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001. briefing paper	Confirmation Issues Outline (partial) (1 page)	7/11/1994	P5
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COLLECTION:

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

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [9]

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RESTRICTION CODES

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

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

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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]

INTRODUCTORY BRIEFINGS FOR EEOC NOMINEES

Friday, June 24
Room 180 Old Executive Office Building

11:00 - Noon *General Title VII Issues*

Puerto Rican Legal Defense & Education Fund (PRLDEF)
Ken Kimerling

People For the American Way
Elliot Minberg
Larry Ottinger

Kerry Scanlon - Deputy Assistant Attorney General for Civil Rights

Noon - 1:00 *ADA/Disability Issues*

Chai Feldblum
Director of the Federal Legislation Clinic at Georgetown University Law Center

Bazelon Center for Mental Health Law
Mary Giliberti
Ira Burnim

* Pat Wright of DREDF has been invited, but is not yet confirmed.

- Break -

3:00 - 4:00 *Womens' Issues*

National Womens Law Center
Márcia Greenberger

Womens' Legal Defense Fund (WLDF)
Donna Lenhoff
Jocelyn Frye

Womens' Issues - cont.

**NOW Legal Defense Fund
Lynn Schafran**

**Wider Opportunities for Women
Cindy Marano**

**Women Work (f/k/a Displaced Homemakers)
Jill Miller**

**ACLU Womens' Rights Project
Marcia Thurmond**

4:00 - 5:00 Aging Issues

**AARP
Michele Pollak**

**National Senior Citizens Law Center
Burton Fretz**

**Christopher Mackaronis
Private practitioner specializing in age discrimination litigation
(Formerly of both EEOC's Office of Legal Counsel and AARP)**

- END -



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

MEMORANDUM

To: Alfred Ramirez, Office of Presidential Personnel
From: John Dean, White House Liaison, EEOC
Subject: Clarification of EEOC's role in the "overall minority employment rate" issue
Date: September 16, 1993
Reference: The Wall Street Journal, "Losing Ground," 9/14/93
The Washington Post, William Raspberry,
"Lots of Reasons, One Bad Result," 9/15/93

Both of the above referenced articles suggest a major EEOC role in the overall or general minority employment rates used by the Department of Labor in evaluating private sector affirmative employment plans. The following is offered as a point of clarification.

EEOC collects racial data from federal and local governmental entities and from private employers with 100 or more employees. Such data is collected using the EEO-1 form which breaks out the following five racial groups by job category; white excluding Hispanic, black excluding Hispanic, Hispanic, Asian-American/Pacific Islander and American Indian/Alaskan native.

EEOC has responsibility for compliance reviews of federal affirmative employment plans. In investigating individual, systematic and class complaints in the federal and private sectors, EEOC will use racial breakout data to review the employment rate for minorities in each racial category and for their distribution in the employer's career ladder.

The Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) requires private employers with 50 or more employees to submit affirmative employment plans if they have government contracts. OFCCP uses EEO-1 data supplied by EEOC to determine such employer's overall minority employment rates.

OFCCP is responsible for compliance reviews of such private affirmative employment plans. Only when their compliance reviews or "audits" are undertaken will OFCCP conduct an analysis of racial breakouts.

From EEOC's perspective, it is important that any Administration official involved in any civil rights presentation at a Congressional Black Caucus conference session be aware of this information.

MEMORANDUM

TO: Steve Warnath
FROM: Willie Epps, Jr.
DATE: 11 July 1994
RE: Major Supreme Court Cases in
Employment Discrimination

Title VII:

Griggs v. Duke Power Company, 401 U.S. 424 (1971):

Case established the disparate impact theory of discrimination.

This North Carolina power company had a policy of requiring a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. Black workers charged that these requirements were not directed at or intended to measure ability to learn to perform a particular job or categories of jobs; requirements operated to disqualify blacks at a substantially higher rate than white applicants; and the jobs in question formerly had been filled by white employees as part of a longstanding practice of giving preferences to whites.

Chief Justice Burger, writing for the 8-0 majority, stated that Title VII of the Civil Rights Act of 1964, requires the elimination of such artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race. If an employment practice that operates to exclude African-Americans cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. The EEOC, comporting with the intent of Congress, must insure that tests used by employers measure the person for the job and not the person in the abstract.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973):

Case outlines burdens of proof in race discrimination cases.

African-American male claimed that he was denied re-employment "because of his involvement in civil rights activities" and "because of his race and color." Company denied discrimination and asserted that its failure to re-employ this man was based upon and justified by his participation in the unlawful conduct against it. The critical issue resolved in this case concerns the order and allocation of proof in a private, non-class action challenging employment discrimination.

