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CONFIRMATION ISSUES
EXECUTIVE SUMMARY
(7/11/94)

Title VII -

- *St. Mary's Honor Center v. Hicks*
- *Garcia v. Spun Steak*
- *Gilmer*/Protection from Coercive Employment Agreements Act of 1994
- Uniform Guidelines on Employee Selection Procedures (UGESP)
- Coordination between EEOC & OFCCP
- Guidance Needed on Intersection of Bases
- Women's Issues under Title VII -
  - **Sexual Harassment Issues**
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Civil Rights Act of 1991 -

- Summary of Principal Provisions of Civil Rights Act of 1991
- Equal Remedies Act of 1993
- Justice for Wards Cove Workers Act
- Make CRA '91 Applicable to ADEA
- Retroactivity -- Effect of *Landgraf v. USI File Products*
- Discriminatory Tests and Prohibition of "Race Norming"
- EEOC Policy not to inform CPs of availability of damages and not to negotiate damages in settlement

Americans With Disabilities Act (ADA) - Title I

- ADA Fact Sheets
- Existing EEOC ADA Guidances
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- Unresolved Issues
- Coordination of the ADA and the Family and Medical Leave Act (FMLA)
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- Kassebaum Amendment

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  - **The Current State of the Law on Affirmative Action**
  - **Case Summaries of Pertinent Supreme Court Decisions Affecting Affirmative Action in Employment**
- Inclusion of Religion in the Proposed Consolidated Harassment Guidelines
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- Employment Non-Discrimination Act of 1994 (ENDA)
- EEOC's Policy on the Use of Testers in Enforcement

Title VII
- Briefing Materials -

GARCIA V. SPUN STEAK CO., 998 F.2d 1480 (9th Cir.), cert. denied, 62 U.S.L.W. 3839 (June 20, 1994).

ISSUE: Lawfulness of English-only rules in the workplace.

HOLDING: 9th Circuit holds that English-only rules have no significant adverse impact on bilingual workers, therefore no violation of Title VII. EEOC National Origin Discrimination Guidelines that state that English-only rules are prima facie discriminatory are ultra vires.

FACTS: Spun Steak is small meat processing company, the majority of its 30 workers are Latinos who with a few exceptions are bilingual. After a complaint by fellow non-Latino workers that two Latino workers had made ethnically offensive remarks about them in Spanish, the owner of the company established an English-only rule. Workers could speak Spanish while on break or at lunch but not on the job. An exception was made for a Latino who spoke only Spanish.

Two workers, who were reprimanded under the rule, and their union filed a Title VII complaint in USDC in ND of Calif. They obtained a summary judgment. On appeal in a split decision the 9th Circuit held that there was no adverse impact on bilingual Latinos because they could speak English; the case was remanded for a hearing on impact on one Spanish monolingual worker. The Circuit rejected arguments that the English-only rule denies them the ability to express their cultural heritage, holding that Title VII does not protect that right, but only disparities in treatment. The court also rejected an argument that the rule allows English monolinguals to speak a language of their choice, but bilingual Latinos are forced to speak English. The court held that there is no significant adverse impact because bilinguals could choose to speak English -- at most its a mere inconvenience. Finally the Court found that despite claims that the rule created an atmosphere of inferiority, isolation, and intimidation, there had been no showing, other than the rule, of an overall pervasive abusive atmosphere sufficient to show a violation of Title VII.

Significantly, the Court rejected an EEOC Guideline as beyond the scope of the statute and EEOC's authority. The Guideline provided: "A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on a national origin which could result in a discriminatory working environment." 29 CFR § 1607.7(a).

EEOC National Origin Guidelines - Speak-English-only Rules

- A rule requiring that English be spoken <u>at all times</u> is presumed by EEOC to violate Title VII.

- An employer may defend an English-only rule that is applied only at certain times by a showing of business necessity. (Disparate impact analysis.)

- EEOC recognizes that a primary language other than English is often "an essential national origin characteristic."

§ 1606.7 Speak-English-only rules.

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.[1] Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) *Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

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[1] See CD 71-446 (1970), CCH EEOC Decisions ¶6173, 2 FEP Cases, 1127; CD 72-0281 (1971), CCH EEOC Decisions ¶6293.

ISSUES FOR THE CHAIR: Now that certiorari has been denied what will the EEOC do?

1. Indicate publicly that the EEOC will continue to enforce its guideline and send a memo to its employees to that effect. [This may be limited to places outside of 9th Circuit, see 2.]

2. In the 9th Circuit, determine what is the Government's policy in regard to enforcing regulations declared to be ultra vires in cases in which it is not a party. Can it continue to enforce the regulation or guideline until it is enjoined?

3. Review the Guideline with the General Counsel to determine whether the Guideline can be redrafted to meet the concerns of the 9th Circuit [unlikely] and redraft and reissue the Guideline.

ENGLISH-ONLY RULES

QUESTIONS AND ANSWERS

Q. Aren't English-Only rules a way of decreasing racial and ethnic tensions at the workplace?

A. There are better ways of accomplishing this without discriminating against language minorities. Employer rules that prohibit offensive racial and ethnic remarks, if enforced, are one way to start. In Spun Steak, the employer instituted such a policy and there were no further allegations of racial remarks by employees. In addition, employers can institute worker education programs that explain why language minorities often prefer to speak in languages other than English, and that speaking in another language does not mean any disrespect for those who are unable to understand.

Q. But aren't employers entitled to know what their employees are saying so they can effectively supervise them?

A. The EEOC recognizes that in some settings employees can be required to speak English. The EEOC Compliance Manual provides numerous examples of when an English only rule can be enforced. The National Origin Discrimination Guidelines does not outlaw English only rules, but requires provide that an employer must justify the use of use of such rules, especially when social speech is restricted.

Q. Why can't bilingual employees simply comply with an English only rule?

A. We believe they should not be forced to give up an element of their cultural identity. If simply the ability to comply was a bar to a finding of discrimination, an employer could again install white and "colored" drinking fountains. Finally, if you have ever been in the company of bilingual people, you will see them go back and forth from Spanish to English in the same sentence. This switching is not conscious, nor totally volitional. Bilingual employees should be able to speak in a language of their choice as do monolingual English speakers.

PDA/Fetal Protection Policie
Johnson Controls

B. "Fetal Protection" Policies

1. 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 have asserted that these policies are based on their concerns that the hazards posed by these jobs would harm the fetuses that women might carry. Advocates for women's employment rights have argued that because policies are based on women's ability to become pregnant, they violate Title VII of the Civil Rights Act as amended by the PDA. Lower federal courts and the Equal Employment Opportunity Commission have taken varying positions on the issue. The Supreme Court decided the issue this year in United Autoworkers v. Johnson Controls, 111 S. Ct. 1196 (1991).

2. UAW v. Johnson Controls

Facts - In 1982, Johnson Controls adopted policy barring all fertile women from jobs in which they would be exposed to lead above a certain level. Fertile women were also barred from entry level jobs with low lead exposure which would lead to higher lead jobs. For all women under 70, proof of sterility required for exemption from the policy.

Plaintiffs brought suit under Title VII of the Civil Rights Act of 1964. The trial court granted the company's motion for summary judgment, holding that the company's rationale of protecting the fetus justified its policy of excluding women from certain jobs.

Seventh Circuit - Sitting en banc, the Seventh Circuit affirmed the district court holding. The majority upheld the policy under both a disparate impact and a BFOQ analysis.

Supreme Court Opinion - Supreme Court in a unanimous opinion, reversed the Seventh Circuit, finding that the company's "fetal protection" policy violated Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978: "Respondent's fetal-protection 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."

The Court noted further that "Johnson Control's policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing."

Court states that "[w]ith the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual women to make for herself."

On the issue of tort liability, an issue about which employers have expressed concern, Court held that without a finding of negligence, "it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best."

3. EEOC Policy Guidance On Johnson Controls

EEOC revised its policy in light of Johnson Controls to provide that:

a. Policies that exclude members of one sex from a workplace for the purpose of protecting fetuses cannot be justified under Title VII. Individuals who can perform the essential functions of a job must be considered eligible for employment.

b. It does not matter whether the employer can prove that a substance to which its workers are exposed will endanger the health of a fetus.

c. It also does not matter that an employer can prove that it will incur a higher cost as a result of hiring women.

With this new policy, the Commission rescinds all earlier guidance on the issue. See EEOC Policy Guidance on Johnson Controls (June 1991).

III. Work and Family Issues

A. Although the Pregnancy Discrimination Act provides

Civil Rights Act of 1991
- Briefing Materials -

A SUMMARY OF THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 (CRA) reversed a series of Supreme Court cases which had narrowly construed Title VII of the Civil Rights Act of 1964 and Section 1981. It also created a monetary damages remedy for intentional discrimination under Title VII and the Americans With Disabilities Act. The following is a brief description of the principal provisions of the Act:

• Disparate Impact: The CRA codified a cause of action for disparate impact discrimination under Title VII. In so doing, it reversed the Supreme Court's 1989 decision in Wards Cove Packing Co. v. Atonio, which, itself, had reversed long-standing caselaw on the subject. The CRA restored the standard the Supreme Court had first announced in 1972 in Griggs v. Duke Power Company, providing that, once a plaintiff establishes that an employment practice results in a disparate impact against a protected class, the burden shifts to the defendant to justify that practice by showing that it is "job related for the position in question and consistent with business necessity." In a rather convoluted provision, the CRA provides that this amendment does not apply to cases pending on a certain date; the only case affected is the Wards Cove case itself. This provision is the subject of pending legislation, the Justice for Wards Cove Workers Act. See further discussion below.

• Mixed Motive Discrimination: The CRA provides that, except as otherwise provided under Title VII, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." In so doing it reversed Price Waterhouse v. Hopkins which held that there is no violation of Title VII, even when discrimination played a part in an adverse employment decision, if the employer can show that he or she would have taken the same action in the absence of the discrimination. Damages are not available in mixed motive cases.

• Third Party Challenges to Consent Orders: The CRA reversed Martin v. Wilks in which the Supreme Court had made it substantially easier for third parties (in that case, white fire fighters who had sat out a race discrimination case) to challenge consent orders in employment discrimination cases. The CRA provides that, once a settlement order is final, it can be challenged only in limited circumstances.

• Statute of Limitations for Challenging Seniority Plans: In Lorance v. ATT&T Technologies, the Supreme Court held that Title VII's 180 day statute of limitations period for challenging a discriminatory seniority plan starts running from the time the plan is adopted, even though the actual discrimination occurred

much later. The CRA provides that the time runs from the time the plan is adopted, the time an individual becomes subject to the plan or the time a person is injured by the plan. This amendment applied only to Title VII; the Lorance problem persists in ADEA cases.

♦ Scope of Section 1981: Section 1981, a civil war era statute, prohibits discrimination on the basis of race and national origin in the making and enforcing of contracts, including employment contracts. In Patterson v. McLean Credit Union, the Supreme Court reversed long-standing precedent and held that § 1981 applies only to discrimination in the entering into of a contract and, accordingly, does not apply to harassment on the job. The CRA reversed Patterson, providing that § 1981 applies to all aspects of the employment relationship.

♦ Damages: The CRA created a damages remedy for victims of intentional employment discrimination in violation of Title VII and the Americans with Disabilities Act. Previously, injured parties had been limited to equitable remedies. However, the damages under the CRA are subject to sliding caps, based on the size of the employer. These caps set total limits for combined punitive damages, emotional distress and future pecuniary loss. They do not include back pay, front pay, or past pecuniary loss. The caps are as follows:

Employers of between 15 and 100 employees:	$ 50,000
Employers of between 101 and 200 employees:	$100,000
Employers of between 201 and 500 employees:	$200,000
Employers of over 500 employees:	$300,000

Legislation to eliminate the caps, the Equal Remedies Act, is pending in Congress and is before the Labor and Human Resources Committee. Senator Kennedy is the chief sponsor; Senator Simon is a co-sponsor. See further discussion below.

♦ "Race Norming": The CRA prohibits the adjustment of standardized test scores on the basis of race, color, religion, sex, or national origin in tests which are "employment related." Material questions remain regarding the proper interpretation of this section including whether, based on the "employment related" language, score adjustments can be used in the case of a test which is not valid (or, job-related for the position in question and consistent with business necessity) and whether, and, if so, how, this provision applies to separate gender-norming in physical and psychological testing.

♦ Extra-territoriality: The CRA reversed a Supreme Court decision* holding that Title VII does not apply to employees who work outside of the United States for employers who are covered by Title VII. * EEOC v. Aramco (1991)

♦ Expert fees: The CRA provides that prevailing plaintiffs can recover expert witness fees in Title VII proceedings and

employment claims brought under § 1981. It did not similarly amend the ADEA or the general civil rights attorneys fees statute, 42 U.S.C. § 1988. Expert fees are not available under those statutes.

♦ Affirmative Action: The CRA provides that nothing in it affects "court-ordered remedies, affirmative action, or conciliation agreements which are in accordance with the law." Based on this section, courts have rejected the argument that the Price Waterhouse fix (except as otherwise provided in Title VII, employment practices cannot be motivated in any part by race, gender, etc.) invalidates any affirmative remedies under Title VII.

♦ Congressional Coverage: The CRA extends Title VII's substantive protections to employees of Congress, although different procedures apply.

**SERRANO AMENDMENT - Mandated an education and outreach program by the EEOC targeted to historically underserved groups such as Hispanics, Asian Americans, Native Americans, and the disabled.

POST CIVIL RIGHTS ACT ISSUES

I. Pending Legislation

A. Equal Remedies Act: Legislation was introduced in 1992, and again last year, to remove the caps on damages in the Civil Rights Act. There are no caps on damages available under Section 1981 in cases of intentional race and national origin discrimination; the argument in support of the Equal Remedies Act is that all victims of discrimination should be treated alike.

Senator Kennedy is the primary Senate sponsor. In addition, all of the Labor and Human Resources Committee Democrats are on the bill as is Senator Durenberger. In the last Congress the bill was reported out of the Labor Committee with strong support. There may be questions on the subject. Janet Reno supported the Act in her confirmation hearings and Deval Patrick has indicated that he will testify in support of it when Senate hearings are held (possibly in the fall). It is strongly supported by the civil rights community (with particular emphasis by the women's and disability groups since its principal, although not exclusive, application will be to sex and disability discrimination cases). It is opposed by the business community which had fought vigorously against the damages provision in the CRA and, not surprisingly, resists any expansion of liability.

B. Justice for Wards Cove Workers Act: (See attached)

C. St. Mary's Honor Center v. Hicks: While not part of the CRA, this is a closely related issue. In June of 1993, in Hicks, the Supreme Court narrowed its earlier rulings regarding the proof of disparate treatment under Title VII based on circumstantial evidence. In its earlier decisions in McDonnell Douglas Corp. v. Green and Texas Department of Community Affairs v. Burdine, the Supreme 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 or 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 has been introduced in both the House and Senate to reverse Hicks. Original Senate co-sponsors include: Senators Metzenbaum (the principal sponsor), Wofford, and Simon.

II. Legislation In The Discussion Stage

A. Retroactivity: After a contentious debate on the

subject, the Civil Rights Act simply stated that it would take effect on its date of enactment. There was conflicting legislative history on the intent of this provision. Extensive litigation on the subject followed the CRA's enactment which was resolved this spring with two decisions by the Supreme Court in Landgraf v. USI Film Products and Rivers v. Roadway Express (CRA provisions regarding damages and Patterson apply only to post-Act conduct). Following these decisions, there has been some discussion about the development of legislation to apply the CRA provisions to cases pending on the date of enactment. Nothing has been introduced; any legislation would likely be strongly supported by the civil rights community and actively opposed by business interests. The EEOC initially issued a guidance taking the view that the CRA was not retroactive and then reversed itself after the Solicitor General took a contrary position.

B. Application of CRA Amendments to the ADEA: See ADEA discussion.

III. EEOC Policy Issues Related to the Civil Rights Act

A. "Race-Norming:" Policy needs to be developed regarding the applicability of this provision, including its applicability to tests which are not valid and to gender-norming issues in connection with physical ability and psychological tests.

B. Damages: While the Commission has issued policy that damages should be part of the administrative process, staff have instructed filed offices that damages are inappropriate in settlements which are "no fault" because damages are statutorily available only for cases of intentional discrimination. In addition, some have suggested that it may be appropriate for the EEOC to issue additional guidance regarding the computation of damages under the Civil Rights Act.

C. Policy Interpreting Disparate Impact Provision: Needs to be adopted.

D. Retroactivity: There is some room after Landgraf and Rivers to address the applicability of other CRA provisions to cases involving pre-Act conduct.

JUSTICE FOR WARDS COVE WORKERS ACT
FACT SHEET

- Congressman Jim McDermott (D-WA) in the House of Representatives and Senators Patty Murray (D-WA) and Edward Kennedy (D-MA) in the Senate have introduced the Justice for Wards Cove Workers Act, H.R. 1172/S. 1037, to repeal the Wards Cove Packing Co.'s special interest exemption from the Civil Rights Act of 1991.

- The House Judiciary Subcommittee on Civil and Constitutional Rights unanimously reported H.R. 1172 favorably to the full Judiciary Committee; H.R. 1172 has over 100 cosponsors and awaits action by the House Education and Labor Committee. S. 1037 has 22 cosponsors and awaits action by the Labor and Human Resources Committee.

- The Civil Rights Act of 1991 contains a provision that exempts only one case, *Atonio v. Wards Cove Packing Co.*, from coverage under the anti-discrimination laws of the 1991 Act. Ironically, the Supreme Court decision in the *Wards Cove* case, which overturned well established law, is one of the decisions that the 1991 Act sought to address.

- *Wards Cove* was exempted from coverage despite the fact that at the time the original lawsuit was brought by 2,000 Asian Pacific Americans and Alaskan Natives, management was virtually all white, the company's employees had to wear race-coded badges, and the work force, sleeping quarters, and eating facilities were segregated.

- Contrary to what Wards Cove lawyers claim, this is a strong case. As the recent Ninth Circuit decision proves, the disparate impact charge has *never been adjudicated under the correct legal standard*. Cannery workers in two companion cases won their claims.

- This is an appalling example of special interest legislation. In 1991 alone, Wards Cove Packing Co. paid $175,000 to a Washington D.C. firm to lobby for this provision.

- The Justice for Wards Cove Workers Act does not seek to address the issue of whether the 1991 Act should be applied retroactively to cases pending at the time the 1991 Act was enacted; that issue is currently being decided by the courts. *The legislation would only put both parties in the same position as the other parties who had disparate impact cases pending at the time the 1991 Act became law.*

- Asian Pacific American cannery workers continue to be harmed by the exemption. The Ninth Circuit Court of Appeals recently sent the Wards Cove case back to the trial court for further argument on the issues of separate hiring channels, racially segregated housing and the race-labelling of jobs, housing and messing, but declined to require the trial court to apply the Civil Rights Act to the case because of the special interest exemption.

