

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Bill White to Claire Gonzales re: Summary on Commission Information Systems (4 pages)	7/12/1994	b(2)

COLLECTION:

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

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [7]

ds57

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

Withdrawal/Redaction Marker

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For a complete list of items withdrawn from this folder, see the
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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 at all times 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.

¹See CD 71-446 (1970), CCH EEOC Decisions §6173, 3 FEP Cases, 1137; 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.

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 woman 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

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.

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.

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.

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.



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;

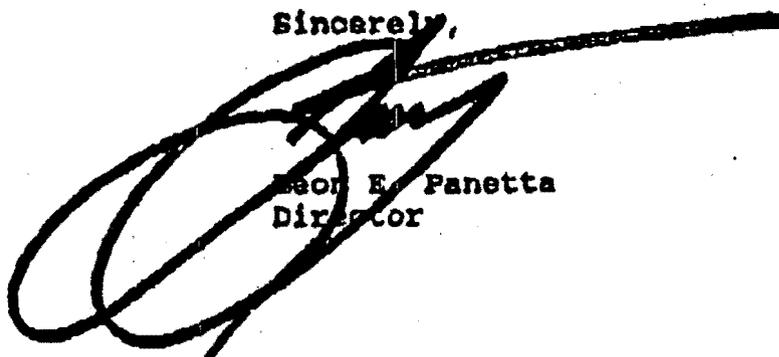
allow the Administration time to manage effectively the implementation of the bill by delaying the effective date until January 1997; and

- 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

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 and when it severely or pervasively denigrates or shows hostility on the basis of religion.

Contrary to some erroneous commentary, the guidelines do not 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.