Justice Powell, delivering the opinion for a unanimous Court, ruled that in a private, non-class-action complaint under Title VII charging racial employment discrimination, the plaintiff has the burden of establishing a prima facie case, which he or she can satisfy by showing that (1) s/he belongs to a racial minority; (2) s/he applied and was qualified for a job that the employer was trying to fill; (3) though qualified, s/he was rejected; and (4) thereafter the employer continued to seek applicants with plaintiff's qualifications. Employer then has the opportunity to provide non-discriminatory reasons for the company's decision. If the company provides "non-discriminatory reasons" for its decision, the plaintiff must then show that the employer's stated reasons were pretextual.

Pretext can be shown, for example, by presenting evidence that white employees involved in acts against the company of comparable seriousness were nevertheless retained or rehired; including facts as to the company's treatment of plaintiff during prior term of employment; analyzing company's reaction to plaintiff's legitimate civil rights activities; and examining the company's general policy and practice with respect to minority employment. This evidence will help to prove that the presumptively valid reasons for rejection of the applicant were in fact a coverup for a racially discriminatory decision.

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976):

Seniority rights.

Race discrimination was detected in company's employment of over-the-road (OTR) truck drivers. Black applicants were denied employment because of their race after the effective date and in violation of Title VII of the Civil Rights Act of 1964. The Court, 5-3, approved seniority awards by lower courts dating back to rejection of the job application. Retroactive seniority was appropriate remedy, and such awards should be made in most cases where a seniority system exists and discrimination is proved, Justice Brennan said while delivering the opinion of the Court.

Such awards fulfill the "make-whole" purposes of Title VII. Without them, the victim of job discrimination "will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferior."

The Court did not distinguish between benefit seniority, which determines such matters as length of vacation and pension benefits, and competitive seniority, which determines issues such as the order in which employees are laid off and rehired, promoted, and transferred.

General Electric Co. v. Gilbert, 429 U.S. 125 (1976):

Pregnancy not covered in company's health plan.

This class action was brought by women employees who charged that the disability plan of General Electric constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Under the plan GE provides nonoccupational sickness and accident benefits to all of its employees, but disabilities for pregnancy are excluded.

Justice Rehnquist wrote for the six-justice majority that "[E]xclusion of pregnancy from a disability benefits plan providing general coverage is not gender-based discrimination at all." The plan covered some risks, but not others; there was no risk from which men were protected, but not women, or vice versa.

In dissent, Justice Brennan wrote: "Surely it offends common sense to suggest...that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.' Pregnancy exclusions...both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force."

This decision led to the enactment of the Pregnancy Discrimination Act, which overturned Gilbert.

Trans World Airlines v. Hardison, 432 U.S. 63 (1977):

Seniority system-- absent intentional discrimination-- can have discriminatory consequences.

A TWA employee's religious beliefs prohibited him from working on Saturdays. TWA made attempts to accommodate him, and these were successful mainly because on his job at the time he had sufficient seniority to regularly observe Saturday as his Sabbath. But when he sought, and transferred to another job where he was asked to work Saturdays and where he had low seniority, problems began to rise. No accommodations could be reached in second job; employee claimed religious discrimination in violation of Title VII of the Civil Rights Act of 1964.

Justice White and the Court, 7-2, found that an employer's statutory duty reasonably to accommodate the religious practices of employees' does not require a departure from a seniority system for the benefit of an individual whose religious beliefs prevented him from working on Saturday: "Absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."

Dothard v. Rawlinson, 433 U.S. 321 (1977):

Job requirements must be job related.

Woman's application for employment as a "correctional counselor" (prison guard) in Alabama was rejected because she failed to meet the minimum 120-pound weight requirement of an Alabama statute, which establishes a height minimum of 5 feet 2 inches. She filed a lawsuit with the EEOC challenging the statutory height and weight requirements and a regulation establishing gender criteria for assigning correctional counselors to "contact" positions as violative of Title VII of the Civil Rights Act of 1964. She also challenged the law on the grounds that it would disqualify more than 40 percent of the women in the country but less than 1 percent of the men.

Justice Stewart, delivering the opinion of the Court, ruled this prima facie evidence of sex discrimination because the apparently neutral physical requirements "select applicants for hire in a significantly discriminatory pattern." The state was then required to show that the height and weight requirements had a "manifest relationship" to the job in question. This the state failed to do, the Court said.

The Court did uphold, however, a provision of the Alabama statute that prohibited women from filling positions that brought them into close proximity with inmates. In this case, the majority said an employee's "very womanhood" would make her vulnerable to sexual and other attacks by inmates and thus "undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."

Justice Marshall, with Brennan, dissented. The majority decision "perpetuates one of the most insidious of the old myths about women -- that women, wittingly or not, are

seductive sexual objects." The majority, Marshall wrote, makes women "pay the price in lost job opportunities for the threat of depraved conduct by prison inmates....The proper response to inevitable attacks on both female and male guards is ... to take swift and sure punitive actions against the inmate offenders."

Hazelwood School District v. United States, 433 U.S. 299 (1977):

Statistics can be used to prove discrimination.