- President Bill Clinton has expressed his commitment to removing the Wards Cove Packing Co. exemption by delivering a letter to Congressman McDermott in support of the Justice for Wards Cove Workers Act.

- Over 75 labor, civil rights, religious, legal and other groups, such as the U.S. Civil Rights Commission, AFL-CIO, American Bar Association, NAACP and the Leadership Conference on Civil Rights, support the Justice for Wards Cove Workers Act.

Justice for Wards Cove Workers Act - cont.

EFFECT ON LANDGRAF

The recent Supreme Court decisions in *Landgraf v. USI Film Products* and *Rivers v. Roadway Express* did not make S. 1037 moot.

Contrary to popular belief, the Court's decisions in *Landgraf* and *Rivers* did not necessarily rule out retroactive application of the Civil Rights Act of 1991 in all cases.

While the rulings are fairly sweeping, the Court in *Landgraf* stated that prospective application of the 1991 Act is the default rule for changes in "substantive rights, liabilities or duties," but not necessarily for procedural changes. It could be argued that the *Wards Cove* case involves such procedural issues. Consequently, the opinion does not foreclose the retroactive application of the two sections of the 1991 Act that relate to *Atonio v. Wards Cove Packing Co.*

Atonio v. Wards Cove Packing Co. is still pending. The Ninth Circuit, even after reviewing the case under the Supreme Court standard that the 1991 Act sought to reverse, found that the trial court judge had failed to address sufficiently all of the allegations of discriminatory practices, and remanded the case back to the trial court to consider the discriminatory impact of:

- Race labelling – the practice of denominating groups of workers and the facilities they use by racial terms
- Segregated housing
- Separate hiring channels

Even if there were no likelihood of obtaining retroactive application under *Landgraf* and *Rivers*, it is still imperative that Congress act to remove the special interest Wards Cove Co. exemption.

The Civil Rights Act of 1991 marks the first time that Congress passed a civil rights bill with a special interest exemption for one corporation. Unless the provision is repealed, it stands as a dangerous precedent for the future. That is why over 75 religious, labor, professional, civic, community and civil rights organizations, such as the American Bar Association, AFL-CIO, NAACP, JACL, APALA, OCA, NAPABA, National Council of La Raza, American Jewish Committee, and the United Methodist Church, have endorsed S. 1037.

The *Justice for Wards Cove Workers Act* remains one of the top priority issues for Asian Americans and Pacific Islanders across the country who view the Wards Cove exemption as an measure of how Congress views their concerns.

Equal Pay Act (EPA)
- Briefing Materials -

Equal Pay Act

LIMITATIONS OF CURRENT LAWS AGAINST WAGE DISCRIMINATION

Two federal laws prohibit wage discrimination--the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.

The Equal Pay Act

- The Equal Pay Act prohibits unequal pay for equal or "substantially equal" work performed by men and women. "Substantially equal" has been interpreted by the courts to mean that the jobs must be equal in skill, effort, responsibility and must be performed under similar working conditions. The Act bars employers from reducing the wages of either sex to comply with the law.

- The Act 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 produced. The term "factors other than sex" has been interpreted broadly by the courts to include factors such as prior salary and profitability.

- The Act makes no provision as to wage discrimination based on race. It is thus narrowly tailored, addressing only the issue of sex-based wage discrimination and covering only situations involving substantially equal work.

Title VII of the Civil Rights Act

- Title VII prohibits discrimination in employment -- such as hiring, firing, or in setting compensation -- on the basis of race, sex, color, religion, or national origin.

- Because the coverage of the Equal Pay Act is narrowly tailored, most litigation attacking wage discrimination -- when an employer sets wages based on the race or sex of an individual worker or based on the race- or gender-based composition of a job classification -- has been brought under Title VII.

- In *County of Washington v. Gunther*, the Supreme Court ruled in 1981 that Title VII goes beyond the Equal Pay Act to prohibit discrimination not only in pay between jobs that are equal, but also between jobs that are different. In *Gunther*, the County's own job evaluation study had determined that the female prison guards' jobs were worth 95 percent of the male prison guards' jobs -- yet the female prison guards were then paid only 70 percent of the male prison guards. The female prison guards argued that their lower wages were in part the result of intentional sex discrimination. The Supreme Court ruled that Title VII would apply, and that its prohibitions on wage discrimination were not limited to cover only claims of pay inequalities between men and women performing the same job.

- Since that time, however, plaintiffs' success in bringing Title VII claims against wage discrimination has been limited.

Prepared by WLDF

- For example, when a wage discrimination claim is not based on equal pay for equal work, most courts have held that the employee must prove discriminatory intent on the part of the employer -- in other words, women must prove that a wage disparity was adopted *intentionally* to discriminate against them.

- Most courts also require that any evidence of intent in wage discrimination cases must be much stronger than that usually required in other kinds of Title VII cases. This makes it very difficult to prove intentional discrimination. For example, it is very difficult to find "smoking gun" evidence -- like a memo saying that "we won't pay secretaries as much as janitors because the secretaries are women and working for pin money." Without such a smoking gun, employers can justify disparate wages between men and women by "articulating a legitimate nondiscriminatory reason" for the disparity -- and the market is often considered such a "legitimate nondiscriminatory reason" -- even if it institutionalizes longstanding discrimination.

The Need for Improved Enforcement of the Equal Pay Act and Title VII

- Before 1982, the Equal Employment Opportunity Commission (EEOC) took the initiative in the area of wage discrimination -- for example, by filing *amicus* briefs in important cases, conducting hearings on wage discrimination in the workplace, and commissioning a National Academy of Sciences study on the issue.

- Since 1982, however, the EEOC has done little on wage discrimination. Indeed, it allowed hundreds of cases to languish without resolution and it restrictively interpreted case law on the issue, guaranteeing that many potential cases were never investigated.

- EEOC's enforcement of the Equal Pay Act's requirements of equal pay for equal work has been particularly dismal over the last 12 years. While the agency filed 79 Equal Pay Act cases in 1980 under then-Chair Eleanor Holmes Norton, it filed only six in 1991, and in 1992, EEOC filed only <u>two</u> Equal Pay Act cases.

- Given the critical importance of pay equity for women and people of color, Congress should insist that the EEOC take leadership in aggressively enforcing and implementing these laws. For example, Congress should engage in searching oversight of the agencies charged with enforcing our nation's anti-discrimination laws by urging the EEOC to:

  - fulfill its mandate to enforce the Equal Pay Act and Title VII's prohibitions on wage discrimination through targeted litigation;

  - review Equal Pay Act regulations in light of case law developments over the last 12 years to ensure that they're tough, effective and up-to-date; and

  - consider developing a clearinghouse to provide technical assistance to employers on implementing compensation systems free from wage discrimination and pay inequities.

- Congress should also urge the Department of Labor's Office of Federal Contract Compliance Programs (which enforces anti-discrimination and affirmative requirements by federal contractors) to enforce the law in this area by:

  - undertaking Equal Pay Act compliance reviews of federal contractors -- as part and parcel of standard compliance review procedure -- with zero tolerance for violations by contractors; and

  - providing technical assistance to help employers voluntarily implement their own pay equity plans.

Arguments Against Comparable Worth

jobs (79)

D. Should focus on the value of workers versus the value of jobs (79)

III. U.S. Chamber believes comparable worth proponents propose a new definition of discrimination that disrupts the "existing law and precedent" (80)

A. Says equal opportunity is the law. Equal pay for equal work is the law. Non-discrimination is the law. Comparable worth is not the law. "Any bill which explicitly or implicitly seeks to define discrimination on the basis of the comparative value of difficient jobs represents a significant change in the law" (80)

B. In the past, Congress has rejected comparable worth as a basis for finding sex discrimination (80)

IV. Ninth Circuit Court-U.S. Chamber and Spauling v. University of Washington (80-82)

A. Ruled cannot presume discrimination when different-sex employees receive different compensation for "work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market" (80)

B. Federal policy of Title VII implies individuals "entitled to equal opportunities in the job market, but not equal results" (81)

C. Comparable worth proponents ignore legitimate market factors such as supply and demand (81)

D. Spaulding is a logical extension of County of Washington v. Gunther

a. Gunther, along with Spaulding, says that plaintiffs have a claim under Title VII only if they can prove the pay disparity resulted from intentional sex discrimination (82)

b. Chamber states, "Comparable worth legislation proposes to change sharply the law, however, by eliminating the need for proof of intentional discrimination and by declaring that discrimination can be demonstrated by merely showing the existence of a difference in pay (82)

V. Ramifications of comparable worth (84-86)

A. Should not do comparability study because court decision in Gunther compels any institution conducting such a study must then remedy the disparity if one exists (84)

B. Should not conduct study because if disparity exists, than institution is guilty of intentionally discriminating if it does not do something about it (84).

Statement of Virginia Lamp Thomas, U.S. Chamber of Commerce
May 22, 1985 Hearing - Subcomittee on Post Office, Civil Service
Senate Gov't Affairs Committee

C. Costs of implementing comparable worth policies too high--estimated at $6.6 billion (85-86)

VI. Economic consequences of comparable worth (86-87)

A. It raises price of low-productivity workers without improving their productivity (86)
   a. employers would have to lay off workers to decrease rise in costs (86)
B. For low-paid women working in small firms, rise in labor costs will result in bankruptcy or closure--disemployment results (87)
C. In larger firms, the increase in labor costs will create incentives to replace low-paid women or to raise hiring standards so fewer workers, male or female, who are more productive can replace them (86)
D. Employers deterred from doing any job evaluation that might put them in court (87)

VII. Four issues related to comparable worth debate which are distorted and misleading (87-90)

A. Sixty-four cents/dollar statistic misleading according to U.S. Chamber (87)
   a. based on female workers bringing in more education and training, wage gap is narrowing (87)
   b. comparable worth proponents do not factor in work experience, occupation, seniority, and education (87)
B. Women have entered labor force at tremendous rates (88)
   a. women however, receive fewer degrees then men and obtain these degrees in fields with lower earnings potential (89)
   b. women work on average less hours/week than men (89)
C. Wage gap is narrowing without comparable worth (90)
   a. womens' wages with respect to mens' wages have remained constant and/or increased relative to womens' skill(education and experience) levels as compared to mens' (90)
D. Factors such as women's choices--putting her career second to husband's, primary care-takers of children, or choosing traditionally female jobs-are not taken into account in wage disparity (90)

VIII. Existing law (93)

A. Women benefit from federal government's Affirmative Action policies (93)
B. Under Equal Pay Act and Title VII of the Civil Rights Act of 1964, women cannot be denied equal pay for equal work

IX. Congress, National Academy of Sciences, and the U.S. Civil Rights Commission have rejected comparable worth (94-96)

A. Congress rejected comparable worth in 1962 (94)
B. National Academy of Sciences(NAS) performed study in in late 1970's rejecting comparable worth--report was titled Women, Work, and Wages (95)
   a. states no universal standard of job worth exists--worth of jobs is a matter of values (95)
C. U.S. Civil Rights Commission advanced Congress not to establish comparable worth legislation (96)

X. Comparable worth (96-98)

A. "Only to the extent that the market reflects societal attitudes and biases that may influence an employer's choice in selecting and performing a job can the market be said to be discriminating" (96)
B. Discriminating practices by employers can be handled under present law (96)
C. Employer should not be responsible for marketplace effects on women in female-dominated jobs because employer did not create those conditions (97)
D. "Comparable worth is preferential treatment for groups, not equal opportunity for individuals" (97)
E. Job evaluations cannot objectively determine job worth or compare different jobs (98)
F. Worth does not determine wages (98)
   a. worth subject to changes in competition, consumer preferences, individual merit or experience, or new technology (98)
   b. determined by society's emphasis (98)
   c. income based on society's valuation of what is produced (98)

XI. U.S. Chamber's recommendations-reject comparable worth (100-101)

A. It implicitly defines discrimination in a radical new way (100)
B. Triggers expensive litigation for government and taxpayers (101)
C. Far-reaching implications for private sector (101)
D. Cost taxpayers $6.6 billion (101)
E. Job evaluations wrongly defined as objective because objectivity is impossible to establish (101)
F. Issue is not eliminating unfair and discriminating compensation practices (101)
   a. issue is whether existing law can remedy specific instances of discrimination (101)
   b. issue is whether comparable worth provides a practical way of eliminating pay inequities ("Inequalities are not per se inequities) (101)

Statement of Michael Wieloszynski, President, National Public Employer Labor Relations Assoc.
Sept. & Dec. 1982 Hearings - House Post Office & Civil Service

I. Testimony of Michael Wieloszynski, President, National Public Employer Labor Relations Association (629-630)
   A. Public employers should not be forced to reset wages simply because women train and occupy particular positions to the exclusion of others (629)
   B. Supply and demand market forces should play natural role in establishing wage rates (629)
   C. Comparable worth puts courts in position of evaluating worth of jobs to employers (629)
   D. Title VII remedies all claims of sex discrimination (630)

II. Imposition of comparable worth theory upon state and local governments will create serious constitutional conflicts (631-633)

   A. Imposition of comparable worth makes a federal government agency and courts responsible for making political decisions (631)
      a. this removes local elected officials and their representatives from decision-making process (631)
      b. this creates improper federal intrusion into local governmental affairs condemned by Supreme Court in National League of Cities v. Usery (631)
         1. Usery struck down application of minimum wage provisions of the Fair Labor Standards Act (631)
         2. application of minimum wage was constitutionally impermissible and an intrusion by the government --this is applicable to comparable worth (631)
   B. Comparable worth imposition is impermissible for Congress under Commerce Clause (632)
   C. Application of Age Discrimination in Employment (ADEA), similar to the comparable worth theory, is being challenged for its violation of the Tenth Amendment in that it regulates conditions of state employees. This is beyond federal regulation and is state sovereignty (632-633)

   -Richard S. Whitmore, attorney on behalf of the California Public Employers' Labor Relations Association(CALPELRA), testified substantially the same as Michael Wieloszynshi of the National Public Employer Labor Relations Association as to the effects of comparable worth.
   -Michael Wieloszynshi in his testimony outlined many of the anti-comparable worth ideas contained in the National Public Employment Reporter, Potential Impact of Concept of Comparable Worth on Public Sector Bargaining, which his law partners, William F. Kay and M. Carol Stevens, wrote.

QUESTIONS AND ANSWERS ON THE FAIR PAY ACT OF 1994

WHAT ARE THE MAJOR PROVISIONS OF THE FAIR PAY ACT OF 1994?

The Fair Pay Act of 1994 amends the Fair Labor Standards Act (FLSA) by banning 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. An employer can successfully defend a charge of pay discrimination by showing that a pay disparity is justified by seniority, merit, quantity or quality of production, or any other factor than sex, race, or national origin.

HOW IS THIS LAW DIFFERENT FROM THE EQUAL PAY ACT?

The Fair Pay Act expands the protections established by the Equal Pay Act in two ways. First, it prohibits pay discrimination on the basis of race and national origin, in addition to gender. Second, it prohibits such discrimination between workers performing dissimilar work of equivalent value, while the Equal Pay Act prohibits only sex discrimination between workers performing substantially the same job.

WHY IS THE FAIR PAY ACT NEEDED?

Discrimination on the basis of sex, race and national origin is embedded in the way jobs in the United States are both filled and compensated. Women continue to make only 71 cents for every dollar that men earn. Women of color experience even more severe inequities; black women earn only 61.8 cents for every dollar earned by a white man, and Hispanic women are paid only 53.6 cents for every dollar that a white man is paid. Men of color also experience significant pay discrimination, with black men earning only 72 percent, and Hispanic men earning only 65 percent, of the wages of white men. These extraordinary wage gaps and the impact of historical job segregation compel legislative action.

Support for fair pay for work of equivalent value is broad and transcends race, class, gender, and political party lines. A 1991 study by the Greenberg-Lake Analysis Group found that a striking 77 percent of voters support pay equity laws for women and minorities. The vast majority of voters are convinced that pay equity would benefit society as a whole by enabling women to more adequately provide, or contribute to, economic security for their families.

HOW WILL THE FAIR PAY ACT AFFECT BUSINESSES?

The Fair Pay Act merely clarifies the need to eradicate systemic pay discrimination. By barring distinctions -- based on the sex, race, or national origin of the employee -- in compensation for work of equivalent value, it seeks to eliminate longstanding, systemic bias.

Fair pay for employees can lead to greater productivity by raising morale among workers who can expect to receive fair pay for a fair day's work. By compensating workers for the fair value of their work, the Fair Pay Act can help businesses recruit and retain qualified workers. The many businesses which already evaluate their compensation plans to correct for the effects of bias will not be impacted by this legislation. For other employers, the Act will simply require that they examine their wage-setting policies and eliminate any bias.

WHO IS COVERED BY THE FAIR PAY ACT?

Since the Fair Pay Act amends the FLSA, it covers the same employers and employees as does the FLSA. Both private businesses and government agencies are covered. Part-time and temporary workers are protected to the same extent that they are currently under the FLSA.

HOW WILL THE FAIR PAY ACT BENEFIT WOMEN AND PEOPLE OF COLOR?

Women and people of color have historically been undervalued in the workplace due to discrimination. This significantly undermines their ability to sustain ideal levels of productivity, their ability to provide economic security for their families, and their human dignity. By ensuring fairness in compensation, the Act will improve employment opportunities and boost financial security for these workers.

DOES THE FAIR PAY ACT REQUIRE BUSINESSES TO DO PAY EQUITY STUDIES AS THE ONTARIO, CANADA PAY EQUITY ACT DOES?

No, the Fair Pay Act imposes no affirmative duty on the covered employer to perform a pay equity study. It simply requires that employers refrain from discriminating in compensation on the basis of sex, race, or national origin.

HOW WILL THE NEW LAW BE ENFORCED?

Like the Equal Pay Act, the Fair Pay Act provides for two means of enforcement. An individual may either file a complaint in court, or may file a complaint with the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcement of the Act.

DOES THE ACT INCLUDE A DISCLOSURE AND REPORTING REQUIREMENT?

Yes, the Act requires that employers disclose in adequate detail the salary rates paid to each job classification, as well as the sex, race and national origin composition of employees in the relevant position. The Act does not require that the covered employer reveal the name or salary of any individual employee.

For a free market system to work effectively, all economic decisionmakers require information for fully-informed choices. This includes employees. Right now, employers are entitled to know a great deal about employees, but employees often lack even the most basic information about overall compensation practices. Without this information, workers cannot fairly compare and evaluate present and prospective empoyers, thus artificially constraining their employment choices. Disclosure will serve employers as well. Analyzing compensation by job type, gender, race, and national origin will enable employers to identify and remedy inequities that might not otherwise come to their attention. Fair employers have nothing to hide.

