of persons who must be fired during a reduction in force or to encourage higher paid individuals to leave the workforce voluntarily. Similarly, employers often use severance pay and retiree health benefits to cushion the blow of involuntary layoffs. Long term disability is useful to employees who are, temporarily or permanently, unable to perform their jobs. The main point of difficulty in all such plans occurs when employers provide a higher level of benefits to younger workers than to older workers.

The provisions of the ADEA as amended by the OWBPA raise several serious questions of policy and statutory interpretation, including the definition of "a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act" in section 4(f)(2)(B)(ii). After I have had a chance to study the OWBPA amendments in detail, I will give employee benefits questions high priority in light of the increased use of such plans. Until such time, I do not feel it appropriate to comment further on these issues without time to consider the legal and policy ramifications of the OWBPA.

ADEA
Waivers Issues

- Q. What is the legal status of the consideration for a waiver if the EEOC finds that the waiver is invalid?
- A. In cases decided since the Older Workers Benefit Protection Act (OWBPA) waiver standards went in to effect in October 1990 for the ADEA, the Courts of Appeals are split on this issue. The Seventh Circuit in Oberg v. Allied Van Lines held in 1992 that former employees are not required to tender back or repay the consideration that the employer provided in return for an employee waiver and retention by the employee does not constitute ratification of an invalid waiver. The Court suggested that such consideration would be a setoff against any damages recovered by the plaintiffs. The Fifth Circuit in Wamsley v. Champlin Refining and Chemicals (1993) held to the contrary. Wamsley held that an employee who chooses to retain and not tender back to the employer the consideration for the waiver or release of ADEA rights has ratified the agreement whether valid or invalid and must abide by its terms.

In litigation, the EEOC has agreed with the position taken by the Seventh Circuit in the Oberg case.

ADEA
Waivers Issues

- Q. Does the language in subparagraph (F)(ii) and (H) of ADEA subsection 7(f) -- "other employment termination program offered to a group or class of employers" -- include involuntary termination such as reductions-in-force?
- A. While commentators to the EEOC Notice on OWBPA have been split of this issue, the weight of the legislative history and the purposes of the passage of the OWBPA support the position that involuntary programs were to be included under the statutory requirements for valid waivers or releases of ADEA rights. Congress wanted to insure that when waivers were offered to a group or class of employees, those persons would have sufficient information to decide whether signing a waiver was in their best interest. This policy concern would apply to involuntary terminations as well as voluntary ones.

ADEA
Waivers Issues

- Q. May an employee validly waive ADEA rights within the 21- or 45-day consideration period, (as applicable), of Section 7(f)(1) and shorten the 7-day revocation period following the execution of the waiver.
- A. The statutory requirement states that the 21-day or 45-day periods within which to consider the agreement must be given to the employee(s). If an employee wishes to take less than this full period to consider the agreement and sign an ADEA waiver, the statute does not appear to prohibit this action. See the discussion to that effect between Senators Hatch and Metzenbaum at 136 Cong. Rec. 813807-8 (daily ed. September 25, 1990). Of course, an employer asserting the validity of a waiver agreement has the burden of demonstrating that the full minimum time to consider the agreement was given the employee and that the "employee's decision to accept such shorter period of time is knowing and voluntary." (Id.). The seven day revocation period following the execution of an agreement cannot be shortened under any circumstances.

ADEA
Waivers Issues

- Q. Does the ADEA as amended by the OWBPA require that separate or additional consideration be offered in exchange for a waiver of ADEA rights in connection with a reduction in force to those persons who have claims pending unrelated to the reduction in force?
- A. Opinions differ as to whether the same consideration may be offered by the employer in exchange for all employee claims and/or rights that may arise or have arisen under the ADEA, or whether separate and additional consideration must be offered for a waiver of separate and distinct ADEA rights and/or claims that may be pending against the employer. It is my understanding that EEOC staff is studying this issue with regard to policy and potential litigation.

ADEA

Q. Is an agreement for compulsory arbitration of an age discrimination claim enforceable under the ADEA?

A. In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 1 (1991), the Supreme court held that a claim under the Age Discrimination in Employment Act (ADEA) can be subjected to compulsory arbitration pursuant to an arbitration clause set forth in a required registration application with the New York Stock Exchange. While the Gilmer holding may directly affect an individual's right to file suit under the ADEA in the above circumstances, it does not preclude the individual from filing a charge with the Commission. The Commission, of course, is empowered to combat age discrimination even absent a charge -- it possesses independent investigation and enforcement authority under the ADEA.

The Gilmer case was decided on the basis of the ADEA prior to its amendment by the OWBPA, which contains specific minimum criteria for a valid ADEA waiver. The specific OWBPA standard proscribing prospective waivers of rights (ADEA § 7 (f)(1)(C)) may well be at issue in a Gilmer setting because the right to bring a private action and the right to a jury trial are waived prior to the arising of any dispute by an employee subject to compulsory arbitration.

In addition the Gilmer case predated the passage of the Civil Rights Act of 1991, section 118 of which encourages the use of alternative dispute resolution procedures, but makes clear in its legislative history that the employee agreement to such procedures must follow, not precede, the dispute at issue. This is an important and controversial area of the law that I will carefully assess.