United States brought action against the Hazelwood School District alleging that school district officials were engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

Justice Stewart and the Court, 8-1, ruled that a prime facie case may be established by showing a general pattern of discrimination rather than individual acts of illegality. "Statistics can be an important source of proof in such cases since 'absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired,' even though Title VII 'imposes no requirement that a work force mirror the general population.'" That is, the proper statistical comparison in pattern-or-practice action against school district for alleged racial discrimination in hiring practices is between the percentage of black teachers employed in school district and the percentage of black teachers in relevant labor market.

City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1977):

Women do not have to contribute more money than men to pension fund to get the same benefits.

Suit was filed by present and former female employees of the L.A. Dept. of Water and Power, alleging that the Department's requirement that female employees make larger contributions to its pension fund than male employees violated Title VII of the Civil Rights Act of 1964, which make it unlawful to discriminate on the basis of an individual's sex.

Justice Stevens, writing for the Court, stated that even though women usually live longer than men, that generalization does not justify obligating women to make larger pension fund contributions in order to receive equal monthly benefits after retirement. Since the focus of Title VII is on the individual, the use of sex-segregated actuarial tables that differentiate solely on the basis of generalizations about life expectancy of women as a class violates Title VII.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981):

Burden shifts in discrimination cases outlined.

Employee filed suit alleging that her termination of employment with the State of Texas was predicated on gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The case focuses on the burden of proof in Title VII cases.

Justice Powell, delivering the opinion for a unanimous Court, held that when a plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. That is to say, while the burden of production shifts to the employer upon establishment of a prima facie case, the burden of persuasion remains with the plaintiff at all times: "The burden that shifts to the defendant ... is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected ... for a legitimate, nondiscriminatory reason."

County of Washington v. Gunther, 462 U.S. 161 (1981):

Sex-based wage discrimination.

Women brought lawsuit alleging sex-based wage discrimination under Title VII of the Civil Rights Act of 1964. Employer's own job evaluations showed female jail-guard positions to be worth 95% as much as male guard positions, but the employer proceeded to pay women guards only 70% as much as men.

Court held that claims for sex-based wage discrimination may be brought under Title VII, whether or not a co-worker of the opposite sex receives higher pay for equal work. Sex-based wage discrimination may violate Title VII even if it does not violate Equal Pay Act.

Connecticut v. Teal, 457 U.S. 440 (1982):

Disparate impact claims can be based on a component of a selection process.

A Connecticut state agency had the policy of provisionally promoting employees to the position of supervisor. To attain permanent status as supervisors, employees had to participate in a selection process that required a written examination. A group of black employees who failed the test filed suit alleging that state agency violated Title VII of the Civil Rights Act of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately exclude blacks and was not job related. State agency claimed that plaintiffs were precluded from establishing a prima facie case because its job selection process, of which the test was a part, ultimately resulted in selection of greater proportion of blacks than whites.

Justice Brennan, delivering the opinion of the Court, 5-4, held that state agency's nondiscriminatory "bottom line" does not preclude respondents from establishing a prima facie case nor does it provide petitioners with a defense to such a case. The fact that a workforce is racially balanced does not immunize an employer from liability for acts of discrimination. A disparate impact claim can be based on a component of a selection process, even if there is no disparate impact in the entire selection process, i.e., at the "bottom line."

Newport News Shipbuilding and Dry Dock v. EEOC, 462 U.S. 669 (1983):

Men and women should receive comparable fringe benefits from employers regardless of sex.

After the passage of the Pregnancy Discrimination Act of 1978 (an amendment to Title VII of the Civil Rights Act of 1964), employer amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions, but the plan provided less extensive pregnancy benefits for spouses of male employees. Employer filed action challenging the EEOC's guidelines which indicated that the amended plan was unlawful, and the EEOC in turn filed an action against employer alleging discrimination on the basis of sex against male employees in employer's provision of hospital benefits.

Justice Stevens, in a 7-2 decision, held that fringe benefits are part of the "compensation, terms, conditions and privileges of employment" which must be provided on non-discriminatory basis. Thus, employer's health plan, which provided female employees with hospitalization benefits for pregnancy but provided less extensive pregnancy benefits to spouses of male employees, discriminated against male employees in violation of Title VII.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986):

Sexual harassment is a form of sex discrimination under Title VII.

Former female employee of a bank brought action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964. Bank and supervisor maintained that any sexual interaction between the former employee and the supervisor was voluntary.

Justice Rehnquist, in a unanimous decision, argued that the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. Sexual harassment is a form of sex discrimination in violation of Title VII. A plaintiff can establish a violation of Title VII by proving that s/he was subjected to a hostile or abusive work environment, even if there was no economic or tangible injury. Agency principles should be used for guidance in determining employer liability for sexual harassment.

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

Affirmative action "goals" are constitutional.

Agency voluntarily adopted an affirmative action plan for hiring and promoting minorities and women. The plan provides that in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the agency is authorized to consider as one factor the sex of a qualified applicant. Plan had no quotas, just short-term goals. Male employee and female employee applied for the same promotion, within the skilled craft worker job classification. Of the 238 existing positions, not one was held by a woman. Both the male employee and female employee were equally qualified. The job was given to the female employee, with her sex being the determining factors in her selection. Male employee then filed suit claiming that such actions violated Title VII of the Civil Rights Act of 1964.