IS THERE A MARKET DEFENSE FOR EMPLOYERS UNDER THE FAIR PAY ACT?

Yes, an employer may rely on the market as a legitimate basis for pay disparities between workers performing work of equivalent value if the employer can show both that legitimate labor shortages or surpluses exist, and that the employer has historically responded to shortages by raising the wage rates of employees, or to surpluses by lowering wage rates in those job categories. For example, if an employer historically has responded to a labor shortage of engineers by raising wages, while importing nurses from abroad in response to similar shortages, it will be vulnerable to a challenge under the Fair Pay Act.

WHAT SORT OF NEW REGULATIONS ARE CREATED BY THIS LAW?

The Fair Pay Act directs the EEOC to develop regulations as necessary to facilitate enforcement.

WHAT IS THE EFFECTIVE DATE OF THE FAIR PAY ACT?

The Fair Pay Act becomes effective one year after enactment.

Prepared by the WOMEN'S LEGAL DEFENSE FUND

6/29/94

Age Discrimination in Employment Act (ADEA)
- Briefing Materials -

Charge Processing

Issue:

Whether EEOC should continue its practice of issuing "no cause/no violation" letters in ADEA cases.

Background:

When the Department of Labor had jurisdiction over the ADEA, it issued "no violation" letters even though the statute did not require it. When EEOC assumed jurisdiction of the ADEA it continued the DOL practice. (EEOC changed the label to "no cause," consistent with its practice under Title VII). The majority of charges are dismissed as "no cause."

Political Issue:

AARP has suggested that issuing "no cause" letters is prejudicial to charging parties and should be discontinued since they are not required by statute.

Arguments in favor

- The statute does not require issuance of the "no cause" letters
- "No cause" letters make it difficult for charging parties to obtain legal counsel
- "No cause" letters may be prejudicial in a court proceeding

Arguments Against

- Since EEOC does investigate ADEA charges -- although an investigation is not statutorily required -- there is value in treating ADEA charges like Title VII charges
- If EEOC were to issue cause findings but not no cause findings the EEOC may be perceived as other than a neutral fact finder. Evenhanded treatment of charges probably enhances the credibility of the agency's cause findings
- Because the EEOC is a neutral third party it is useful to charging parties to know the agency's findings and conclusions. Such knowledge may forestall unnecessary litigation.

N.B. It may be that the real concern is the large number of "no cause" findings. If so, the solution would appear to be to identify the reasons for the small number of cause findings for all of the statutes EEOC enforces, rather than to single one statute out for different treatment.

Police and Fire Exemption Legislation

Issue Whether Congress should enact H.R. 2722, introduced by Major Owens, permitting age based hiring/retirement of police and fire fighters

Background Despite many successful challenges to such practices, Congress enacted a temporary exemption permitting age based hiring and retirement of state and local public safety employees. (effective January 1, 1987; expired December 31, 1993).

At the behest of Congress, EEOC and DOL completed a study, which found that there are practical tests that are better predictors of job performance than age and that gradual deficits in abilities and sudden incapacitating events (e.g., heart attacks) are only marginally associated with age.

Political perspectives

Arguments in favor of the exemption

- Age limitations are necessary to public safety.

- EEOC was to identify specific tests that they could use which would not be subject to challenge. No such "safe harbor" tests were identified.

- Eliminating mandatory retirement age will make it harder for minorities and women to find positions.

- Departments claim rank and file members overwhelmingly support age limitations.

Arguments against exemption

- EEOC has long challenged such age limitations and has usually persuaded courts that they are unnecessary.

- Tests are available that can be used in place of age. Employers must be prepared to validate tests if they have an adverse impact on protected groups. Validation standards are fully described in the government's Uniform Guidelines on Employee Selection procedures.

N.B. • Senator Metzenbaum -- Age limitations should not be used. The only reason the Senate authorized the prior exemption was on condition that law and fire departments would abandon age limitations at the end of 1993. ••• Administration Position -- Further study on the use of testing in place of age and a 4 year temporary extension of the law permitting age limitations

ADEA - Police & Firefighters Exemption

ADMINISTRATION POSITION

Congressional Medal of Honor. We have no objection to § 3056 of the House Bill, which provides a higher maximum penalty for unauthorized wearing, manufacturing, or selling of military decorations and medals, if the medal is the Congressional Medal of Honor. We recommend, however, that any definition of the term "sells" in this statute (18 U.S.C. 704) apply uniformly to all medals and decorations covered by the statute.

Age Discrimination Exemption for Law Enforcement Agencies. Title XXX.M of the House Bill renews (without any time limit) an exemption from age discrimination prohibitions for law enforcement officers and firefighters. We would prefer a temporary four-year extension of the exemption, similar to that contained in § 3 of the Age Discrimination in Employment Amendments of 1986. This would allow for necessary further study of age restriction policies for public safety workers. It would also be more consistent with the intent of the original Act, which sought to promote the employment of capable older persons and prohibit arbitrary age discrimination in employment.

Prohibition of Strength-Training and Martial Arts for Federal Prisoners. We oppose Title XXX.N of the House Bill insofar as it prohibits weight lifting activities for Federal prisoners. Weight lifting reduces inmate idleness and helps to relieve tension and stress. It is a valuable management tool whose benefits far outweigh any potential dangers. Prohibiting it would seriously impede -- not enhance -- prison security.

We know of no evidence that banning weight training in prisons will make prisoners less dangerous upon release -- and the dedicated men and women of our prison system, who stand guard over criminals, believe this provision will make inmates more dangerous during the period of their incarceration.

"Made in America" Labels. Section 3086 of the House Bill requires registration with the Commerce Department of all products bearing "made in America" labels, and a determination by the Commerce Department that 60% of the product was manufactured in the United States and that final assembly took place in the United States. We oppose § 3086 of the House bill. The requirements of this section are inconsistent with existing rules requiring accurate country-of-origin labeling, and would impose unnecessary burdens on American businesses.

Country-of-origin regulations for products are currently enforced by the Customs Service of the Treasury Department and by the Federal Trade Commission (FTC). Under current law, a "Made in USA" label must be truthful, and imported products must contain a label indicating country of origin. Imported products must undergo substantial transformation in the United States before they can bear a "Made in USA" label.

Reductions-in-Force (RIFS)

Background: RIFs frequently are at the core of a great many of the ADEA charges filed with the Commission. There are several things that employers clearly cannot do when conducting a RIF, for example:

(1) You cannot select on the basis of age;

(2) You cannot select on the basis of stereotypical assumptions about older workers (all those within a year of age 55 will retire next year anyway -- I'll select them for the RIF);

(3) You cannot apply different more stringent performance criteria for employees above a certain age.

These kinds of actions would constitute clear examples of disparate treatment because of age -- they are unlawful even if the employer has a legitimate need to reduce its workforce.

The more difficult cases arise when an employer terminates employees for more subtle cost-based reasons (e.g., level of salary vs. level of productivity analysis). In this area the judicial decisions are far from uniform. The Supreme Court's decision in Hazen Paper (1992) further clouded this area of the law.

Hazen held that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than an employee's age. This maxim applies, said the Court, even when the factor used is empirically correlated with age.

Issue: Should the Commission, on the heels of Hazen Paper, attempt to issue definitive guidance on how it will treat cost-based decisions under the ADEA -- or should this area be left to the case-by-case approach that been in operation since ADEA's enactment?

Existing Commission Guidance:

EEOC guidance in this area is quite limited, to wit: "A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans ..." See 29 C.F.R. § 1625.7(f). In addition to its brevity, this interpretation does not explain what theory of discrimination is being applied (disparate treatment, disparate impact, or both). The interpretation was published long before the Hazen Paper decision thus leaving the impact of Hazen, if any, unclear. Finally, this guidance is not helpful for analyzing cases where an individual is terminated on the basis of higher cost to the employer.

Disparate Impact Theory under ADEA

Background: Disparate impact theory was developed initially by courts addressing Title VII. The theory permits liability to attach to an employer's use of facially neutral policies or practices that have a disproportionate adverse effect on members of a protected group, unless the employer can prove the practice is a business necessity.

The Commission and most courts of appeals have applied disparate impact theory under the ADEA. There has been, however, a persistent school of thought contending that the theory should not be available under ADEA. Some believe the Supreme Court in the 1992 Hazen Paper decision signalled that it may side with those opposing use of the theory in age cases. But as of this writing, the Court has not decided the issue.

The Commission has routinely applied the theory when investigating and litigating age cases. In policy documents, however, it has done little more than reference the terms "adverse impact" and "business necessity" in an interpretive regulation dealing with reasonable factors other than age. See 29 C.F.R. §1625.7(d).

Issue: Should the Commission provide a fuller statement in support of adverse impact theory under the ADEA?

Public Reaction:

Employee groups would likely welcome such guidance both because impact theory can play a critical role in reduction-in-force cases where the neutral policy or practice is often cost, and because the Hazen Paper decision has clouded the availability of disparate treatment theory in cost cases.

Employer groups would likely oppose any effort by the Commission to increase the potential for litigation and liability in reduction-in-force cases.

Pension Benefit Accruals Under the ADEA

Issue:
Why has the Commission not issued final pension accrual regulations

Background:

- ADEA amended in 1978 to raise maximum age limit from 65 to 70 and to forbid mandatory retirement under pension plans. 1978 legislative history indicated that pension plans could cease benefit accruals at normal retirement age (generally age 60 or 65).
- DOL issued an Interpretative Bulletin in 1979 stating that pension accruals would not be required for persons who work beyond a plan's normal retirement age.
- EEOC wrestled with the issue until 1986 when Congress amended the ADEA, the Internal Revenue Code, and ERISA in the Omnibus Budget Reconciliation Act of 1986 (OBRA 86).
- OBRA 86 required pension accruals regardless of age and required EEOC, IRS, and DOL to coordinate regulatory efforts with each other, and specified that any agency's regulations must be consistent with the other agency's regulations.

Political Issue:
Did the statute apply prospectively or retroactively?

- On November 1987, with the express permission of IRS, the Commission published a proposed regulation under OBRA 86, stating that the statute would be applied only prospectively.
- After strong Congressional criticism, IRS published a proposed regulation requiring retroactive application of OBRA 86.
- After the publication of the IRS proposed rule, EEOC decided that, since IRS was given lead regulatory authority under the statute, EEOC would take no final action until after IRS acted.
- On December 27, 1988, IRS issued a notice which stated that in its final regulations, OBRA 86 would apply retroactively to noncontributory defined benefit pension plans and prospectively to defined contribution pension plans. The notice took no position on defined benefit pension plans that required employee contributions.
- EEOC issued a virtually identical notice on January 9, 1989.

Status:

- Still awaiting final IRS action.
- Since January 1989, EEOC has frequently requested that the Department of the Treasury and IRS issue final regulations under OBRA 86. Each time, the Commission's request has been turned down.

Older Workers Benefit Protection Act
- Briefing Materials -

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).

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Elizabeth M. Thornton to Claire Gonzales re: The Older Workers Benefit Protection Act of 1990 (2 pages)	5/19/1994	P5

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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]

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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]

Why was Prior Administration Reluctant to Issue OWBPA Guidance

Staff was not informed of the reasoning -- The decision not to go forward with regulatory guidance was issued by the Chairman's Office, not by the Commission as a whole. Thus, there is no record of why issuing guidance was not deemed advisable.

Possible Reasons -- OWBPA was the subject of considerable debate and compromise. Many OWBPA issues were hotly contested and the positions of employer/employee groups on various issues were not always predictable. After completion of the long and detailed legislative process, there may have been a desire by the prior Administration to wait and see if the statutory language was sufficiently clear to obviate the need for regulatory guidance.

OWBPA Rulemaking - Options

Issues: What approach, if any, should the Commission use in issuing guidance under OWBPA?

Options: The Commission has four options

- Do nothing and let courts resolve the issues.

  Doing nothing avoids committing EEOC resources to developing guidance on issues that arguably are clear on the face of the statute. The other view is that OWBPA leaves certain issues unresolved and the Commission should provide guidance on issues that are of major import for employers and employees, i.e., employee benefits plans and waivers of rights or claims.

- Issue guidance, such as Enforcement Guidance or a Field Notice, that does not have the weight of regulations.

  This approach would be the fastest means of getting guidance to our field staff and the public. This method, however, does not allow for public input, and leaves the Commission more vulnerable to criticism of positions it takes in this guidance.

- Issue substantive or interpretive guidance using notice and comment procedures (traditional way of issuing regulatory guidance).

  Commission has experience with this method of rulemaking. Guidance could be issued within a predictable timeframe (1 year or earlier) with minimal expense to the Commission. On the other hand this approach limits public participation and consensus building efforts. This in turn could hamper voluntary compliance with government policy positions and/or increase the possibility of court challenges to the regulatory positions.

- Issue guidance using negotiated rulemaking techniques.

  This approach has been encouraged by the Administration because it enhances public involvement in the regulatory process. Where consensus can be achieved, voluntary compliance with regulatory positions is maximized. On the other hand, the Commission has no experience with this procedure. It is difficult to predict timeframes for final guidance, cost to the Commission, or, indeed, whether consensus can be achieved on the issues.

Early Retirement Incentives after Title I of OWBPA

Background: The OWBPA made clear that many voluntary early retirement incentive plans (ERIPs) are permissible under the ADEA. OWBPA specifically authorizes (gives safeharbors) for ERIPs that waive actuarial reductions and those that provide social security supplements.
Additionally, it is permissible to:

(1) provide a flat dollar amount to all employees above a certain age;

(2) provide a dollar amount multiplied by each year of service for all employees above a certain age; or

(3) impute additional years of service or age for all employees above a certain age.

Issue: Does the ADEA, as amended by OWBPA, permit ERIs offering an incentive only to persons under a specified age (so-called "Cipriano plans")? For example, would it be permissible to offer $10,000 to "all employees under age 65 who retire within 6 months?"

OWBPA Provision Implicated:

It is not unlawful to observe the terms of a bona fide employee benefit plan - "that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act."

Pre-OWBPA EEOC Position on Age-Capped ERIs:
Age-Capped Plans Lawful if --

(i) Voluntary

(ii) All individuals older than a specified age have at least 1 opportunity to participate

(iii) Employer has a business reason for structuring the plan with an age cap, e.g., some measured assessment of increasing cost or declining benefit to the employer.

Current EEOC Guidance:
No OWBPA policy guidance in place. EEOC has, however, opposed an age-capped plan in litigation (amicus brief).

View of Congressional
Commentors in Response to
EEOC OWBPA Notice:
Democrats & AARP -- So called "Cipriano Plans" are highly suspect if not plainly unlawful after OWBPA.

Republicans -- Voluntary "Cipriano Plans" where all employees have at least 1 opportunity to participate are clearly lawful under OWBPA.

OWBPA - Title I

State and Local Government Disability Retirement Plans

Background: This is an area where State and local government employers appear to be in substantial need of guidance under OWBPA.

OWBPA has made these public employers aware, some seemingly for the first time, that their employee benefits plans are subject to the ADEA.

We have been informed by knowledgeable sources that many public employers use a disability retirement plan that may now violate the ADEA.

How the Plan Operates:

State and local governments frequently calculate disability retirement benefits by projecting years of service until normal retirement age under the pension plan. This can work to the disadvantage of older individuals. Consider the following example.

Age at Hire	Age when Disabled	Normal Retirement Age	Years of Credit for Disability Benefits
25	30	55	30 yrs
45	50	55	10 yrs
56	61	55	0 yrs

As the above chart demonstrates, each of the 3 employees worked the same amount of time for the employer prior to disability (5 years). However, the 25 year old will receive three times the benefit available to the 45 year old, and the 56 year old has no benefit at all. The distinctions made are age-based.

Issue: Are disability retirement plans such as the above subject to a pension accrual analysis or an equal cost or equal benefit analysis?

Once the appropriate analytical framework is identified, is the plan permissible or impermissible?

If equal cost or equal benefit analysis applies, how does the employer cost justify the plan?

Existing EEOC Guidance:

No guidance is in place to address the specific questions raised. There is, however, general EEOC guidance on cost justification.

Assistance Provided:

The Office of Legal Counsel has offered informal advice on the various legal issues and suggested ways to avoid possible problems. This kind of guidance is, of course, non-binding and unofficial. Few were satisfied with this informal assistance and some stated that they would not make any changes unless or until EEOC issues official guidance. There is a good likelihood that many jurisdictions continue to use these plans. If litigation ensues, it is virtually certain that public sector employers will criticize for failing to issue guidance.

Severance and Pension Integration after Title I of OWBPA

Background: Prior to the Supreme Court's decision in Betts, which insulated virtually all benefit plans from ADEA challenge, the Commission had successfully argued that severance benefits could not be denied or reduced because of pension eligibility. The theory was based on 2 prongs:

1) severance and pension are different benefits provided for different purposes; and

2) pension eligibility is almost always tied to age.

OWBPA Provision Implicated:

Severance pay can be offset by:

(1) additional pension benefits made available to an employee;

(2) the value of certain retiree medical benefits.

Issue: Is OWBPA dispositive of all questions dealing with pension/severance integration? In other words, are the above 2 exceptions the only permissible ways of integrating the 2 benefits.

For example, some have asked if severance pay can be conditioned on an employee's agreement to defer pension receipt until severance is exhausted. Would this be permissible where severance replaces a laid-off persons salary for some period of time, and the employer would not normally provide pension and salary simultaneously.

Existing EEOC Guidance: No OWBPA guidance has been issued.

OWBPA - Title I

Are employers permitted to end all retiree health coverage when the retiree becomes eligible for medicare (age - 65)?

Background: EEOC has an existing ADEA interpretive regulation permitting employers to integrate employer-provided benefits with government-provided benefits, even those made available on the basis of age. However, this integration feature is available only if the employee is not left with a lesser amount of coverage than was provided by the employer's plan.

By contrast, OWBPA legislative history flatly declares that nothing in OWBPA prohibits an employer from terminating its retiree health benefits whenever the retiree becomes eligible for Medicare (age 65).

Issue: Which of the above provisions is the correct statement of the law?

This is an area that likely will be the subject of litigation because employer-provided retiree health benefits are often more generous than Medicare benefits. Thus, a complete cut-off of employer-provided benefits at age 65 would leave the employee with lesser amount of coverage -- a result arguably prohibited under EEOC's interpretive regulation. Moreover, the OWBPA legislative history offering a contrary view does not rest on any particular statutory language. The gratuitous nature of the comment may undercut its persuasiveness in the courts.

Existing EEOC Guidance:

No OWBPA guidance has been issued.

ADEA Waivers (Title II of OWBPA)

Background:

- The Commission issued a final rule permitting private or unsupervised waivers of rights or claims under the ADEA in 1987.