I am troubled by the implications of the Court's decision in Gilmer, especially when I see reports that companies are requiring employees and applicants for employment to sign agreements similar to the one in the Gilmer case. These agreements purport to bind even applicants for employment to forego their statutory right to file a charge of discrimination with EEOC if, at some time in the future, they believe that they have been victimized by discrimination.

I have not seen anything that indicates what standards will be used by arbitrators under these agreements to determine whether the law has been violated; I haven't seen anything that indicates what training these arbitrators have to decide issues of discrimination law; and I haven't seen what remedies will be awarded to those who prevail in these arbitration hearings. It seems to me that this approach is fraught with problems and deserves critical evaluation by the EEOC as soon as possible.

ADEA

- Q. What is the current standard for determining if liquidated damages should be awarded in an ADEA case?
- A. Under the ADEA, an aggrieved person is entitled to an award of liquidated damages in an ADEA action if it is determined that the employer's conduct was willful. In 1993, the Supreme Court again addressed this issue in Hazen Paper Co. v. Biggins, where it confirmed that the standard for assessing willfulness in disparate treatment cases where age influenced the employer's decision on an ad hoc individualized basis is whether the employer "knew or showed reckless disregard" for whether its conduct violated the Act.

ADEA

- Q. What is your opinion of the proposed legislation that would amend the ADEA to permit all state and local governments to use age as a basis for hiring and retiring law enforcement officers, correction officials, and firefighters?
- A. As you know, the 1986 ADEA amendments created a temporary exemption for age-based hiring and retirement decisions in public safety occupations through December 31, 1993. At the same time, Congress charged the EEOC and the Department of Labor with conducting a study to determine whether tests are available that could replace the use of age as a predictor of job performance.

In October 1992, the mandated Study -- organized and structured by researchers from Penn State University -- was sent by the two agencies to Congress. The Study concluded that (1) age is a poor predictor of performance in public safety occupations, (2) practical tests are currently available that are better predictors, and (3) the temporary exemption should be permitted to expire as scheduled.

Because some members of Congress felt that the Study's standards for testing public safety officers were not sufficiently precise and the elimination of the exemption would subject state and local governments to uncertainty, expense and differing results in litigation, there is currently proposed legislation to reinstitute the exemption for public safety officers (without an expiration date). The proposed legislation also requires the EEOC to further study and report on the development of performance standards, alternative assessment methods, and the administration and use of performance tests of public safety officers as well as to develop guidelines on the use and administration of such tests.

The Administration supports the proposed exemption but only on a temporary four-year basis. I believe that this issue is so complex and of such importance to both the public and those employed or seeking employment as public safety officers that a temporary exemption with further study and identification of performance standards is a reasonable approach to this subject matter.

ADEA

Q. Has the Commission done enough to pursue cases involving systemic employment bias, especially with regard to discriminatory reductions in force?

A. As a result of the trend during the past five to ten years toward major corporate restructuring and downsizing, the Commission has received a significant number of class charges, many alleging age discrimination in a reduction in force.

The Commission of course should never reject a case simply because the expected relief available is small, or protects the rights of only a few individuals. On the other hand, I am firmly committed to taking an active role in class action suits. The Commission should do everything possible to make larger employers pay the price for discrimination against classes of individuals.

I would note that even though in the recent Supreme Court decision in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993), the Court arguably made it a little more difficult to show age discrimination in a disparate treatment context, the Commission should devote a significant portion of its time and resources to penalizing age-based actions against a large class of employees.

Because reductions in force so often target older workers, perhaps the time is right to flesh out EEOC's longstanding enforcement position that it is unlawful to make differentiations based on the average cost of employing older workers as a group. If confirmed, this will be one of my priorities.

ADEA

Q. What is your view on the applicability of the Civil Rights Act of 1991 (CRA 91) amendments to enforcement under the ADEA?

A. It is my understanding that whenever possible, the Commission seeks to enforce the substantive provisions under the ADEA in the same manner that it enforces comparable provisions of Title VII. However, it is also my understanding that there may be legal impediments precluding the Commission from applying certain of the CRA amendments to the ADEA. Those who hold this view point out that many of the CRA amendments specifically reference Title VII while omitting any reference to the ADEA, except in one or two areas. If I am confirmed, I will carefully review this matter. If it appears that the CRA of 91 does not affect the ADEA in areas where the two statutes previously were consistent, I will not hesitate to urge this body to offer legislation that will cure the problem.

ADEA

Q. Has the Commission done enough to pursue cases involving systemic employment bias, especially with regard to discriminatory reductions in force?

A. Based on newspaper articles that I have read, there appears to have been a substantial amount of major corporate restructuring and downsizing in recent years. I have seen many reports suggesting that older higher paid workers often bear the brunt of these actions. If these articles are accurate, I would assume the Commission has received many charges in this area and probably many that are in the nature of class charges.

I cannot say with certainty what the Commission's prior record has been in the context of reductions in force. In my view, however, the Commission must strive for greater efficiency and greater impact in using its limited resources.

Consequently, I would like to see the Commission target systemic discrimination thereby making clear that a high price will be paid for such conduct. If employers are in fact targeting older workers when they conduct reductions in force, I would strongly support committing a substantial part of the Commission's resources to alleviating this problem.