Justice Brennan, writing for the 6-3 Court, stated that the agency appropriately took account of Joyce's sex as one factor in determining that she should be promoted. The agency plan represented a flexible, moderate, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the agency's work force, and is consistent with Title VII. Plan did not trammel the rights of non-minorities.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989):

Sex discrimination can be an element in a firing decision.

A female senior manager in an office of a large professional accounting partnership was neither offered nor denied partnership when she was proposed for partnership. Instead her candidacy was held for reconsideration the following year. Later the partners in her office refused to repropose her for partnership. She then filed suit under Title VII of the Civil Rights Act of 1964, charging that the partnership discriminated against her on the basis of sex in its partnership decisions.

Justice Brennan, delivering the 6-3 decision of the Court, stated that plaintiff proved that although gender discrimination played a part in the job decision, employer may avoid liability by proving that it had a "mixed motive," i.e., it would have made the same decision regardless of discrimination. That is, defendant is liable for discrimination in employment unless it shows by a preponderance of the evidence that the same employment decision would have been reached without the discrimination.

Case was overturned by the Civil Rights Act of 1991.

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989):

Case makes it tougher to prove race discrimination.

Jobs at packing company fall into two categories: unskilled, which are filled primarily by nonwhites; and skilled positions which are filled predominantly with white workers, and virtually all pay more than unskilled positions. A class of non-white workers filed suit under Title VII of the Civil Rights Act of 1964, alleging that the company's hiring/promotion practices were responsible for the work force's racial stratification and had denied them the opportunity to work at skilled jobs on the basis of race.

Justice White, delivering the 5-4 decision of the Court, wrote that the plaintiff maintains burden of persuasion in disparate impact case. Employer's burden is only to produce evidence that practice significantly serves business needs. To make out prima facie case of impact, plaintiff must show that disparity is result of one or more specific job practices.

Decision overturned by the Civil Rights Act of 1991.

United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991):

Sex-specific fetal-protection policy illegal.

Battery manufacturing process at plant exposed workers to high level of lead, which entailed health risks, including the risk of harm to any fetus carried by a female employee.

After eight of its employees became pregnant while maintaining blood lead levels exceeding that noted by OSHA as critical for a worker planning to have a family, company announced a policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding OSHA standard. A group of female employees filed a class action claiming that the policy constituted sex discrimination violative of Title VII of the Civil Rights Act of 1964.

Justice Blackmun, delivering the 9-0 opinion of the Court, stated that Title VII, as amended by the Pregnancy Discrimination Act, forbids sex-specific fetal-protection policies. The policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females.

Such a policy also could not be justified as a bona fide occupational qualification analysis because women could perform the essential functions of the job at issue.

St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993):

Case creates higher standard to prove race discrimination.

Halfway house employed Hicks as a correctional officer and later a shift commander. After being demoted and ultimately discharged, Hicks filed suit, alleging that these actions had been taken because of his race in violation of Title VII of the Civil Rights Act of 1964. At trial court, Hicks established a prima facie case of racial discrimination; the halfway house rebutted that presumption by introducing evidence of two legitimate, nondiscriminatory reasons for their actions; and then the halfway house's reasons were determined to be pretextual.

The Supreme Court held, 5-4, that when the reasons offered for an adverse employment decision are not credible, the fact finder is not compelled to find for a plaintiff. Justice Scalia wrote that the burden of proof remains at all time with the plaintiff to show intentional discrimination.

Justice Souter, with whom Justices White, Blackmun and Stevens join, dissented. Justice Souter stated: "Ignoring language to the contrary in both **McDonnell Douglas** and **Burdine**, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove." The new scheme is termed "unfair and unworkable."

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

Harris v. Forklift Systems, 114 S.Ct. 367 (1993):

Sexual harassment equals "abusive work environment."

Female employee sued former employer claiming that his conduct toward her constituted "abusive work environment" harassment because of her gender in violation of Title VII of the Civil Rights Act of 1964. Lower courts determined that employer's insults and sexual innuendos were not "so severe as to seriously affect [her] psychological well-being" or lead her to "suffer injury."

Justice O'Connor, writing for a unanimous Court, concluded that plaintiff is not required to prove psychological harm in order to prevail on a hostile environment sexual harassment claim. To prove hostile environment, plaintiff must prove that reasonable person would find environment hostile or abusive and that the plaintiff subjectively perceived environment as abusive.

Landgraf v. USI Film Products, 62 U.S.L.W. 4255 (U.S. Apr. 26, 1994):

Civil Rights Act of 1991 is NOT retroactive.