- The Commission's rule was suspended through appropriations riders in FY 1988, 1989, and 1990.

- Title II of OWBPA passed in 1990 provides that unsupervised waivers may be valid and enforceable if they meet the following requirements and are otherwise knowing and voluntary.
    1. Written document that is clear and understandable.

    2. Specific reference to rights or claims under the Act.

    3. Does not waive rights or claims that may arise after the date the waiver is signed.

    4. Consideration is given the individual in addition to anything of value to which he is already entitled.

    5. Individual is advised in writing to consult with an attorney before signing.

    6. Individual is given 21 days to consider the agreement.

    7. Individual is given 7 days after signing to revoke.

  If a waiver is part of a group or class program, individuals must receive
    1. information on others who are eligible or selected for the program

    2. information on others who were not eligible or selected for the program

    3. 45 days to consider the agreement

- Title II specifically recinds the Commission's rule, while it incorporates most of the major provisions of that rule.

ADEA Waivers

Issue - May an individual challenge a waiver while at the same time retaining the consideration given in return for signing the agreement?

- Courts have split on the issue. In a post-OWBPA cases the 5th Circuit has found that an employee ratifies the agreement if the consideration is not tendered back or returned within a reasonable amount of time after the employee comes to believe that the waiver is invalid. By contrast the Circuit in a poste-OWBPA case rejected the ratification theory, stating that the consideration need not be returned. It further suggested that any back pay award could be offset by the value of the consideration.

- Commentors were split in our request for public comment in 1992 with the majority in favor of the ratification approach. Senator Hatch and Congressman Goodling supported ratification. They felt that the matter should be left to the Supreme Court since OWBPA does not address the issue.

- Senators Pryor and Metzenbaum stated that individuals should not have to return benefits to challenge waivers that may have been obtained by misrepresentation or duress.

Status - Issue awaits decision by Commission on whether to conduct rule making or issue other guidance on this issue.

Arbitration Agreements

Background: In the Gilmer decision, the Supreme Court ruled that an individual can lawfully agree to submit an ADEA claim to mandatory arbitration. Many courts since Gilmer have sustained the validity of such arbitration agreements, and have extended the Gilmer rationale to Title VII claims.

In addition to judicial support for mandatory arbitration agreements, Congress has signalled strong support for the creative use of alternative dispute resolution (ADR) techniques as a possible way to reduce the great number of administrative and judicial employment discrimination claims.

Unfortunately, there is the potential for abuse accompanying the movement toward ADR. There are indications that increasing numbers of job applicants are being "asked" to sign mandatory arbitration agreements as a condition of employment.

Title II of OWBPA, effective after the Gilmer decision, prohibits prospective waivers of rights or claims under the ADEA. It also requires that waiver agreements be supported with valuable consideration to which an individual is not already entitled.

Issue: Should the Commission take the position that Title II of OWBPA applies to mandatory arbitration agreements? If this position is taken, does it follow that pre-employment agreements are invalid either as prospective waivers or as agreements unsupported by consideration.

Current Guidance: No OWBPA guidance has been issued.

Congressional Comments in Response to OWBPA Notice:

Democrats -- Gilmer conflicts with the later enacted OWBPA and its prohibition on prospective waiver of rights or claims.

Republicans -- No conflict -- Waiver is not prospective as procedural rights exist at time of waiver. Also, OWBPA addresses waivers of substantive rights, not procedural rights. Employees should be permitted to select the forum in which their dispute will be heard.

Americans With Disabilities Act (ADA) - Title I
- Briefing Materials -

ADA: DEFINITION OF DISABILITY

* The Americans with Disabilities Act (ADA) is patterned after Section 504 of the Rehabilitation Act of 1973. Section 504 is a law which prohibits discrimination against people with disabilities in a range of areas (such as employment, social services and education) on the part of entities that receive federal funds. It is a law which has been in effect for over a decade.

* The ADA's definition of disability is <u>identical</u> to the definition under Section 504, with the exception of deletion of coverage for current users of illegal drugs (see below). In addition, the ADA uses the term "disability" rather than "handicap," to reflect the term of choice in the disability community.

* Under Section 504's definition, and hence under the ADA's definition, a person with a disability is defined as:

1) a person with a physical or mental impairment that substantially limits that person in some major life activity; or

2) a person with a record of such a physical or mental impairment; or

3) a person who is regarded as having such an impairment.

* This three-part definition of disability has been in place since 1974 under Section 504. This definition has been amplified in both regulations and caselaw. First, to have a disability, one must have an actual physical or mental <u>impairment</u> -- not simply a physical <u>condition</u>, such as black hair or blue eyes. Second, the disability must be serious enough so as to affect some form of major life activity, such as walking, talking, breathing or working.

* The type of impairments covered under this definition include a wide range of conditions. For example, it covers people who use wheelchairs, people with vision and hearing impairments, people who have such conditions as heart disease, epilepsy, cerebral palsy, or HIV disease, and people with a range of mental impairments.

* The definition also includes someone with a record of an impairment. These include, for example, individuals with a history of mental illness, heart disease or cancer, who no longer have the disease but who are discriminated against because of their record of an impairment.

* The definition also includes individuals who are regarded as having an impairment. This includes individuals who may not have a physical impairment that actually limits a major life activity, but who are nonetheless regarded as being impaired and limited. For example, this would include a person who has a significant physical burn on his or her face which does not actually limit the person in any major life activity, but who is nonetheless discriminated against because of the disfigurement. It also includes individuals who have no impairment but are regarded as having one.

* This three-part definition of disability is a critical component of the coverage of both Section 504 and the ADA. Congress' intent in adopting the definition in 1974 was to establish a broad definition that would ensure adequate protection for individuals experiencing any form of discrimination based on disability, including discrimination based on myths and stereotypes.

* In both the Rehabilitation Act and in the ADA, Congress made an intentional decision not to try to list every possible medical disability that exists, but rather to establish a generic, functional definition that would encompass all types of conditions that Congress wished to protect from discrimination.

* There is one respect in which the ADA's definition of disability is different than that which currently exists under Section 504. Individuals who are addicted to drugs have a medical disability and had been previously covered under Section 504. The ADA, by contrast, excludes a person who is currently illegally using drugs from the definition of an individual with a disability. Thus, employers and others can discriminate against individuals who illegally use drugs, because of that use, without any liability under the ADA. In addition, the ADA explicitly allows employers to engage in drug testing for illegal use of drugs.

* The ADA also covers individuals who associate with people with disabilities, and are discriminated against on the basis of that association.

ADA: EMPLOYMENT PROVISIONS

* The Americans with Disabilities Act (ADA) is patterned after Section 504 of the Rehabilitation Act of 1973. Section 504 is a law which prohibits discrimination against people with disabilities in a range of areas (such as employment, social services and education) on the part of entities that receive federal funds.

* The ADA's employment provisions will ultimately cover all employers who have 15 or more employees. This is the same scope of coverage which exists under Title VII of the Civil Rights Act of 1964 for race and sex employment discrimination.

* The first basic employment provision of the ADA is that an employer may not refuse to hire a person with a disability, because of the person's disability, when that person is qualified to perform the job. This is exactly like the law which exists in race and sex discrimination. As in those areas, an employer can continue to have all types of job qualifications, such as requiring a certain educational level or requiring that the person be able to perform a certain function at a certain competence level. What an employer cannot do is to refuse to hire or to promote a person because of that person's disability, when that person otherwise meets all the qualifications of the job.

* The second basic employment provision of the ADA is that an employer must make reasonable accommodations for a person with a disability, if that accommodation will allow the person to perform the essential functions of the job. This is a requirement that has been in place under Section 504 for 15 years. It is a very simple, yet essential, requirement. What it means is that if there is some modification in a job's requirements or structure that an employer can do, which will not cause the employer undue hardship, but which will allow the employee with the disability to do the job, that modification or change must be made. For example, if placing an amplifier on a telephone, or lowering a desk, or establishing a flexible work schedule will allow a person with a disability to perform a job, that type of accommodation could be required.

* Under the ADA, whether an accommodation is ultimately required depends on two things. First, the accommodation has to really work; that is, it has to result in the employee actually being able to do all the essential

functions of the job. Second, the accommodation may not impose an undue hardship on the employer. This is a long-standing standard under Section 504. It means that the accommodation cannot impose significant difficulty or expense on the employer, taking into account specifically the size of the business, the number of employees, the type of business, and the nature and cost of the accommodation.

* The remaining provisions in the ADA's employment section are essentially subsets of these two main provisions and derive directly from the regulations and caselaw under Section 504. For example, an employer may not segregate or classify persons with disabilities in a way that adversely affects their employment status. An employer may not deny an employment opportunity to an individual because of the individual's need for a reasonable accommodation. And an employer may not have a qualification standard that eliminates persons with disabilities unless the employer can show that the standard is job-related and consistent with business necessity.

* An employer may not ask applicants, early on in the application process, whether the applicant has a disability. The employer may ask whether the applicant can perform the functions of the job. In addition, the employer may condition the applicant's job offer on the results of a medical examination. Again, however, those results may not be used to withdraw the job offer unless the applicant is shown not to be qualified for the job.

* With regard to religious entities, the ADA includes a provision which states that a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of the organization.

* The employment provisions of the bill take effect on July 26, 1992. Upon the effective date, employers with 25 or more employees will be covered. Employers with 15 or more employees will be covered two years later, on July 26, 1994.

ADA: COVERAGE OF DRUG AND ALCOHOL USERS

* Individuals who are current illegal users of drugs are excluded from the definition of a person with a "disability" in the ADA. This same exclusion was also adopted for the Rehabilitation Act of 1973.

* Under this exception, an individual who currently illegally uses drugs is not entitled to any protection under the ADA, regardless of whether that person is a casual user of drugs or is an addict and regardless of whether his or her illegal drug use has any adverse impact on job performance in the employment sector. Employers may thus refuse to hire and may discipline or fire any person who currently illegally uses drugs without violating the ADA.

* If a person with a disability (e.g., a person with AIDS) is an illegal user of drugs, but is discriminated against because of that person's covered <u>disability</u> (i.e., AIDS), and not because of the drug use, the person <u>is</u> protected under the ADA.

* The following individuals <u>are</u> protected under the ADA:

  a) a person who has successfully completed a drug rehabilitation program and is no longer illegally using drugs;

  b) a person who has otherwise been rehabilitated and is no longer illegally using drugs;

  c) a person who is participating in a rehabilitation program and is no longer illegally using drugs; and

  d) a person who is erroneously regarded as illegally using drugs.

* The "illegal use of drugs" is defined as the use of drugs which is unlawful under the Controlled Substances Act. It does not include the use of drugs taken under supervision by a licensed health care professional. Many people with disabilities, such as people with epilepsy, AIDS and mental illness, take a variety of drugs, including experimental

drugs, under supervision by a health care professional. Discrimination on the basis of use of such drugs remains illegal under the ADA.

* Testing for the illegal use of drugs is not considered a medical examination for purposes of the ADA and is, therefore, not subject to the ADA's restrictions on medical examinations. The ADA thus does not prohibit testing for the illegal use of drugs.

* An applicant or employee may, however, contest the accuracy of a drug test. An individual who does not, in fact, illegally use drugs, but who has been erroneously identified as an illegal drug user by a test would fall into the category of an individual "perceived to be" an illegal user of drugs.

* An employer's allowance to test for the illegal use of drugs is also restricted by the employer's obligation not to identify, through a medical examination, the existence of a disability prior to a conditional job offer. Persons with disabilities often take drugs that may be identified through a drug test. In order to assure compliance with the ADA's pre-employment medical provisions, therefore, employers must either assure that the required drug test identifies strictly the illegal use of drugs or require successful passage of a drug test only of applicants who have received a conditional job offer. An employer could also choose to have an outside laboratory conduct the test and to have the laboratory inform the employer only of results indicating illegal drug use.

* Individuals who are alcoholics remain covered under the ADA. An employer may, however, prohibit the use of alcohol by all employees on the job; require that employees not be under the influence of alcohol at the workplace; and hold an alcoholic to the same performance and behavioral standards to which all employees are held.

ADA: REMEDIES

* Any anti-discrimination law is made up of two basic parts: a statement of what actions are illegal under the law and a provision for the remedies that are available if an entity engages in those illegal actions.

The remedies provided by the ADA are as follows:

* EMPLOYMENT: The ADA adopts the remedies provided by Title VII of the Civil Rights Act of 1964. Under Title VII, and hence under the ADA, a plaintiff has a private right of action (which means that, after going through the mandatory Equal Employment Opportunity Commission process, a plaintiff can bring a lawsuit in a local federal district court) and has the right to get injunctive relief from a judge. Injunctive relief includes such things as reinstatement in a job or an order for backpay.

The EEOC may bring cases on behalf of victims of discrimination as they do under Title VII.

Under the Civil Rights Act of 1991, plaintiffs are also allowed to recover compensatory and punitive damages, such as damages for pain and suffering and for harassment, for intentional employment discrimination. These damages are capped at different levels, depending on the size of the business. An employer may avoid damages for failure to provide a reasonable accommodation if the employer demonstrates that it made a good faith effort to provide the accommodation.

* PUBLIC ACCOMMODATIONS: The remedies available for violations of the public accommodation section are similar to those available under the employment section. The ADA incorporates the remedies available under Title II of the Civil Rights Act of 1964. Thus, plaintiffs have a private right of action and the right to seek injunctive relief from a judge. Private plaintiffs are precluded from seeking general, compensatory damages, including damages for pain and suffering.

Unlike other laws, there is a mandatory injunction process under the ADA for certain violations. For example, if a judge finds that a public accommodation has built a new building which is inaccessible to people with disabilities, in violation of the ADA, the judge must issue an order

requiring the owner to retrofit the building to make it accessible.

Following the pattern of other civil rights laws (such as the Fair Housing Act), the ADA gives the Attorney General the right to bring an action in cases of pattern or practice of discrimination or in suits of general public importance. In such cases, a judge can award the same type of injunctive relief available in private suits. The judge can also assess a civil penalty (not unlimited damages) of not more than $50,000 for the first violation and not more than $100,000 for a subsequent violation, if the judge determines such penalties are necessary "to vindicate the public interest." This standard means that civil penalties will be assessed only when such penalties are called for by the facts of the case. In addition, if the Attorney General requests it, the judge can award monetary damages to a person aggrieved by the discriminatory action. A private party may not, on his or her own, request such damages.

* COMMUNICATIONS: The telecommunications relay services section of the bill amends the Communications Act of 1934 and uses the administrative remedies procedure established under that Act. Thus, in most situations, the Federal Communications Commission will handle complaints in the first instance. The Commission will refer complaints about intrastate telecommunications relay services to state agencies that have received Commission certification to implement those services. Plaintiffs have a private right of action to obtain review of Commission decisions in the federal courts.

* PUBLIC SERVICES: The public services section of the ADA incorporates the remedies available under Section 505 of the Rehabilitation Act of 1973. These are the remedies currently available for violations of Section 504. These include a private right of action and both injunctive relief and damages in certain circumstances.

Existing Guidance: **Preemployment Disability-Related Inquiries and Medical Examinations Under the ADA**

The Commission's "Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act" concerns the ADA's restrictions on an employer's use of preemployment disability-related inquiries and medical examinations. Such inquiries and examinations are not permitted before an employer has extended a conditional offer of employment. The Guidance provides instructions for investigators to use in determining whether an inquiry is disability-related and whether an examination is medical.

Status: The Guidance was approved by the Commission on May 19, 1994, for interim use by EEOC staff while it is being coordinated with affected federal agencies under Executive Order 12067.

Political Issues:

1. The Guidance states that, at the pre-offer stage, an employer may not ask isolated questions about whether an applicant needs a reasonable accommodation. However, an employer may ask applicants to describe or demonstrate how they would do the job with or without a reasonable accommodation.

- Major employer groups (EEAC, SHRM) have publicly criticized this aspect of the Guidance. They feel that, to conserve resources, employers should be able to gain complete information, about reasonable accommodation before extending an offer of employment.
- Our position is that isolated questions (i.e., not in the context of describing or demonstrating performance) focus on disability, rather than ability, and therefore are not permitted at the pre-offer stage.

2. The Guidance says that an employer may inquire at the pre-offer stage about lawful drug use that may have caused a positive drug test result.

- Disability advocates may feel that we are opening the door to employer abuse. (None have publicly said so yet.)
- We believe that permitting such inquiries protects applicants who have not engaged in the illegal use of drugs, but who nonetheless test positive on a test for illegal use.

3. The Guidance broadly permits employers to invite voluntary self-identification in connection with affirmative action programs.

- Disability advocates may feel we are opening the door to abuse by employers. (None have publicly said so yet.)
- The Guidance provides safeguards against abuse by, inter alia, requiring employees to make clear that the self identification is voluntary, and that the information will be used solely for affirmative action purposes.

Existing Guidance: **Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance**

This Interim Guidance sets forth a framework for analyzing the legality of "disability-based distinctions" in employer provided health insurance plans. Under the Guidance, a "disability-based distinction" is a distinction that singles out a particular disability or group of disabilities (e.g., an AIDS-only benefit cap). Such a disability-based distinction violates the ADA unless the employer can prove that it is not being used as a subterfuge. The employer can meet its burden by demonstrating, inter alia, that the disability-based distinction is necessary to ensure the continued survival of the insurance plan, or is justified by the risks or costs associated with the disability.

Status: The Interim Guidance was issued on June 8, 1993. Final, more comprehensive guidance on the impact of the ADA on employer provided health insurance is under development. The final guidance will be published in the Code of Federal Regulations after a period of notice and comment by the public and will provide further information regarding the legality, in light of ADA, of various health insurance practices.

Political Issues:

The Interim Guidance states that a different level of benefits in an employer-provided health insurance plan for "mental/nervous" conditions is not a "disability-based distinction" and therefore need not be defended by the employer.

- Some mental health advocacy groups are highly critical of this provision. They believe that the ADA requires parity for mental health insurance benefits, and that our analysis is specious.

- Our position is that broad distinctions (such as the "mental/nervous" category) -- which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities -- are not distinctions based on disability.

    - In addition, there is nothing in the language of the statute itself, or in its legislative history, that suggests that the ADA should be the vehicle for achieving parity for mental health insurance benefits.

    - It also appears that the parity issue is more properly resolved in the context of health care reform.

Future Guidance: **Definition of the Term "Disability" Under the ADA**

A draft EEOC Compliance Manual section entitled "Definition of the Term Disability" sets forth the analytical framework for determining whether an individual has a "disability" as defined by the ADA. The 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.

Status: The draft Compliance Manual section has been coordinated with all EEOC offices and with other federal agencies. With the exception of the comments of the Department of Labor (DOL), all comments made in the coordination process have been incorporated or reconciled as appropriate. Following the resolution of our differences with DOL, the section will be sent to the Commission for final approval.

Political Issues

1. The draft section contains a number of provisions relevant to psychiatric disabilities that have long been requested by disability advocates. They include:
   - the listing of concentrating, processing information, and functioning in social settings as examples of major life activities;
   - a statement that episodic disorders, such as bipolar disorder, which remit and then intensify, may be substantially limiting; and
   - an example showing a person with schizophrenia who can function well on medication, but who is considered substantially limited in major life activities because he cannot care for himself without the medication.

2. The draft section states that an impairment substantially limits the major life activity of working if it significantly restricts a person's ability to perform either a class of jobs, or a broad range of jobs in various classes.
   - DOL wants us to extend coverage to persons who are significantly restricted in performing a narrow range of jobs.
   - EEOC's Final ADA Regulation (issued in 1992) limited coverage under the "working" prong to class/broad range; in the accompanying Appendix we specifically said that "narrow range" is not covered. DOL raised these specific objections when the Regulation and Appendix were developed, but ultimately backed off. No other agency, including the Department of Justice, disagrees with our formulation of the "working" issue.

3. The draft section makes clear that a person is covered under the "regarded as" prong if s/he is treated as having a substantially limiting impairment.
   - This clarification was made in response to Justice's concern that our "regarded as" formulation was too restrictive; Justice agrees with the revised section.

Future Guidance: **The ADA and Psychiatric Disabilities**

A consistently high number of ADA charges involve psychiatric disabilities. These charges raise questions that are legally and factually complex, as well as politically controversial. Guidance on ADA and psychiatric disabilities will address a variety of issues including disclosure and documentation of psychiatric disability, conduct, discipline, and reasonable accommodation.

Status: The enforcement guidance is under development. To assist us in the policymaking process, informational meetings have been conducted with the Bazelon Center for Mental Health Law, the Office of Technology Assessment, the Center for Mental Health Services (HHS), and with individual mental health professionals.

Political Issues:

1. As urged by mental health advocacy groups, activities that are typically impacted by psychiatric disabilities will be discussed in the "major life activities" section of the guidance. The draft Compliance Manual section on "Definition of the Term Disability" also includes several such activities in its discussion of "major life activities."

2. As urged by mental health advocacy groups, episodic disorders, which remit and then intensify, will be discussed in the guidance. Episodic disorders are also discussed in the draft Compliance Manual section on "Definition of the Term Disability."

3. As urged by mental health advocacy groups, the draft guidance will make clear that the positive effects of medication should not be considered when evaluating whether an underlying psychiatric impairment is "substantially limiting."

4. Reasonable accommodations for persons with psychiatric disabilities often require flexibility in scheduling, leave, supervisory style, and procedures. Certain kinds of accommodations are particularly controversial:

- Some advocacy groups believe that the ADA requires employers to change supervisors as a reasonable accommodation. Employers are vehemently opposed. The Commission has not taken a position on this subject.
- Some employers support the monitoring of medication as a reasonable accommodation. However, many persons with psychiatric disabilities strongly oppose medication monitoring as paternalistic. The Commission has not taken a position on this subject.
- Some advocacy groups believe that co-worker training is a reasonable accommodation. The Commission has not taken a position on this subject.

NOTE: Benefits for persons with psychiatric disabilities are addressed in the talking points on health insurance and long term disability.

Future Guidance: **Reasonable Accommodation and Undue Hardship Under the ADA**

Central to the protection afforded by the ADA is the requirement that an employer make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship. A draft Compliance Manual section provides detailed guidance for investigators to use when confronted with issues related to the duty to provide reasonable accommodation and/or the undue hardship defense.

Status: The draft is being reviewed within the Office of Legal Counsel in preparation for coordination with Commission offices.

Political Issues:

1. What is the meaning of Undue Hardship in the context of reasonable accommodation for psychiatric disabilities?

- Reasonable accommodation for persons with psychiatric disabilities will normally involve "significant difficulty," rather than "significant expense."

  - Employers are pushing for bright lines (or safe harbors) to determine whether an accommodation involves "significant difficulty."

  - The Commission, declining to provide safe harbors, has consistently supported a case-by-case approach to reasonable accommodation and undue hardship.

2. When does the effect of a reasonable accommodation on co-workers amount to an undue hardship?

- Employers are arguing that, at some point, poor co-worker morale becomes poor co-worker performance and thus amounts to a "significant difficulty."
- We have said that poor co-worker morale alone does not constitute undue hardship. We have not addressed the slippery slope argument.

3. Can a job transfer for the purpose of obtaining better medical treatment ever constitute a reasonable accommodation?
- The Ninth Circuit approved such an accommodation in Buckingham v. U.S., 998 F.2d 735 (1993).
- The Commission has not yet taken a position on this issue.

NOTE: Reasonable accommodations relating to psychiatric disabilities are discussed in the talking points on ADA and Psychiatric Disabilities.

Unresolved Issue: **"Mental/Nervous" Distinctions in Long Term Disability (LTD) Plans**

LTD plans typically limit benefits for "mental/nervous" conditions to two years, but do not similarly limit benefits for physical conditions. Is this distinction a "disability-based distinction" violative of the ADA unless shown not to be a "subterfuge" to evade the Act?

Status: The Office of Legal Counsel is in contact with field offices on several pending charges involving this issue. An options paper is being developed for Commission review.

Political Implications:

- Mental health advocacy groups strongly urge us to say that limitations in long term disability benefits for mental disability are "disability-based distinctions" and therefore violate the ADA unless shown not to be a subterfuge.

    - They argue that the "mental/nervous" analysis in the Interim Guidance on health insurance does not apply because -- unlike treatment for mental/nervous conditions which is available to people with and without disabilities -- long term disability is available only to people with actual disabilities.

    - They also argue that, since long term disability (unlike employer provided health insurance) involves merely wage replacement (and not coverage for treatment), the traditional employer arguments about uncontrollable mental health costs do not apply here.

- If we say that limitations in long term disability benefits for mental disability are "disability-based distinctions" and therefore violate the ADA unless shown not to be a subterfuge, we will likely compel the present LTD system to change.

    - However, it is unclear whether the change would be increased coverage of "mental/nervous" conditions, decreased coverage of physical conditions, or total elimination of LTD coverage -- any of which would be legal under the ADA. The latter two alternatives would obviously place persons with disabilities at a further disadvantage.

Unresolved Issue: **Interaction Between ADA Reasonable Accommodation Requirements and Collective Bargaining Agreements**

What is the relationship between ADA's duty to make reasonable accommodation and the NLRA's duty to bargain with labor union representatives over wages, hours, and terms and conditions of employment? When should it be considered an undue hardship for an employer to provide a reasonable accommodation that is inconsistent with the terms of the applicable collective bargaining agreement?

Status: A document detailing the various options for resolving this issue has been prepared, and a rulemaking has been scheduled in the regulatory agenda. However, since a joint substantive rule or memorandum of understanding with the NLRB would provide the clearest guidance for employers and labor unions, and would facilitate compliance with the ADA, the Commission has invited the NLRB to resume discussions toward a joint document. The NLRB has agreed to an initial meeting.

Political Implications:

- The disability rights community and organized labor are divided on the proper resolution of this issue. The disability rights community would give greatest weight to the need to provide reasonable accommodation, while organized labor would defer to the collective bargaining agreement.

- Employers are concerned about the prospect that compliance with the ADA's duty to accommodate will lead to unfair labor practice complaints filed with the NLRB. Therefore, they are reluctant to conciliate ADA charges without some assurance that they will be protected from unfair labor practice complaints. The greatest desire of employers is for guidance on how to comply with both laws.

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

Issue: The ADA and the FMLA both impose leave-related obligations on covered employers. Because the FMLA does not modify or affect the ADA, covered employers must coordinate their obligations under both laws. The Office of Legal Counsel has been working with the Department of Labor (DOL) during their FMLA rulemaking process to coordinate implementation of these laws. When DOL issues its final FMLA rule later this year, the Coordination Division will finalize an enforcement guidance on the ADA and the FMLA. (The guidance will also deal with the relationship of Title VII and the FMLA.)

Issues That Appear To Be Resolved:

- It is not automatically an undue hardship on an employer to provide more than the 12 weeks of FMLA medical leave as an accommodation under the ADA. However, employers evaluating undue hardship can take into account the cost and disruption of FMLA leave already taken by an employee.

- The FMLA interim final rule states that an employer may not require an employee to take a job with a reasonable accommodation when the employee is entitled to take, and prefers to take, FMLA leave. This is consistent with the ADA because an individual with a disability is not required by the ADA to accept an accommodation offered by the employer.

Politically Sensitive Issue

- The basic issue of whether an employee entitled to leave under ADA and FMLA (1) must take FMLA and ADA leave sequentially, or (2) is entitled to simultaneously enjoy the best of both laws, proved to be controversial when the Women's Legal Defense Fund (WLDF) learned that EEOC was considering the implications of both options last fall.

    - WLDF, supported by Senators Dodd and Harkin and Representatives Ford and Williams, argued vigorously to EEOC that the FMLA compelled a result under which employees would enjoy the best of both laws.
        - This would mean, for example, that an employee working part-time under the FMLA also would be entitled to accommodation in the job under the ADA.
        - It also would mean that an employee covered by both laws who was changing from full-time to part-time status would be entitled to continued health insurance under the FMLA and also to the right to remain in the same job, barring undue hardship, under the ADA.
    - In its written comments, EEOC identified this issue but did not take a public position. Although indications from DOL are that they interpret FMLA to mean that employees are entitled to the best of both laws, this issue will not be resolved until the final FMLA rule is issued later this summer.

Relationship Between the Rehabilitation Act and the ADA

Issue: Section 501 of the Rehabilitation Act prohibits federal sector discrimination based on disability and also requires the federal government to engage in affirmative action based on disability. Title I of the ADA prohibits discrimination based on disability by certain private employers and state and local employers. What is the relationship between the two statutes?

Background

- Effective October 29, 1992, the Rehabilitation Act was amended to apply ADA legal standards in complaints alleging non-affirmative action employment discrimination. This means that Section 501 of the Rehabilitation Act is now substantively the same as the ADA with respect to non-affirmative action employment discrimination.

- The 1992 amendment does not affect the affirmative action provisions in the Rehabilitation Act. Therefore, with respect to affirmative action, the Rehabilitation Act remains substantively different from the ADA.

Political Implications

- The application of ADA legal standards in the area of non-affirmative action employment discrimination means changes in the way the federal sector operates -- particularly in the area of disability-related inquiries and medical examinations.

- The ADA rules regarding what types of disability-related inquiries and medical examinations are permissible are significantly more stringent than the old Section 501 Rehabilitation Act rules.

- Federal law enforcement agencies may oppose the application of the ADA standards regarding permissible inquiries and examinations on public safety grounds.

  - They may argue that public safety requires giving them unfettered discretion to inquire about the physical and mental condition of their applicants and employees.

  - These kinds of arguments have previously been raised by state and local law enforcement agencies covered under Title I of the ADA.

  - We have answered these arguments under the ADA as follows:

    - Congress did not exempt law enforcement agencies from the ADA.
    - The ADA permits all inquiries that are job-related and consistent with business necessity.

Civil Rights Issues in Health Care Reform
- Briefing Materials -

Questions and Answers About Civil Rights Issues In Health Care Reform

Why are civil rights provisions necessary for any legislation reforming the health care system?

One of the ills affecting the existing health care system is discrimination that appears in a variety of guises: e.g., insurance companies redlining minority and low-income communities, hospitals turning away expectant mothers because they have had little prenatal care, health care facilities refusing to treat and insurers refusing to cover persons with limited English proficiency. In a very real sense, for many, meaningful access to necessary health care is a function of their race, sex, national origin, among other characteristics, which is an untenable result. Therefore, as we strive to remove the barriers to health care, civil rights provisions that apply to all actors in the reformed system are essential to ensuring that care is available to all eligible persons.

If universal coverage is guaranteed under the new health care system, aren't anti-discrimination provisions superfluous?

No. Civil rights provisions are necessary to ensure that universal coverage is a reality for all persons, particularly those that have traditionally been underserved under the existing system, such as people of color and women. Without strong proscriptions against discrimination, providers and other actors in the reformed health care system will be permitted to continue practices that result in health care for only the most "desirable" persons, i.e., those with the resources to pay.

Are civil rights provisions in health care legislation duplicative of existing federal anti-discrimination laws?

Existing civil rights laws provide some protections, but there are significant gaps in that coverage. For example, Title VI of the Civil Rights Act of 1964 prohibits discrimination in all federally funded programs, including those that provide health care services, on the basis of race, color, and national origin. Similarly, the Section 504 of the Rehabilitation Act and the Age Discrimination Act prohibit discrimination on the basis of disability and age, respectively, in federally funded programs. However, no such protection is available for discrimination based on sex, religion, or sexual orientation. Moreover, health care providers, insurers, and other actors in the health care system who do not receive federal funding are not covered by these laws. In addition, the protections of the Americans with Disabilities Act extend only to persons with disabilities that affect major life activities. Thus, insurers could deny medical coverage to those persons who are predisposed genetically to breast or colon cancer, conditions for which a hereditary link has already been established, but who are not disabled within the meaning of the Act.

Finally, although Title VII prohibits discrimination on the basis of sex, race, and national origin, it applies only to employment and conditions of employment. Thus, although employers

offering health plans would be required to do so on a nondiscriminatory basis, even in the absence of any health care civil rights provisions, no such requirement presently exists for other actors in the health care system, such as insurers, health plans, and providers, many of which do not receive federal funds and have the ability to block access to health care by discriminating in ways that have been recognized as impermissible in other contexts. In addition, Title VII does not apply to employers of fewer than 15 employees. This excludes more than half of the employers in the United States and close to one-fifth of all working Americans.

The civil rights provisions apply to new classes of persons (specifically language, socio-economic status, sexual orientation, health status, and anticipated need for health services) other than those traditionally recognized as needing protection under the law. Does this addition of new protected classes in the health care context constitute an inappropriate expansion of civil rights law?

No. Ensuring that all eligible persons have access to health care is very much a civil rights issue. Anti-discrimination provisions are key to ensuring that health care truly is available on a universal basis. In the context of health care, there is a long history of excluding groups such as women, persons of color, as well as persons with illnesses that insurers or providers deem as too costly to treat. For example, a managed health care plan in Florida has a practice of disenrolling people who contract long-term illnesses such as AIDS. In New York, a hospital has segregated maternity patients, and as a consequence, limited the type of care available to them, based on whether they had private insurance or Medicaid. In other instances, insurers have refused to provide coverage to persons who speak little English, even after the affected person has promised to have a relative translate the materials. Expanding access to health care for all, which is the goal of the proposed comprehensive reform of the health care system, means ensuring that these practices are discontinued.

The existing health care system already is proliferated with lawsuits. What will be the impact of the creation of new areas of liability in this already litigious arena? For example, will hospitals have to keep a Farsi translator on their payrolls to comply with the anti-discrimination provisions?

Eradication of discrimination in health care is consistent with the goals of reform; consequently, elimination of the civil rights provisions because of the fear that they might be misused ultimately would subvert the purposes of the legislation. Moreover, imposing a new federal prohibition against discrimination in health care is not unduly burdensome for providers, health plans, and the like. For example, the federal government has extended protection to language minorities effectively without creating a situation where persons have a right to interpreters on demand, as the nation's experience with the Voting Rights Act has demonstrated.

GAPS IN EXISTING CIVIL RIGHTS LAWS

I. PROTECTED CLASSES:

TITLE VI is the primary civil rights statute applicable to health care providers. It prohibits discrimination by recipients of federal financial assistance, only on the basis of race and national origin.

- Only health providers that receive federal financial assistance are covered.
- A health plan that refuses to enroll federally subsidized individuals (Medicaid and Medicare recipients) might not be deemed a recipient of federal financial assistance.
- Title VI does not protect the classes that the Kassebaum amendment would strike - language, sexual orientation, income, health status or anticipated need for health services.
- Title VI does not protect, and therefore, does not provide remedies for discrimination against, women, the aged or persons with disabilities.
- There is no civil rights statute in existence that prohibits health care providers from discriminating against women or the aged.[1]
- There is no civil rights statute in existence that prohibits health care providers from discriminating against people based on their income,[2] language, sexual orientation, health status or anticipated need for health status.

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[1] Persons with disabilities may have some protections under the ADA. There is a phrase in that statute that includes the provision of medical services, but there are few court cases interpreting this phrase.

[2] The Hill-Burton Act prohibits recipients of Hill-Burton funds (hospitals and nursing homes) from discriminating based on race, national origin or "payor status" (Medicaid or Medicare). Health plans and other non-facility providers are not covered by the Hill-Burton Act.

Recipients are required to provide uncompensated care for 20 years. Many recipients are no longer subject to the uncompensated care provisions. Therefore, they can refuse to serve those unable to pay for services.

- Title VI does not protect racial and ethnic minorities from discrimination because income, language, sexual orientation, health status and anticipated need for health services can be used as a proxy for unlawful discrimination.

- The Voting Rights Act specifically recognizes that language discrimination is in appropriate based on a history of discrimination against certain language minorities. However, there is no corresponding recognition with corresponding protections in the area of health care.

II. ACTUAL DAMAGES, PUNITIVE DAMAGES & FEDERAL ENFORCEMENT POWERS:

TITLE VI provides injunctive relief for violations. It also provides the Secretary of HHS federal enforcement powers, including the power to withhold federal financial assistance. The U.S. Attorney General also has some enforcement authority. Courts have not ruled on the question of whether actual damages are available under Title VI.

- Any person discriminated against because of his or her race or national origin might not be fully compensated for violations of Title VI.

- Any person discriminated against because he or she is low-income, is limited english proficient, is sick or at risk of illness or is gay or lesbian, would not be fully compensated for discrimination, even intentional discrimination.

- Because Title VI does not cover women, the aged, persons with disabilities, those with low-incomes, etc., the federal government would have no power to sanction a federally funded health plan or health provider that discriminates against these classes of people. Neither the U.S. Attorney General, nor any federal agency would have the power to seek sanctions.

- The federal government would not have the power to sanction a health plan or health provider that is not deemed a recipient of federal financial assistance, even for intentional race or national origin discrimination.

- Other civil rights statutes require a party that discriminates to pay actual damages. A party who acts maliciously must pay punitive damages under many civil rights statutes. (e.g. The Fair Housing Act - TITLE VIII; Title VII - Civil Rights Act of 1991; Americans

with Disabilities Act). These statutes do not cover access to health care services for the classes protected in the Chairman's Mark.

- Title VIII was amended in 1988, after 20 years of insufficient enforcement, to include punitive damages. Congress determined that the statute provided a right without a remedy because the enforcement provision was toothless. The provision was inadequately enforced even with compensatory damages and some federal enforcement provisions.