Justice O'Connor, writing for a unanimous Court, stated that Sections 101 and 102 of the Civil Rights Act of 1991 (overruling Patterson v. McLean Credit Union and authorizing damages and jury trials) may not be applied to pending cases. Neither language of Act nor its legislative history manifest clear Congressional intent that Act be retroactive. Substantive provisions such as Sections 101 and 102, that impair rights a party had when s/he acted or increased liability, are presumptively prospective.

Age Discrimination in Employment Act:

Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985):

Mandatory retirement age must be based on a bona fide occupational qualification.

Age Discrimination in Employment Act of 1967 prohibits employers from discriminating on the basis of age against employees who are between the ages of 40 and 70 by discharging them or requiring them to retire involuntarily, except when age is shown to be "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." Some federal civil servants were not covered by this Act.

City of Baltimore maintained an age 55 mandatory retirement for firefighters based on the federal civil service state which applied an age 55 mandatory retirement for federal firefighters. City employee filed suit claiming that the Act was violated by the City of Baltimore.

Justice Marshall, writing for a unanimous Court, argued that City of Baltimore must prove that its age 55 mandatory retirement for firefighters was based on a BFOQ. It is not sufficient for the City to simply point out or reference a federal service state which applied an age 55 mandatory retirement for federal firefighters.

Western Airlines v. Criswell, 472 U.S. 400 (1985):

Flight engineer filed suit claiming that policy of airline to force flight engineers' retirement at age 60 violated the Age Discrimination in Employment Act of 1967. Airline's defense was bona fide occupational qualification (BFOQ).

Justice Powell, 8-0, wrote that in order to prove a BFOQ, an employer must show, first, that the age limitation is reasonably necessary to the essence of its business. It must then show either that it had a factual basis for believing that all or substantially all persons over the age in question would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or highly impractical to deal with older employees on an individualized basis. The Court said the greater the safety factor, measured by the likelihood of harm and probable severity of that harm in case of an accident, the more stringent may be the job qualification designed to insure safety.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991):

Justice White, 7-2, stated that an individual's claim under the Age Discrimination Employment Act (ADEA) may be subjected to compulsory arbitration pursuant to an arbitration clause set forth in a registration application with a stock exchange. This holding does not preclude the individual from filing a charge with the EEOC or affect the EEOC's investigative and enforcement authority under ADEA.

Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104 (1991):

Plaintiff filed a charge with EEOC, alleging employer dismissed him because of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). Under a worksharing agreement, the EEOC referred his claim to the state agency responsible for claims. State agency found no probable cause under state law to believe plaintiff was terminated on account of age, and its decision was upheld on administrative review. Rather than appealing that decision to state court, plaintiff filed the same suit in the Federal District Court and lost due to issue preclusion. Low court claimed the ADEA did not have a legislative intent to deny preclusive effect to such state administrative proceedings. Court of Appeals reversed, arguing issue preclusion.

Justice Souter, delivering the opinion for a unanimous Court, stated that judicially unreviewed state administrative findings have no preclusive effect on age-discrimination proceedings in federal court. While well-established common-law principles, such as preclusion rules, are presumed to apply in the absence of a legislative intent to the contrary, Congress need not state expressly its intention to overcome a presumption of administrative estoppel.

Gregory v. Ashcorft, 501 U.S. 452 (1991):

Appointed state court judges are not covered by the Age Discrimination in Employment Act (ADEA) because the Act's term "employee" excludes elected state officials (including judges) and most high-ranking state officials, including "appointees on the

policymaking level," a category to which an appointed judge could reasonably be said to belong.

Stevens v. Dept. of Treasury, 500 U.S. 1 (1991):

Justice Blackmun, delivering the opinion of the Court, stated that a federal employee who chooses to go directly to court must file a notice of an intent to sue with the EEOC within 180 days of the alleged unlawful practice, and file a lawsuit after the expiration of 30 days. This decision corrected an erroneous lower court reading of the statute to the effect that suit must be filed within 180 days and EEOC notified within 30 days of the filing.

Hazen Paper Co. v. Biggins, 113 S.Ct. 1701 (1993):

62 year old plaintiff brought suit alleging a violation of the Age Discrimination in Employment Act (ADEA). He claimed that age had been a determinative factor in his employer's decision to fire him. Employer contested the claim, asserting instead that plaintiff had been fired for doing business with competitors.

Justice O'Connor delivered the opinion for a unanimous Court. She stated that an employer does not violate the ADEA by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. In a disparate treatment case, liability depends on whether the protected trait-- under ADEA, age-- actually motivated the employer's decision. When that decision is wholly motivated by factors other than age, the problem that prompted the passage of the ADEA-- inaccurate and stigmatizing stereotypes about older workers' productivity and competence-- disappears. Thus, it would be incorrect to say that a decision based on years of service is necessarily age based.

Also, the "knowing or reckless disregard" standard for determining willful violation of the ADEA applies not only where age discrimination entered into an employment decision through a formal and facially discriminatory policy but also in cases where age is an informal and undisclosed motivating factor.

Rehabilitation Act:

Southeastern Community College v. Davis, 442 U.S. 397 (1979):

Woman who suffers from a serious hearing disability and who seeks to be trained as a registered nurse, was denied admission to a nursing program because officials believed her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients.

Justice Powell, delivering the unanimous opinion of the Court, wrote that an educational institution may require reasonable qualifications for admission to a clinical training program. Woman was not qualified because she could not meet the college's legitimate physical requirement of ability to understand speech without lipreading, and no accommodation existed that would permit her to benefit from the program.

This case is significant to the EEOC because it explains that, if an otherwise qualified individual cannot meet a particular qualification standard because of a handicap, he or she must show either that the standard is not legitimate, or that there is a reasonable accommodation that will enable him or her to meet the standard.

School Board of Nassau County v. Arline, 480 U.S. 273 (1987):

Justice Brennan, in a 7-2 decision, stated that a person afflicted with a contagious disease may be a "handicapped individual" within the meaning of Section 504. This case is significant for EEOC because it sets forth the direct threat analysis adopted by Congress in enacting the ADA.

DRAFT

PENDING LEGISLATIVE ISSUES

LEGISLATION TO REFORM THE FEDERAL EEO COMPLAINT PROCESS:

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

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

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

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

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

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

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

AGE DISCRIMINATION IN EMPLOYMENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related Legislation:

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

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

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

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

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

The bill was jointly referred to the House Committee on Post

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

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

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

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

RELIGIOUS HARASSMENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No further Committee actions have been scheduled on these bills.

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

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

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

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

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

No further Committee actions have been scheduled on these bills.

LEGISLATION TO REMOVE CAPS ON DAMAGES:

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

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

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

No further Committee actions have been scheduled on these bills.

LABOR LAW COVERAGE OF FOREIGN VESSELS:

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

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

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

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

SEXUAL HARASSMENT:

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

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

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

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

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

Harassment-Free Workplace Act, S. 1864

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

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

Economic Equity Act of 1993

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

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

SEXUAL ORIENTATION:

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

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

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

Civil Rights Act of 1993, H.R. 431

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

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

ALTERNATE DISPUTE RESOLUTION:

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

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

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

MANDATORY ARBITRATION:

Protection from Coercive Employment Agreements Act, S. 2012

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

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

PAY EQUITY:

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

(To be completed)

PREFERENTIAL TREATMENT:

Civil Rights Restoration Act of 1993, S. 53

(To be completed)

ATTORNEYS FEES:

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

(To be completed)

DRAFT

5/12/94

PRIVATE SECTOR PROGRAMS

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

Charge Receipts: EEOC's incoming work (receipts and net transfers/deferral from FEPA¹) has increased 41 percent from 1990 to 1993. Receipts during FY 1993 were 21.6 percent higher than in FY 1992. In FY 1993, charges filed under the ADA (15,274) or 17.4 percent of total receipts, greatly contributed to the increase.

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

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

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

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

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

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

FEDERAL SECTOR PROGRAMS

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

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

LITIGATION PROGRAM

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

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

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

APPROPRIATIONS

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

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

A. Effective Date of OWBPA:

1. Background:

In the course of the legislative process on OWBPA, the original Senate Bill, S. 1511, provided that the statutory amendments would be applied retroactively to all cases pending on June 23, 1989 and to all cases arising on or after that date. However, in the final version of the legislation Congress determined that the statutory changes should be applied prospectively only. Thus, cases based upon conduct occurring prior to the effective date of OWBPA would not be covered by OWBPA.

2. Statutory Provisions:

(a) In General:

Section 105(a) of OWBPA states that in general the amendments will apply only to:

- (1) any employee benefit established or modified on or after the date of enactment of this Act; and
- (2) other conduct occurring more than 180 days after the date of enactment of this Act.

OWBPA was enacted on October 16, 1990. The 180 day period expired on April 14, 1991.

(b) Collectively Bargained Agreements:

Section 105(b) provides an exception to the general rule in section 105(a) for any employee benefits provided in accordance with a collective bargaining agreement--

- (1) that is in effect as of the date of enactment of this Act;
- (2) that terminates after such date of enactment;
- (3) any provision of which was entered into by a labor organization. . . ; and
- (4) that contains any provision that would be superseded (in whole or part) by this title and the amendments made by this title, but for the operation of this section.

OWBPA would not apply to such employee benefits until the earlier of June 1, 1992 or the date of expiration of such collective bargaining agreement.

TO: Marvin Krislov

FROM: Neera Tanden

RE: Priscilla M. Garcia, et al, petitioners v. Spun Steak Company

In Brief:

The question presented is whether an English-only work rule has a discriminatory impact on the terms and conditions of employment of national origin minorities and therefore violates Title VII. The Court of Appeals for the Ninth Circuit decided such a policy does not violate Title VII, thereby rejecting the EEOC's longstanding policy towards English-only work rules. The Solicitor General argued in its brief that the Supreme Court should grant a writ of certiorari in order to reverse the circuit court's decision. The brief supported the EEOC policy, which considers English-only work rules discriminatory and in violation of Title VII, unless justified by business necessity.