LANGUAGE DISCRIMINATION IN HEALTH CARE

"Language" is not a "new" category of protected rights. As a primary characteristic of national origin, language is often a proxy for national origin and race discrimination.

- The Equal Employment Opportunity Commission has long recognized that national origin discrimination under Title VII of the Civil Rights Act of 1964 includes discrimination based on language. *See* 29 C.F.R. Ch. XIV, §1606.1.

- Section 203 of the Voting Rights Act, which requires language assistance in voting for Asian Americans, Hispanics and Native Americans, also recognizes the linkage between language and national origin, race and ethnicity.

- Title VI of the Civil Rights Act has been interpreted to prohibit the denial of access to federally assisted programs because of a person's limited English proficiency. *See* 35 Fed. Reg. 11595 and *Lau v. Nichols,* 414 U.S. 563 (1974) (bilingual education).

However, existing civil rights laws have not provided sufficient protection against language discrimination in health care. Title VI applies only to institutions receiving federal funds. The only enforcement tool that HHS has is to stop federal funding, and we know of no instance where HHS has done so for language discrimination. Moreover, private insurance companies freely discriminate against limited English proficient individuals.

- The Asian Pacific American Legal Center of Southern California has received complaints from Asian Americans who have been denied health insurance because they don't speak English. The pretext used is that the insured may not understand the policy, that they would not be able to participate effectively. In some cases, the insurance company refused coverage even after English speaking adult children assured the insurance company that they would interpret for their parents.

Without clear, unambiguous antidiscrimination protection for language, health care plans will be free to cherry pick for English-speaking nonimmigrant consumers. Time of immigration and English-speaking ability are closely linked. Recent immigrants from certain regions tend to have less experience with preventative medicine and more health problems, and, therefore, can have a greater initial need for health services. Some industry providers assume that language assistance will add to the delivery cost, but ignore system savings from delivery of timely appropriate care. Eliminating antidiscrimination protection would allow insurers and others to use language to redline out potentially more expensive patients, by simply refusing to put out program materials in nonEnglish languages and not providing language assistance.

Lack of translated materials and other language assistance creates a barrier that would preclude true universal coverage and access to health care for limited-English proficient Americans. Millions of Americans will not have real access to health care if health care system players remain able to discriminate against them on the basis of language.

- Two out of three Asian Pacific Americans speak an Asian or Pacific Island language with

over 2.3 million speaking English "not well" or "not at all." Over half-million Asian Pacific American households are linguistically isolated - that is no person over the age of 13 in the household can speak English very well.

- People with limited English proficiency have difficulties with all aspects of the enrollment process in government programs. Those unable to read program materials have difficulty understanding what programs exist, who is eligible and what documents to supply. they also have difficulty completing applications and speaking with intake workers. *See* GAO Fact Sheet "Asian Americans: A Status Report," March 1990.

- One San Diego study showed that a quarter of the Mexican Americans interviewed feared seeking health care because of their inability to speak English. 60% of the Southeast Asian refugees interviewed cited language as a major obstacle.

Lack of language appropriate care results in cost inefficient care and potentially fatal inadequate health care. The Senate Labor and Human Resources Subcommittee on Health received testimony in June 1993 submitted by the South Cove Community Health Center in Boston and the Association of Asian Pacific Community Health Organizations, that:

- patients are turned away from hospitals and other health care facilities because they did not bring their own interpreter;

- the inadequacy or absence of interpreters often results in misdiagnoses, delayed second class care, inaccurate medical histories, and failure to provide an emergency response in life-threatening situations;

- language and cultural barriers often result in delayed entry into the health care system, failure to receive routine screening such as annual physical check-ups, mammograms or PAP smears, and poor knowledge of health risks.

Some health care providers and state and local governments have already acknowledged the barriers presented by limited English proficiency.

- California's Department of Health Services, upon the recommendation of a working group composed of local health care departments, the California Medical Association, insurance companies and community health care advocates, has agreed to provide language assistance as part of its Medicaid Managed Care expansion.

- In January 1993, after the United States Conference of Local Health officers conducted a survey of local health departments showing language difficulties to be one of the primary barriers to providing health care to limited English proficient clients, the U.S. Conference of Mayors called on Congress and the Administration to increase the emphasis on and funding for multilingual health assistance activities, as well as to take other measures to address this growing problem.

May 1994

Summary of the Kassebaum Amendment

During the Senate Labor and Human Resources Committee mark-up, Senator Nancy Kassebaum (R-KS) offered an amendment to remove several important protected classes from the antidiscrimination provision of Chairman Kennedy's Mark: income, language, sexual orientation, health status and anticipated need for health services. The amendment also would have denied full relief for discrimination claims by limiting the remedies for violations of the antidiscrimination provision to injunctive relief. The Kassebaum amendment, if adopted, would have undermined the goal of achieving universal access to health care services in several important ways:

* The amendment would allow otherwise impermissible discrimination to occur in the health care system. For example, by excluding health status as a protected class, a health plan could limit individual enrollments on the basis of race or gender and justify its actions by claiming that the individual was excluded because she was unhealthy. Given that many women, particularly poor women, and people of color face barriers to quality health care services, their impaired health status could be used to exclude them from much needed health care services.

* Health care providers could deny benefits or coverage to individuals who are unhealthy or may become sick. Thus, providers could avoid serving certain poor communities where individuals who lack access to quality preventive health care services often experience more health care problems.

* Health insurers would be able to redline low income communities, thus, creating a two-tiered system of care where poor communities receive second-class health care services. A two-tiered health care structure -- one serving the poor and the other serving the wealthy -- undermines the very goal of health care reform to provide all eligible individuals with universal access to quality health care services.

* Eligible individuals could be denied health services because they were unable to pay the copayment, deductible, or premium.

* Without compensatory or punitive damages, there would be no meaningful disincentive for discrimination by actors in the new health care system.

* The amendment would mean that individuals wrongfully denied health benefits would not be reimbursed for additional health care costs.

Federal Sector Enforcement
- Briefing Materials -

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

MAY 11 1994

Honorable William (Bill) Clay
Chairman
Committee on Post Office
and Civil Service
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Last month I sent you a letter outlining the Administration's principles regarding our shared goal to improve the Federal equal employment opportunity complaint process. Since that time, we have been working very closely with the staffs of the House Education and Labor and Post Office and Civil Service Committees to develop alternative language consistent with the proposed principles.

As a result of this cooperation, we have identified a modified version of the Post Office and Civil Service Committee's bill that the Administration could support. While my staff remains available to resolve any remaining technical issues, it appears that we have agreement on all policy matters. The modified bill would:

- provide for a mandatory pre-complaint counseling process for all agencies with alternative dispute resolution (ADR) processes approved by the Equal Employment Opportunity Commission (EEOC);

- provide for the use of third party neutral counselors during the pre-complaint counseling phase;

- require the EEOC to develop pre- and post-complaint ADR guidelines for use by agencies with approved plans to facilitate the effective resolution of cases;

- remove EEOC's proposed authority to bring civil actions on its own behalf to enforce certain orders by its Administrative Judges, or the provisions of settlement agreements;

- expand the definition of administrative judge to include administrative law judges;

- broaden the EEOC's authority to review an administrative judge's findings of fact and conclusions of law;

- allow the Administration time to manage effectively the implementation of the bill by delaying the effective date until January 1997; and

- raise the standard by which stays will be issued and provide for agency comments regarding the issuance and extension of such stays.

With the above changes, the Administration would support House passage of H.R. 2721. I applaud your efforts to strengthen the EEOC and expedite the resolution of employment discrimination complaints by Federal employees.

Thank you for your consideration of the Administration's proposed changes to H.R. 2721.

Sincerely,

Leon E. Panetta
Director

Identical letter sent to Honorable William D. Ford, Honorable William F. Goodling and Honorable John T. Myers

Federal Sector EEO Leadership Responsibilities
Executive Order 12067
- Briefing Materials -

EEOC's Federal EEO Leadership Responsibilities

APPENDIX E

Legal Authorities

Section 717 of Title VII. In the 1972 amendments of Title VII of the Civil Rights Act (Section 717, 42 USC 2000e-16), the Congress required agencies to maintain affirmative employment programs to ensure enforcement of Federal equal employment opportunity policy; to apply the same legal standards to prohibited discrimination established for private employers to the Federal Government; and to eliminate discrimination that Congress found existing throughout the Federal employment system.

In enacting these requirements, Congress cited the need to eliminate discrimination in Federal employment. This discrimination was evidenced (1) by serious underrepresentation and exclusion of minorities and women in specific areas, agencies, regions, and grade levels; and (2) by systemic institutional barriers operating through various civil service rules and procedures, particularly non-job related selection and promotion techniques.

Section 717(b) reads as follows:

> "... The [EEOC] shall --
> (1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit ... shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment; ..."

Executive Order 11478. Requirements for Federal agency affirmative employment programs were first established by Executive Order 11478 in 1969.

The Executive Order as amended by Executive Order 12106 reads as follows:

> "It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government ... The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction..."

APPENDIX E

Reorganization Plan No. 1 of 1978. This Presidential directive transferred all Federal equal employment enforcement responsibilities vested in the Civil Service Commission to the EEOC.

Executive Order 12067. This Presidential directive gave EEOC lead coordinating responsibility for all Federal equal employment opportunity programs and activities. Pursuant to this authority, EEOC consults regularly with Federal agencies on Federal equal employment opportunity policy.

Civil Service Reform Act. This legislation directed EEOC to develop guidelines for a special recruitment program, designated the Federal Equal Opportunity Recruitment Program (FEORP). The statutory authority for program oversight was given to OPM (5 USC 7201) and requires that agencies conduct affirmative recruitment for those occupations and grades within their work force in which there is underrepresentation of minorities and women. Agency FEORP plans should result in more representative applicant pools from which to select Federal employees.

Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791). This legislation established within the Federal Government, an Inter-agency Committee on Handicapped Employees comprised of such members as the President may select, or their designees, whose positions are Executive Level IV or higher.

Miscellaneous
- Briefing Materials -

The Current State of the Law on Affirmative Action

Voluntary Affirmative Action Plans under Title VII

Title VII standards for **voluntary** affirmative action plans and affirmative action plans adopted pursuant to **consent decrees** are set forth in Johnson and Weber.

1. The plan must be designed to eliminate a manifest imbalance in traditionally segregated job categories.

2. The plan must not unnecessarily trammel the rights of the non-targeted group.

3. The plan must be temporary and not intended to maintain a racial or gender balance.

State and local governments are also subject to the constitutional standards for affirmative action, which are discussed below.

One open issue under Title VII is how employers should treat affirmative action concerns when making layoffs. Existing precedent, while not directly on point, suggests that the Court has reservations about applying affirmative action in the layoff context. In Wygant, the Court held that the employer violated the Equal Protection clause when, for affirmative action purposes, it disregarded a seniority system in making layoffs. The Court stated that the burden imposed by layoffs on non-targeted employees was too intrusive compared to the burdens imposed by hiring goals. It is likely that the Court would consider the burden imposed by layoffs as a factor under Title VII.

Court-Ordered Affirmative Action under Title VII

The Supreme Court established the Title VII standards for court-ordered affirmative action in Sheet Metal Workers. These standards are higher than those for voluntary affirmative action plans in that a showing of past discrimination is necessary before a court can order affirmative action. Assuming that predicate is met, Title VII permits affirmative action relief to be awarded to individuals who are not actual victims of discrimination.

Voluntary Affirmative Action under the Equal Protection Clause

The Supreme Court ruled that strict scrutiny applied to affirmative action plans implemented by state and local governments in Croson and Wygant. The plans must satisfy a compelling government interest in eliminating past discrimination and be narrowly tailored to meeting that goal.

1. A state or local government must demonstrate that there is a strong basis in evidence that it is adopting an affirmative action plan to remedy past discrimination. Interest in eradicating "societal" discrimination is not enough.

2. The plan must be narrowly tailored to accomplish the goals of the plan and the employer must show that less burdensome alternatives are not available.

Affirmative action measures undertaken by the federal government have been addressed in only a limited context. In Metro Broadcasting, the Supreme Court gave greater deference to Congress than to state or local governments and applied the lower standard of intermediate scrutiny to uphold FCC policies that granted preferences to minorities in broadcast licensing.

1. The government had an important interest in promoting diversity in broadcasting, which was determined to serve broad public interests in First Amendment values.

2. The policies were substantially related to achieving broadcasting diversity as there was an empirical nexus between minority ownership and broadcasting diversity.

It is unclear what the implications of Metro Broadcasting are for affirmative action undertaken by the federal government in the employment context.

Court-Ordered Affirmative Action under the Equal Protection Clause

The Court established the constitutional standards for evaluating court-ordered affirmative action in Sheet Metal Workers.

1. Court-ordered affirmative action is appropriate where there is a compelling government interest in eradicating pervasive and systemic discrimination.

2. Court-ordered affirmative action is narrowly tailored when it is flexible, temporary, and does not impose an unacceptable burden on non-targeted individuals.

The following are the Supreme Court cases typically drawn upon to analyze cases of affirmative action in employment:

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (Title VII and 42 U.S.C. § 1981))

Holding

Title VII "prohibits racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes." In addition, § 1981 is applicable to racial discrimination in private employment against White persons; the Act that ultimately became 42 U.S.C. § 1981 was intended "to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race."

Significance

This case is included, even though not an affirmative action case, because the holding laid the jurisdictional predicate for challenges to affirmative action plans.

United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) (Title VII)

Facts

United Steelworkers and Kaiser **voluntarily** entered into a collective bargaining agreement that included an affirmative action plan that was designed to remedy a conspicuous imbalance in craft jobs. The skilled craft jobs were almost exclusively white. The affirmative action plan provided that 50% of the openings in a training program for the skilled craft jobs would be reserved for African-Americans until the percentage of African-Americans in the skilled craft jobs was representative of their percentage in the local work force. There were no skills requirements for admission to the training program.

The case arose when more senior white employees were rejected and less senior African-American employees were selected for the training program and filed a class action suit under Title VII.

Holding

Title VII does not prohibit private, voluntary race-conscious affirmative action plans.

Discussion

- Interpreting Title VII to preclude race-conscious affirmative action would be at odds with the statute's goal to eliminate discrimination.

- The explicit language of Section 703(j) states that Title VII does not "require" employers to grant preferential treatment because of race, but this language does not prohibit employers from doing so.

- The Court concluded that Kaiser's plan fell on the permissible side of affirmative action because *it was designed to break down patterns of racial segregation and hierarchy, and to open employment opportunities to African-Americans in jobs that have traditionally been closed to them.*

- At the same time, the Court noted, *the plan does not unnecessarily trammel the rights of non-minorities because it does not require their discharge and replacement with African-American new hires, nor does it create an absolute bar to their advancement.*

- The Court also reasoned that *the plan was temporary and not intended to maintain a racial balance, but to eliminate a manifest racial imbalance.*

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (Title VII and Sections 1981 and 1983)

Facts

In 1977, Respondent Stotts, a Black firefighter with the Memphis Fire Department, filed a class action in district court alleging a pattern or practice of racial discrimination in hiring and promotion by the fire department and city officials. In 1980, a consent decree was entered with the expressed purpose of remedying the fire department's hiring and promotion practices with respect to Blacks. The consent decree did not contain any provisions regarding layoffs or reductions in rank, or awarding competitive seniority.

In 1981, the city announced layoffs due to budget deficits. The layoffs were to be based on city-wide seniority, with the possibility of "bumping down" to a lower-ranked position to avoid being laid off. At Respondents' request, the district court enjoined the city from applying its seniority system in effectuating the proposed layoffs insofar as it would decrease the percentage of Blacks in specified job classifications. The court based the injunction on its conclusion that the proposed layoffs would have a racially discriminatory effect and that the seniority system was not bona fide. The court then approved a modified layoff plan submitted by the city. The layoffs were carried out pursuant to the modified plan and resulted in a number of White firefighters with more seniority being laid off or bumped.

On appeal, the Sixth Circuit affirmed, even though it concluded that the district court was in error in holding that the city's seniority system was not bona fide. The Supreme Court reversed.

[Note -- the United States argued as amicus curiae in support of Petitioners, the fire department, city officials, and union.]

Holding

The case was not moot (for several reasons). The district court's injunction could not be justified either as an effort to enforce the consent decree or as a valid modification of the decree.

Discussion

- The district court exceeded its powers in entering an injunction requiring White employees with more seniority to be laid off, when the otherwise applicable seniority system would have required the layoff of Black employees with less seniority. The court of appeals erred in affirming, and the alternative reasons advanced by the appellate court lacked support.

- The injunction went beyond enforcing the terms of the consent decree. The scope of a consent decree must be discerned within its four corners. Here, the decree made no reference to layoffs or demotions, and there was no indication of any intent to depart from the existing seniority system.

- The injunction could not be supported as carrying out the purposes of the decree because the expressed purpose of the decree was to remedy past hiring and promotion practices. That remedy did not include displacing White employees with seniority over Blacks.

- The district court did not have inherent authority to modify the decree on the grounds that the unexpected layoffs would undermine the affirmative action set out in the decree and impose undue hardship on the respondents when the modification conflicted with a bona fide seniority system.

- The court of appeals overstated the authority of the trial court to disregard a seniority system in fashioning a remedy where a plaintiff proves an employer's pattern or practice has a discriminatory effect on Black applicants or employees. Relying on Teamsters and Franks v. Bowman and considering the make-whole relief policy behind Section 706(g) of Title VII, the Court noted that individual members of a plaintiff class must demonstrate that they have been actual victims of the discriminatory practice in order to be awarded competitive seniority. Even then, a class member is not automatically entitled to have a nonminority employee laid off to make room for him.

- Finally, the Court did not address whether the city, a public employer, could have lawfully taken this course on its own initiative as a means of voluntary affirmative action.

Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (Title VII and Equal Protection)

Facts

This case involved a challenge to **court ordered** race conscious relief. In 1975, the district court found the union and apprenticeship committee (petitioners) guilty of intentional discrimination against nonwhites in recruitment, selection, training and admission to the union. In 1982-83, the district court found the petitioners in civil contempt for disobeying its earlier remedial orders. The court 1) assessed contempt penalties to be used to finance an Employment, Training, Education and Recruitment Fund to increase nonwhite membership in the union and apprenticeship program; 2) adopted an affirmative action plan establishing a 29.23% nonwhite membership goal to be met by August 1987, and 3) established other interim goals and ratios.

The petitioners and the Solicitor General, argued that the membership goal and Fund order exceeded the scope of the district court's remedial authority under § 706(g) of Title VII because it benefitted individuals not shown to be identifiable victims of employment discrimination. Petitioners also argued that the membership goal and Fund Order were unconstitutional.