Facts:

Spun Steak is a meat company which employs 33 workers, 24 of whom are Hispanic. Spun Steak's Hispanic employees spoke with varying degrees of English proficiency and conversed freely in Spanish. Petitioners Garcia and Buitrago are two of Spun Steak's employees and both are bilingual. In September of 1990, Garcia and Buitrago allegedly taunted a non-Hispanic employee in both English and Spanish. The next day, company president Ken Bertelsen issued a letter stating, "only English will be spoken in connection with work." The rule was strictly enforced against Garcia and Buitrago, who were reprimanded for violating the English-only policy.

The District Court granted summary judgment in favor of petitioners, enjoining Spun Steak from enforcing its English-only rule. The court found that the rule had a discriminatory impact on Hispanics.

A panel of the Ninth Circuit reversed. It held that petitioners had failed to establish a prima facie case of discriminatory impact. The court first rejected petitioners' claim that the English-only policy had an adverse impact on Hispanics because it prevented them from expressing their cultural heritage and identity. The court concluded that "Title VII does not protect the ability of workers to express their cultural heritage at their workplace."

The court rejected petitioners' claim that the English-only policy adversely affected Hispanic workers because it deprived them of the privilege of conversing in the language they speak most comfortably. Even if bilingual employees unconsciously switch from one language to another, the court held, requiring them "to catch [themselves] from occasionally slipping into Spanish does not impose a burden significant enough to amount to a denial of equal opportunity."

The court held that employees who speak English may have a prima facie case because the rule may mean they are denied the privilege of speaking on the job.

The court acknowledged that its decision was at odds with the EEOC's longstanding position that an employer must provide a business justification for an English-only policy. The court concluded, however, that the EEOC had improperly interpreted Title VII because the Commission had simply assumed a disparate impact by English-only work rules.

The Supreme Court denied certiori.

Solicitor General's Brief for the Supreme Court

The brief supports the EEOC policy. It argues that the court of appeals' decision is wrong in rejecting the EEOC's longstanding view that English-only work rules have a discriminatory impact on national origin minorities and therefore must be justified by a business necessity. The brief requests review by the Supreme Court.

The EEOC Guideline states that "[a] rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment." Because "[t]he primary language of an individual is often an essential national origin characteristic," the Guideline explains, "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." Therefore, the Guidelines specify that if an English-only rule is applied at all times, "the Commission will presume that such a rule violates title VII and will closely scrutinize it." In a separate section the Guidelines state that "[a]n 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."

The brief argues that the EEOC's interpretation reflects a sound application of established Title VII principles. Title VII flatly prohibits all discrimination in the "terms, conditions, or privileges of employment" because of national origin. The brief holds that discrimination within the meaning of Title VII includes practices that disproportionately impose an adverse impact on members of protected groups and that cannot be justified by business necessity.

The Ninth Circuit held that the EEOC's interpretation of Title VII is not entitled to deference because it "presum[es] that an English-only policy has a disparate impact in the absence of proof." In contrast, the brief argues that the EEOC has soundly concluded, based on logic and experience, that English-only rules invariably have a disparate impact on national origin minority groups. English-only work rules necessarily preclude disproportionately more national origin minority employees than others from conversing in the language in which they are most comfortable. That discriminatory consequence violates Title VII unless it is justified by a business necessity.

The brief argues that the court of appeal's decision also interferes with the EEOC's ability to administer a uniform nationwide policy on English-only workplace rules. The court of appeal's decision means that the EEOC must either renounce its longstanding policy on English-only work rules, or it must develop one enforcement policy for cases in the Ninth Circuit, and another policy for all other cases.

THE WHITE HOUSE
WASHINGTON

DATE: 7-13-94

TO:

Steve Wornath

FROM:

Marvin Krislov
White House Counsel
Room 128, OEOB, x790#3

- FYI
- Appropriate Action
- Let's Discuss
- Per Our Conversation
- Per Your Request
- Please Return
- Other

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Office of Communications and Legislative Affairs
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Washington, D.C. 20507

FAX TRANSMITTAL FORM

DATE: 7/7 TIME 7pmTO: Steve WarnathFAX TELEPHONE NUMBER: 456-7028FROM: Claire GonzalesDOCUMENT: FYI - Gil Casellas' Revised ScheduleNUMBER OF PAGES TRANSMITTED (INCLUDING COVER): 2

SPECIAL INSTRUCTIONS: _____

DPB - I'll call you from the very important!
special WH-mobile. CEGIF THE ENTIRE DOCUMENT IS NOT RECEIVED, PLEASE NOTIFY US
IMMEDIATELY AT: 202/663-4900.

OCLA FAX NUMBER: 202/663-4912

SCHEDULE FOR GIL CASELLAS

as of 7/7/94 - 7:00 p.m.

Friday, July 8

9:30 a.m.