Holding

Justice Brennan wrote an opinion joined by a majority in part and a plurality in part. A majority of the Court held that a district court may, in appropriate circumstances, order preferential relief benefitting individuals who are not the actual victims of discrimination as a remedy for Title VII violations. A majority also concluded that the relief in this case did not violate either Title VII or the Constitution. Justice Powell wrote separately, setting forth a somewhat different analysis of the Constitutional issues.

Discussion

- § 706(g) of Title VII prohibits a court from ordering a union to admit any individual who was "refused admission ... for any reason other than discrimination." This language does not bar a court from ordering affirmative relief for discrimination that might incidentally benefit non-victims. The provision means only that where a plaintiff demonstrates that a union has engaged in unlawful discrimination, but the union can show that a particular individual would have been refused admission even absent discrimination, for example because that individual was unqualified, a court cannot order the union to admit that individual.

- Reading §706(g) to permit race-conscious relief for Title VII violations "furthers the broad purposes underlying the statute." In some instances, it may be necessary to require a discriminating union or employer to take affirmative steps, beyond making victims whole, in order to effectively enforce Title VII.

- Race-conscious relief to remedy past discrimination should be awarded only where necessary and, even then, carefully tailored to fit the nature of the violation sought to be

corrected. The fund and membership goals in this case met those standards: they were necessary to remedy pervasive and egregious discrimination; the district court was flexible in applying the membership goal by twice adjusting the deadline and continually approving changes in the size of apprenticeship classes to account for economic conditions; and the membership goal and fund order were temporary measures which did not unnecessarily trammel whites' interests by barring white applicants or adversely affecting existing white members.

As to the challenge based on the Equal Protection Clause, although the Court had not agreed on the proper test for analyzing the constitutionality of race conscious remedies, the relief ordered in this case passed even the most rigorous test, i.e., "it [was] narrowly tailored to further the Government's compelling interest in remedying past discrimination."

Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland et al., 478 U.S. 501 (1986) (Title VII)

Facts

An organization of black and Hispanic firefighters, the Vanguards, brought suit against the City of Cleveland primarily alleging race and national origin discrimination in promotions. The labor union representing the firefighters, Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C., intervened. The court approved a consent decree agreed to by the City of Cleveland and the Vanguards, setting aside certain promotion positions for minority candidates and establishing minority promotional goals for each rank. The union would not enter into the consent decree because it objected to the affirmative action provisions. The consent decree imposed no obligations on the labor union. The court entered the consent decree over the union's objections. The union petitioned the Supreme Court for a writ of certiorari, arguing that the last of sentence of § 706(g) limits court ordered relief to individual victims of discrimination.[1] The United States supported the position of the union as amicus curiae.

Holding

The Court held that § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, § 2000e-5(g), does not apply to relief awarded in a consent decree, because such decrees were **voluntary** in nature. The Court decided that it need not address whether similar relief would be appropriate if ordered by a court.

Discussion

- The Court had already held that race-conscious affirmative action was permissible in voluntary affirmative action plans, even if it benefits individuals who were not actual victims of discrimination. Steelworkers v. Weber, 443 U.S.193 (1979). It found this same standard to be applicable to voluntary plans embodied in consent decrees.

- The Court also found that since § 706(g) was not concerned with voluntary agreements, a consent decree was not invalid simply because it provided for relief that may not have been available through litigation on the merits.

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[1] The pertinent part of § 706(g) reads:

> "[n]o order of the court shall require ... the hiring reinstatement, or promotion of an individual as an employee, ... if such individual... was refused employment or advancement...for any reason other than discrimination on account of race, color, religion, sex, or national origin ... .

42 U.S.C. § 2000e-5(g).

- The court also rejected the argument that the consent decree was invalid because the union was not a party to the agreement. The Court described the union's rights as a party intervenor as follows, "Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have the power to block the decree merely by withholding its consent." 478 U.S. at 529.

- The Court noted but did not address the fact that, as a public entity, the City of Cleveland's actions were also subject to the Fourteenth Amendment. This question was not before the Court in this petition.

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) (Title VII)

Facts

The Santa Clara County Transportation Agency adopted a **voluntary** affirmative action plan for hiring and promoting women and minorities because they were significantly underrepresented in certain job categories including skilled crafts. The plan's long-term goal was to achieve a workforce that was representative of the proportion of women and minorities in the local labor force. The plan also set interim goals to track its progress toward the overall goal. The plan provided that hiring officials could consider gender or ethnicity as one factor in making hiring decisions or promotions to traditionally segregated job classifications in which women and minorities had been significantly underrepresented.

The case arose when the Agency promoted a woman into a road dispatcher position over a white male who was ranked slightly higher in the selection process. At the time, women were not employed in any skilled craft jobs and a woman had never been hired as a road dispatcher. The hiring official decided to promote the female, in part because of affirmative action concerns.

Holding

The Agency's plan was valid under Title VII. There were no constitutional claims at issue. The Court specifically rejected applying equal protection analysis to Title VII. "The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution." (emphasis in the original)

Discussion

In analyzing the Agency's plan, the Court relied on the criteria set forth in United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979). A plan is valid if:

1) it is intended to eliminate a manifest imbalance in traditionally segregated job categories;

- *An employer must show that there is a disparity between the representation of the targeted group in the employer's workforce and that of the relevant labor pool. If a job requires certain skills, then the relevant labor pool includes only those individuals with the relevant skills. If a job does not require any specific skills, then the relevant labor pool becomes the general population. Here, the Court found that this prong was satisfied by the absence of any women in skilled craft jobs and in the fact that a woman had never been hired as a road dispatcher.*

- *An employer is not required to show that it discriminated in the past or that it is responsible for the disparity in its workforce to justify implementing a plan.*

2) it does not unnecessarily trammel the rights of the non-targeted group; and

- *The plan cannot absolutely bar the opportunities of the non-targeted group. An employer could not restrict hiring to only individuals within the protected group. An employer would be allowed to hire minorities into a certain percentage of jobs. A targeted individual must be qualified for the position at issue, although that individual need not be the most qualified individual.*

3) it is temporary and not intended to maintain a racial balance.

- *The plan need not have a specific termination date where its requirements are flexible. After the goals of the plan have been met, the employer cannot continue it to maintain a balanced workforce.*

Martin v. Wilks, 490 U.S. 755 (1989) (Title VII and Equal Protection)

Facts

The Ensley Branch of the National Association for the Advancement of Colored People (NAACP) and seven black individuals had filed separate class action complaints against the City of Birmingham, Alabama and the Jefferson County Personnel Board alleging race discrimination in employment. These complaints were resolved when the parties entered into consent decrees providing for hiring and promotional goals for black firefighters. A group of white firefighters, the Wilks respondents, sued the City and the Board for denying them promotions. They alleged that the promotion of less qualified black firefighters pursuant to the consent decrees resulted in reverse discrimination. The City and the Board argued that their hiring and promotional policies could not be attacked as discriminatory since they were acting in accordance with the consent decrees. The Birmingham Firefighters Association (BFA) had participated as amicus curiae in public hearings on the consent decrees and had unsuccessfully sought to intervene in the proceedings and to enjoin the entering of the consent decrees. Although, the BFA raised the same objections to the consent decrees raised by the white firefighters in this case, these particular firefighters were not a party to the prior proceedings resulting in the consent decrees. A groups of black individuals, the Martin petitioners, intervened in their individual capacities to defend the consent decrees.

The District Court found that the hiring and promotional practices of the City and the Board were required by the consent decrees and thus, not subject to collateral attack. The Eleventh Circuit reversed and held that, "[b]ecause ... [the Wilks respondents] were neither parties nor privies to the consent decrees, ... their independent claims of unlawful discrimination are not precluded." 490 U.S. at 761, citing, In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (11th Cir. 1987).

Holding

A consent decree is not shielded from a collateral attack by individuals who were not parties to the decree.

Discussion

- The Court relied on the principle that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." 490 U.S. at 761, citing, Hansberry v. Lee, 311 U.S. 32, 40 (1940). The court stated that a consent decree can only resolve the disputes between the parties to the decree not the disputes of those that are "strangers" to the proceedings.

- The Court rejected the petitioners argument that respondents had a duty to timely intervene in the proceedings that resulted in the consent decrees in order to protect their rights. The Court held that the respondents had no duty to intervene, but rather it was incumbent upon petitioners to join all potentially affected parties to secure the terms of the decrees from possible collateral attack.

Note: On remand, in Bennett v. Arrington, 806 F. Supp. 926 (N.D. Ala. 1992), the district court held that the City's employment actions "taken pursuant to the consent decree constituted valid, constitutional decisions." 806 F.Supp. at 931. The court ruled that:

- The constitutional strict scrutiny standard was the appropriate standard for review because the challenged employment decisions were made by a public employer.

- The Civil Rights Act of 1991 did not apply because the prerequisites for preclusion under that Act - i.e., actual notice of the decree, of the right to challenge the decree and of the opportunity to object to the decree or adequate representation of through another's challenge on the same legal basis under similar legal facts, assuming no intervening change in the law - were not satisfied.

- The City was able to satisfy the requirement articulated in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), that prior to entering into the consent decree it had strong evidence to believe that there had been discrimination by the City in the hiring and promotion of blacks and women as firefighters. The City was not required to prove that it had engaged in such discrimination.

- The court also found that the consent decree was narrowly tailored to achieve its objectives. Alternative measures had been tried but were ineffective. The goals established by the decrees were flexible and of limited duration. They sought to attain rather than maintain a level of representation among blacks and women, commensurate with their availability in the relevant labor force. The plan also did not unnecessarily trammel the employment opportunities of white firefighters since half of the promotions would go to white employees. U.S. v. Paradise, 480 U.S. 149 (1987)

Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (Title VI and Equal Protection)

Facts

In 1973 and 1974, the Medical School at the University of California at Davis denied admission to Allan Bakke, concluding that his qualifications did not justify admitting him under its general admission program. His academic qualifications were, however, equivalent to those of other students being admitted under the program at the time. During those years, Davis operated a special admissions program under which a certain number of places in the class were reserved for African-Americans, Mexican Americans, Asians and Native Americans. Bakke brought suit in state court, claiming that the admissions program violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 and the California Constitution.

Holding

A deeply divided Supreme Court held that the Equal Protection Clause and Title VI required invalidation of the program, since it involved strict racial preferences. The Court concluded, however, that neither the Equal Protection Clause of the Fourteenth Amendment nor Title VI of the Civil Rights Act required invalidation of all race conscious affirmative action programs.

Discussion

Four Justices voted to uphold the plan and four Justices voted to invalidate it. Justice Powell cast the deciding vote. The portion of Justice Powell's opinion -- dealing with the constitutional issue -- with which four Justices agreed, stated:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.

- An admissions program of an institution receiving federal funds -- such as Davis -- violates Title VI when it uses strict racial preferences.

- An admissions program that allows consideration of race as an affirmative factor without using clear racial preferences will not violate Title VI or the Equal Protection Clause.

- It appears that interest in educational diversity could support some use of racial classifications, but there was no majority opinion and that point remains unclear.

Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality) (Equal Protection)

Facts

The Public Works Employment Act of 1977 contains a provision -- the "minority business enterprise" ("MBE") provision -- that requires that, absent a waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members (i.e., Negroes, Spanish speaking, Orientals, Indians, Eskimos and Aleuts). Several associations of construction contractors and subcontractors brought suit seeking declaratory and injunctive relief alleging that they had sustained economic injury as a result of the MBE provision and claiming that the MBE provision on its face violated the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment.

Holding

Justice Burger wrote an opinion joined by two other justices, and Justice Marshall wrote an opinion joined by two other justices. All six justices concluded that the MBE provision did not violate the Constitution. They also found that the objectives and the means behind promulgating the MBE were within the power of Congress and that use of race-based criteria in this instance did not violate the Equal Protection Clause. The justices were divided on the question of how to approach the equal protection analysis.

Discussion

- Burger's opinion noted that "[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination," but stated that it must approach its task with "appropriate deference to the Congress."

- The opinion concluded that the objectives of the legislation were within the power of Congress (i.e., Congress through the Spending Power, the Commerce Power and the Fourteenth Amendment had the power to regulate state and local grantees and private prime contractors). Moreover, the opinion noted that the MBE program primarily regulated state action in the use of federal funds voluntarily sought and accepted by the grantees subject to certain conditions.

- The second prong of the opinion's analysis was whether, as a means to accomplish plainly constitutional objectives, Congress may use racial and ethnic criteria as a condition attached to a federal grant.

- Opinion rejects the contention that in the remedial context Congress must act in a "color-blind" fashion. Indeed, the opinion noted that where federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor.

- Opinion recognized that failure of non-minority firms to receive certain contracts is an

incidental consequence of the program, not part of its objective. "It is not a constitutional defect in this program that it may disappoint the expectations of non-minority firms."

- It was within congressional power to act on the assumption that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

- Opinion concluded that the legislation was not fatally underinclusive because it did not include every identifiable minority group. The opinion noted that Congress could undertake the kind of limited remedial effort represented by the MBE program.

- Opinion found that challenge to the MBE program being overinclusive must await future cases where specific application can be judged. The opinion, however, concluded that it was significant that the administrative scheme provided for waiver and exemption.

Opinion by Marshall concurring in part and dissenting in part:

- Proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the effects of past discrimination is whether the classifications serve <u>important governmental objectives</u> and are <u>substantially related</u> to achievement of those objectives.

- Judged under this standard, the 10% minority set-aside is plainly constitutional.

Wygant v. Jackson Board of Education, 476 U.S. 265 (1986) (Equal Protection)

Facts

The Jackson school board agreed to a provision in the collective bargaining agreement with the teachers' union that layoffs would be made in reverse order of seniority, except that minorities would not be laid off in a percentage greater than the percentage of minorities employed at the time of the layoff. During layoffs in 1974, the Board did not follow the procedure because it claimed it had not engaged in prior discrimination. A state court upheld the layoff provision as an attempt to remedy societal discrimination. During layoffs in 1976-77 and 1981-82, the Board followed the layoff procedure and non-minority teachers who were laid off as a result filed suit.

Holding

The plurality applied **strict scrutiny** to the school board's use of racial classifications in an affirmative action plan and held that the plan was not justified by a compelling state purpose for which the means chosen to effectuate that goal are narrowly tailored. *N.B. The Court did not address Title VII standards for affirmative action.*

Discussion

- The plurality rejected the argument that the layoff provision incorporating a racial classification could be justified as an attempt to remedy the effects of societal discrimination. Thus, the plurality rejected the school board's contention that it sought to retain minority teachers to provide role models to minority students.

- The plurality concluded that a public employer may institute a racial classification where it has a strong basis in evidence for concluding that remedial action is necessary. In this case, there was no such finding of prior discrimination.

- Three justices would find that the layoff provision was also not narrowly tailored because of the burden it imposed on innocent parties. Less intrusive means of meeting the remedial purpose, such as hiring goals, were available that would not so burden innocent individuals.

- Justice O'Connor joined in all aspects of the plurality opinion except the discussion of whether the layoff provision was narrowly tailored. Consideration of this prong was unnecessary in her view because the lower courts incorrectly applied a reasonableness standard, rather than strict scrutiny, and because the layoff provision had no relation to hiring goals or remedying employment discrimination since it was tied to the number of minority students rather than the percentage of minorities in the relevant labor market.

- Justice White concurred in the judgment without addressing the criteria for evaluating affirmative action plans under the Equal Protection clause. In his view, the layoff plan was used to achieve a racial balance by firing whites and hiring blacks, which he found inherently repugnant to equal protection principles.

U.S. v. Paradise, 480 U.S. 149 (1987) (Equal Protection)

Facts

In 1972, the district court found that the Alabama Department of Public Safety had systematically excluded blacks from state trooper jobs in violation of the Fourteenth Amendment. Eleven years later, blacks still had not attained upper rank jobs and the Department had failed to comply with two consent decrees requiring it to develop a valid promotion procedure that had no adverse racial impact. The district court therefore ordered that at least 50% of promotions be awarded to blacks if qualified black candidates were available, if the rank was less than 25% black and if the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank.

Holding

A court order requiring one-black-for-one-white promotion was permissible under the Equal Protection Clause of the Fourteenth Amendment. Although the Supreme Court noted that it had not yet reached a consensus on the appropriate constitutional analysis when a racial or ethnic distinction is made for remedial purposes, it asserted that the relief ordered in Paradise survived even strict scrutiny analysis: it was "narrowly tailored" to serve a "compelling governmental purpose."

Discussion

- The race-conscious relief ordered by the district court was justified by a compelling governmental interest in eradicating the Department's pervasive, systematic and obstinate discriminatory exclusion of blacks.

- The one-for-one promotional requirement was narrowly tailored to serve its purposes: the requirement was necessary to eliminate the effects of the Department's long term, open and pervasive discrimination, to ensure expeditious compliance with the two consent decrees, and to eradicate the effects of the Department's delay in producing a non-discriminatory promotion procedure.

- The one-for-one requirement was flexible in that it applied only when the Department needed to make promotions and could be waived by the court if there were no qualified black troopers. Also, the requirement was temporary, its term contingent upon the Department's implementation of valid promotional procedures.

- The numerical relief bore a proper relation to the percentage of blacks in the relevant workforce, since the district court had ordered 50% black promotions until each rank was 25% black, and blacks constituted 25% of the relevant labor market. The 50% figure was not itself the goal but merely represented the speed at which the 25% goal was to be achieved, some promptness being justified by the Department's history of discrimination and delays.

- The one-for-one requirement did not impose an unacceptable burden on white applicants for promotion, since the requirement was temporary, it was limited in nature, it simply postponed rather than barred advancement of some whites, and it did not require discharge of whites or the promotion of unqualified blacks over qualified whites.

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (Equal Protection)

Facts

The city of Richmond adopted a 30% set-aside program for minority businesses under which prime contractors awarded construction contracts were required to subcontract with one or more minority business enterprises (MBEs). The city relied on a study that showed that 50% of the city's population was African-American but less than 1% of its construction contracts were given to minority businesses; the lack of MBE members in contractor associations; and statements that there was widespread discrimination in the construction industry.

Holding

State use of racial classifications is subject to strict scrutiny and the city failed to demonstrate a compelling governmental interest in remedying past discrimination or that the means selected were narrowly tailored to meet that interest.

Discussion

- Although the scheme was allegedly remedial, there was no prima facie showing that the city or its prime contractors had discriminated in the past because of race.

- The comparison with the minority population was inappropriate because the proper comparison should have been with the percentage of MBEs in the relevant market that were qualified to undertake subcontracting work. Further, there was absolutely no evidence that the city or its contractors had discriminated against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in the city's construction industry, leading the majority to question the alleged remedial purpose of the program.

- The plan was not narrowly tailored since it entitled any of the named minorities from anywhere in country to an absolute preference over others based on their race. The majority also noted that the city had not considered less burdensome, race-neutral means.

Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1989) (Equal Protection)

Facts

Metro raised an equal protection challenge to two FCC policies designed to promote programming diversity through increasing minority ownership of radio and television stations. One policy allowed the FCC to award preferences for minority ownership and participation in management in comparing applications for new radio or television broadcast stations; the other allowed distress sales to be made to minority enterprises under limited circumstances.

Holding

The FCC policies did not violate the Equal Protection Clause. The policies were benign race-conscious measures mandated by Congress and were **substantially related to achieving the important government interest of broadcast diversity**. (Intermediate scrutiny). *N.B. The policies were not defended as attempts to remedy past discrimination.*

Discussion

- The government has an important interest in promoting broadcast diversity. Such diversity protects the public's right to receive the widest possible dissemination of information from diverse groups. Under First Amendment principles, the rights of the public were paramount over the rights of broadcasters. Diversity of views and information over the airwaves serves important First Amendment values, which benefits everyone, not just minorities.

- The FCC's policies were substantially related to achieving its interest in broadcast diversity. Congress and the FCC had concluded that there is an empirical nexus between minority ownership and broadcasting diversity.

- Congress had recognized and acted to correct the barriers to minority ownership in the broadcast industry. Congress had rejected proposed changes to the license renewal process that would have excluded minorities from opportunities to enter the industry. The Court also noted that Congress had authorized the lottery system in 1981 that granted preferences to applicants whose receipt of a license would increase diversity of mass media ownership and added a preference to any applicant controlled by a minority. Congress had also used its appropriations power to keep minority ownership policies in place.

- The policies were adopted only after the FCC established that race-neutral means could not produce adequate diversity and other forms of minority preferences were not workable. The policies were aimed at barriers minorities face in entering the broadcast field, were limited in scope and duration, and subject to review by Congress prior to their extension.

- Finally, there were no undue burdens on non-minorities. Applicants for licenses have

no settled expectation that applications will be granted without consideration of public interest factors, such as minority ownership. Further, the distress sale policy does not set a quota or fixed-quantity set aside, and applies only to a small number of broadcast licenses.

Administration-approved Statement on Religious Harassment Guidelines - Presented at June 9, 1994 Senate Hearing (Judiciary Subcommittee on Courts & Administrative Practice)

Oral Statement

Good Afternoon, I am Douglas Gallegos, Executive Director of the Equal Employment Opportunity Commission. I would like to introduce Elizabeth Thornton, EEOC's Acting Legal Counsel, and Dianna Johnston, Assistant Legal Counsel for Title VII policy.

We are here today to testify before the Subcommittee regarding the Equal Employment Opportunity Commission's Proposed Consolidated Guidelines on Harassment, particularly focusing our comments on the religious harassment provisions. These guidelines would protect from unlawful harassment those wishing to express their faith at work, just as the guidelines would protect workers from being forced to comply with someone else's religious beliefs.

Let us be clear that the guidelines are intended to explain existing law, consolidating existing judicial and Commission precedent, not to create any new legal theories or in any way abridge the free exercise of religion in the workplace. The guidelines provide that conduct towards an employee constitutes unlawful harassment only when it is unwelcome <u>and</u> when it severely or pervasively denigrates or shows hostility on the basis of religion.

Contrary to some erroneous commentary, the guidelines do <u>not</u> prohibit religious expression in the workplace. Such a prohibition would itself violate Title VII of the Civil Rights Act of 1964. Thus, while the proposed guidelines would prohibit

using repeated and offensive religious epithets in the workplace, the guidelines would not forbid wearing a cross or a yarmulke at work, having a Bible on one's desk, or inviting a colleague to church. As you know, the Commission has vigorously defended the right of employees in the workplace to exercise their religious faiths.

The public comment period for the proposed guidelines will continue until June 13, 1994. Any final guidelines would make clear not only that an employer is not required to prohibit non-intrusive religious expression, but that employers could not lawfully ban such expression.

In reiterating existing law, the proposed guidelines are fully consistent with the principles embodied in the Religious Freedom Restoration Act, signed by the President this past fall.

We would be glad to answer any questions you may have. However, because we are still in the comment period and because any action on these proposed guidelines requires approval by the full Commission, it would be inappropriate to commit at this time to any conclusions concerning or suggested changes to the guidelines.

Leadership Conference on Civil Rights

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EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) OF 1994
(Job Discrimination Bill)

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- The Employment Non-Discrimination Act of 1994 (ENDA) prohibits discrimination in employment on the basis of sexual orientation. ENDA extends fair employment practices -- not special rights -- to lesbians, gay men, bisexuals and heterosexuals.

- Federal law currently protects employees from discrimination on the basis of race, religion, gender, national origin, age, and disability. ENDA remedies a gap in federal non-discrimination protection.

- ENDA prohibits employers, employment agencies, and labor unions from using an individual's sexual orientation as the basis for employment decisions, such as hiring, firing, promotion, or compensation.

- Under ENDA, employers may not subject an individual to different standards or treatment based on that individual's sexual orientation (real or perceived) or discriminate against an individual based on the sexual orientation of those with whom the individual associates.

- The "disparate impact" claim available under the employment section of the Civil Rights Act of 1964 (Title VII) is not available under ENDA. An employer is not required to justify a neutral practice that may have a statistically disparate impact based on sexual orientation.

- ENDA exempts small businesses with fewer that fifteen employees, as does Title VII.

- ENDA exempts religious organizations, including educational institutions substantially controlled or supported by religious organizations.

- ENDA prohibits preferential treatment, including quotas, based on sexual orientation.

- ENDA does not require an employer to provide benefits for the same-sex partner of an employee.

- ENDA does not apply to the relationship between the U.S. government and the armed forces and thus does not affect current law on lesbians and gay men in the military.

- ENDA incorporates the remedies of Title VII (injunctive relief and damages to the extent allowed by Title VII).

- ENDA applies to Congress with the same remedies as provided by the Civil Rights Act of 1991.

- ENDA is not retroactive.

"Equality In a Free, Plural, Democratic Society"

THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

SECTION-BY-SECTION SUMMARY

An Act to prohibit employment discrimination
on the basis of sexual orientation

Section 1. Short Title.

The short title of the bill is the "Employment Non-Discrimination Act of 1994" (ENDA). ENDA is designed to provide protection for lesbians, gay men, bisexuals, and heterosexuals against discrimination in the workplace.

Section 2. Findings and Purposes. [Senate Only]

The findings set out the basic premise of the bill that sexual orientation has no relationship to ability to contribute to society and that employment discrimination based on sexual orientation violates fundamental values of equality and fairness.

The purpose of the bill is to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation and to provide meaningful remedies against such discrimination.

Section 3. Discrimination Prohibited.

ENDA prohibits employers (including government employers), employment agencies, and labor organizations from subjecting employees to different standards or treatment, or otherwise discriminating in employment or employment opportunities, on the basis of sexual orientation. Employment and employment opportunities include hiring, firing, compensation, and other terms or conditions of employment. Like a similar provision in the Americans with Disabilities Act (ADA), section 3 prohibits discrimination based on the sexual orientation of someone with whom an employee associates.

Section 4. Benefits.

ENDA does not require employers to provide benefits to their employees' same-sex partners. However, employers remain free to provide these benefits if they wish to do so.

Section 5. No Disparate Impact.

ENDA does not require employers to justify neutral practices that may result in a disparate impact against people of a particular sexual orientation. As a result, the "disparate impact" claim, available under Title VII of the 1964 Civil Rights Act (Title VII), is not available to gay men, lesbians, bisexuals, or heterosexuals under this bill.

Section 6. Quotas and Preferential Treatment Prohibited.

ENDA prohibits employers from adopting quotas or giving preferential treatment to an individual on the basis of sexual orientation.

Section 7. Religious Exemption.

Section 7 exempts religious organizations, including educational institutions substantially owned, managed, controlled, or supported by religious organizations and educational institutions whose curriculum is directed to the teaching of religious doctrine. The bill covers only a religious organization's for-profit activities subject to taxation under the Internal Revenue Code.

Section 8. Non-Application to Members of the Armed Forces; Veterans' Preferences.

ENDA does not apply to the relationship between the U.S. government and members of the Armed Forces. Thus, the bill does not affect current law on gay men, lesbians, and bisexuals in the military. In a provision taken from Title VII, Section 8 further provides the bill does not repeal or modify any other law that gives special preferences to veterans.

Section 9. Enforcement.

Section 9 authorizes the Equal Employment Opportunity Commission (EEOC), the Attorney General, and the federal courts to exercise the same power to enforce ENDA as those branches of the Federal Government have to enforce Title VII. Individuals have the same right to bring a private action that individuals have under Title VII. Congress is covered by the same enforcement mechanisms established by the Civil Rights Act of 1991.

Section 10. State and Federal Immunity.

Section 10 provides that the States and the Federal Government are subject to the same actions and remedies as are other employers for violation of the law.

Section 11. Attorneys' Fees.

The bill provides for attorneys' fees and litigation expenses.

Section 12. Retaliation and Coercion Prohibited.

Section 12 prohibits retaliation against individuals because they oppose an act or practice prohibited by the bill, or participate in an investigation or other proceeding under the bill. This section also prohibits coercion, intimidation, threats, or interference against individuals exercising or enjoying rights protected by the bill. This provision is modelled after similar provisions in Title VII and the Fair Housing Act of 1968.

Section 13. Posting Notices.

As in Title VII, the bill requires that employers post notices describing the requirements of the law.

Section 14. Regulations.

Section 14 authorizes the EEOC to issue regulations to enforce ENDA. Regulations are not mandated under the bill.

Section 15. Relationship to Other Laws.

This section preserves provisions in other federal, state, or local laws that currently provide protection from discrimination.

Section 16. Severability.

The bill includes a general severability clause. Thus, if any provision of ENDA is declared unconstitutional, this section preserves the rest of the bill.

Section 17. Effective Date.

ENDA takes effect sixty days after its enactment. It does not apply retroactively.

Section 18. Definitions.

Most of the definitions in ENDA come directly from existing civil rights laws, primarily Title VII. The bill adds a definition: it defines "sexual orientation" as real or perceived lesbian, gay, bisexual, or heterosexual orientation. The definition includes orientation stated by individuals or manifested in their personal relations.

EMPLOYMENT TESTING

Employment Testing: a systematic social science procedure for observing and recording employers' candid responses to the personal characteristics of job applicants. Typical face to face test involves sending to a test site two people who are similar in all respects material to the job they seek, except for their race or gender, age or other characteristic being tested.

- Supreme Court has already endorsed the right of persons acting as testers to bring litigation challenging discrimination they encounter in the areas of housing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)(testers denied housing may bring claims under the Fair Housing Act) and public accommodations, Pierson v. Ray, 386 U.S. 547 (1967)(testers may challenge segregated bus station; Evers v. Dwyer, 358 U.S. 202 (1958)(tester may challenge segregated seating on bus).

EEOC Policy on Testing

- In 1990 the EEOC issued a policy guidance providing that testers denied equal employment opportunities for a reason prohibited by EEO laws have been harmed and may challenge the discrimination themselves. See EEOC, "Policy Guidance on the Use of EEO Testers," EEOC Compl. Man., (BNA) § 405:6899 (Nov. 20, 1990).

How May Employment Testing Be Used?

- Policymaking

  1. The EEOC and state and local human rights agencies can use testing to measure the effectiveness of their efforts to curb discrimination and to target limited resources. The EEOC has not yet used testing; the Department of Justice and the Department of Housing and Urban Development have used testing as part of their enforcement activities in housing. At the state level, the Massachusetts Commission Against Discrimination has taken the lead in the use of testing in employment, and has established a testing program and filed testing based charges against employers on the basis of race and age.

  2. The U.S. Congress has relied upon testing results to assess the effectiveness of antidiscrimination laws. Under the sponsorship of the Urban Institute, the General Accounting Office conducted a study to test the extent to which employers' hiring decisions were influenced by the national origin and citizenship of the applicants. The test results became a principal basis upon which Congress decided to extend the prohibitions against citizenship discrimination in the Immigration Reform and Control Act. See GAO, Immigration Reform: Employer Sanctions and the Question of Discrimination, at 29-31 (March, 1990).

- **Research/ Public Education**

Results of employment tests have served as a valuable source of documentation of the existence of discrimination in the workplace. Fix & Struyk (eds.), Clear and Convincing Evidence: Testing for Discrimination in America, (Urban Institute Press, 1993); Bendick, et al., "Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices," (January 1994); Bendick, et al., "Measuring Discrimination Through Controlled Experiments," (January 1993); Bendick, et al., "Discrimination Against Latino Job Applicants: A Controlled Experiment." (July 1992).

- **Enforcement**

1. Testing permits targeted investigations of employers' hiring practices, which often rely only upon common knowledge or demographic data.

2. Testing can be used to monitor compliance with injunctive remedies.

3. Testing can be used to investigate allegations of employment discrimination. It can avoid unnecessary or prolonged use of resources by enforcement agencies by differentiating between complaints that appear to reflect systemic problems of discrimination and those that are either without foundation or reflect isolated atypical occurrences.

4. Testing can be used to directly challenge the existence of discrimination in hiring decisions. Two lawsuits have been filed based on tester evidence:

   Fair Employment Council, et al. v. BMC Marketing Corp.T/A Snelling & Snelling involves allegations that the local affiliate of a major national employment referral agency -- Snelling & Snelling -- had twice denied job referrals to black testers while at the same time referring their white counterparts to jobs. The trial court ruled that testers and the Fair Employment Council have standing to challenge discrimination under Title VII of the Civil Rights Act of 1964. Ruling has been appealed to the D.C. Circuit Court of Appeals. The EEOC served as amicus on the standing issue in this case.

   Fair Employment Council et al. v. Molovinsky involved allegations that the owner of another referral agency regularly conditioned job referrals on the granting of sexual favors by female applicants. Testers were used to corroborate a complaint made by a bona fide job applicant. In August 1993 a D.C. Superior Court jury found that there was gender discrimination in violation of the D.C. Human Rights Act, and awarded compensatory and punitive damages to the plaintiffs, including two female testers and the Fair Employment Council. This award marks the first such award in the country in an employment discrimination case.

Issues involving Commission Operations
- Briefing Materials -

TRIBAL EMPLOYMENT RIGHTS OFFICES (TEROS)

BACKGROUND

The Tribal Employment Rights Office (TERO) Program was established in 1980 when EEOC approved "seed money" contracts for TEROs. The purpose of the program is to help develop indigenous capacity to enhance employment opportunities for Indians and to identify, remedy, and eliminate unlawful employment discrimination on or near reservations. These activities are carried out in accordance with Section 703 (c)(i) of Title VII of the Civil Rights Act and Tribal Ordinances.[1]

In FY 94, sixty-three TEROs were funded by EEOC with funds from the $26.5 million state and local FEPA account. Each TERO received $25,000 plus $1,000 for travel and per diem to attend any EEOC training conference offered. The TEROs are located in twenty states (see attached listing). The program is administered by the following EEOC officials:

Contract Specialist	- Lachon N. Raiford
Contract Monitor	- Jeanette M. Leino, Director Seattle District Office
Headquarters EEOC	- Ronald L. Crenshaw, Acting Director State and Local Program Division, OPO
	- Michael J. Dougherty, Director Charge Resolution Review Program, OPO
Project Officer	- James Troy, Director OPO

EEOC has contracts with TEROs in the following areas: Alaska, Alabama, Arizona, California, Colorado, Florida, Idaho, Montana, Minnesota, Michigan, New Mexico, Nevada, Nebraska, North Dakota, Oregon, Oklahoma, South Dakota, Washington, Wisconsin and Wyoming.

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[1]Tribal Ordinances are the laws enacted by the sovereign Indian government for a reservation and are similar to Acts of Congress. For the purposes of this program, these ordinances prohibit employment discrimination and mandate Indian preference employment agreements.

FUNCTIONS

TEROs perform the following tasks:

- Negotiate written preference employment agreements with employers on or near the reservations. These agreements give Indians living on the reservation preference in employment with employers on or near the reservation.

- Secure Tribal Ordinances and Title VII settlements.

- Develop public awareness programs on the discrimination complaint resolution process under Tribal Ordinances on the reservation and Title VII protections and remedies both on and off the reservation.

- Develop referral services between employers on or near the reservation and reservation residents with the skills required for employment.

- Conduct on-site inspections of employers on the reservation to assure that agreed goals and timetables and preference agreements, under Tribal Ordinances, are being met.

ACCOMPLISHMENTS

TEROs submit quarterly reports on their performance. In FY 93, TEROs accomplished the following;

- 1,649 meetings were held to implement or renew Indian preference agreements.

- 6,488 on-site inspections were conducted on compliance with preference agreements and Tribal Ordinances.

- 208 employment discrimination charges were processed under Tribal Ordinances.[2]

- 1,254 technical assistance preventive activities were carried out with employers.

- 17,033 employment referrals were made and 7,002 Indians were hired as a result of those referrals.

- 11.5 million in monetary benefits were received as a result of TERO activities.

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[2]TEROs process charges arising out of Tribal Ordinances and attempt to informally settle them in 30 days. If the charges cannot be settled in that time, they are turned over to EEOC for investigation under Title VII. If the charges are settled by the TERO in the initial 30 day period, the settlements are sent to EEOC and become the basis for a settlement agreement and EEOC administratively closes the case.

CLINTON LIBRARY PHOTOCOPY

KEY ISSUES

- Section 703 of Title VII of the Civil Rights Act sanctions the use of Indian preference in employment on reservations. One qualification criterion for a TERO is that the TERO must be administered by a tribe or tribal organization that is on federally recognized tribal land/reservations over which the tribe has sovereignty. Only on sovereign lands may tribes enact Tribal Ordinances to require Indian employment preference. Applications have been received for TEROs from consortiums of individual scattered tribes, tribesmen, and tribal organizations in Alaska who may own lands, but have no sovereignty over those lands. These Alaskan consortiums would like TERO contracts.

- EEOC has established a task force, recommended by the Council on Tribal Employment Rights (CTER)[3], to identify barriers to the partnership between EEOC and the TEROs. One of the issues of concern to CTER is Tribal preference employment agreements as opposed to Indian preference. Under Indian preference, and in accordance with Title VII, employers on reservations must give preference to any Indian on that reservation. With Tribal preference, which is in effect in some tribes but is not sanctioned by Title VII, the employment agreement names specific tribes whose members must be given preference. No TERO with whom EEOC contracts have indicated that Tribal preference agreement exists on their reservations.

Revised 7/12/94: JD

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[3]CTER is a private group of Indian consultants who serve as a advocacy group on Indian issues. They also enter into contracts with tribes to provide services.