Meeting with Kristina Zahorik, Senior Legislative Aide for Senator Simon's Labor and Human Resources Subcommittee on Employment and Productivity, to discuss matters related to the Senate confirmation process.

@ 438 Dirksen Senate Office Building

(Just in case you need to know – the Subcommittee is located in 644 Dirksen and its general number is (202) 224-5575).

At Kristina's request, only Claire and Eric will accompany Gil to the meeting.

Monday, July 11

2:00 p.m

Tentative meeting scheduled with representatives of the Employer/Management community, including EEAC, NAM, and the Chamber.

Ellen Vargyas will confirm the meeting and its location on Friday, 7/8.

schedl.gil
cg:7/7/94-7:00pm

July 1994

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
					1 182/183	2 183/182
3 184/181	4 185/180 HOLIDAY	5 186/179	6 187/178 10:00 Leadership Council on Aging Org.	7 188/177 3pm Nick Inzer Fed. Sector	8 189/176 9:30 Kristina Zahorik	9 190/175
10 191/174	11 192/173 2pm-GC Business	12 193/172	13 194/171 Q's developed!	14 195/170 Brainstorming on Q's A's	15 196/169 9:15-Religious Com. 2:00 Disability Groups	16 197/168
17 198/167	18 199/166	19 200/165 5:30 Mtg w/Simon	20 201/164	21 202/163 10:00 Conf. Mtg	22 203/162	23 204/161
24 205/160	25 206/159	26 207/158	27 208/157	28 209/156	29 210/155	30 211/154
31 212/153						

PHOTOCOPY
PRESERVATION

CONFIRMATION ISSUES OUTLINE
(6/30/94)



Title VII

- St. Mary's Honor Center v. Hicks - Burden of proof
- Garcia v. Spun Steak -
- Gilmer/Protection fro Coercive Employment Agreements Act of 1994 (Feingold) - Amends Title VII, ADEA, and ADA to prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration. (*Gilmer* was an age case so this is a high priority for AARP.) NT
- Sexual Harassment Issues -
 - Guidelines/*Harris v. Forklift*
 - Coordination between EEOC & OFCCP - need clear articulation of standards for employers [Administration Policy suggested]; allow OFCCP's compliance reviews to include individual cases against employers under OFCCP review
- Uniform Guidelines on Employee Selection Procedures (UGESP) - is revision still contemplated by the Commission?
- Pregnancy Discrimination Act
 - Fetal Protection Issues/*UAW v. Johnson Controls* -
 - Abortion Exception -
- Guidance Needed on Intersection of Bases [Race/National Origin & Gender] -

Religion - SN.
gays } Cliffs
Eng. only }
Fed Employee Law

Civil Rights Act of 1991

- Equal Remedies Act of 1993 -
- Justice for Wards Cove Workers Act
- Fixes Not Applicable to ADEA - experts witness fees, fix for *Lorance* on challenge to seniority system not applicable
- Landgraf v. USI File Products - April 1994 Supreme Court decision that the damages provision of CRA '91 cannot be applied retroactively to cases arising prior to passage of the Act.
- Discriminatory Tests - Effect of Race norming prohibition in CRA '91 on use of separate physical ability tests for different gender
- Litigation of Sex-based cases before juries for the first time - EEOC attorneys need training in jury selection to address tendency to devalue claims of minority women by juries
- Failure to inform CPs of availability of damages and failure to negotiate damages in settlement - Based on theory that settlements allow for "no fault," therefore, there can be no intentional discrimination for which damages can be recovered.

Equal Pay Act

- Narrow Interpretation of Supreme Court cases on EPA - Gunther -
- Coordination of enforcement efforts with OFCCP -
- Comparable Worth - Fair Pay Act to be introduced by Eleanor Holmes Norton

Age Discrimination in Employment Act (ADEA)

- **Age Discrimination Amendments of 1993 (H.R. 2722)** - Police and firefighters exemption from the ADEA allowing use of mandatory retirement age; sponsored by Owens, opposed by Metzenbaum.
- **Older Workers Benefit Protection Act** -
 - **Rulemaking** -
 - **Waivers** - does plaintiff have to tender back consideration received for waiver to challenge? Guidance needed for both employees and employers
 - **Accrual of Pension Benefits** beyond normal retirement age
- **Effect of Reductions in Force (RIFs) on Older Workforce** -
- **Early Retirement Incentive Programs under ADEA**
- **Disparate Impact Theory under ADEA** - no Supreme Court decision applying disparate impact theory to ADEA; *Hazen Paper*, eligibility for pension benefits found not to be related to age; employers using this case to avoid disparate impact; legislative fix being considered by AARP.
- **Charge Processing** - no statutory requirement of "cause" determination, yet age charges still processed like Title VII charges with overwhelming majority of charges dismissed through "no cause" finding

Americans With Disabilities Act (ADA) - Title One

- Existing Guidances - Insurance, medical examinations, pre-employment inquiries
Others?
- Areas where guidance is needed -
 - Standards on undue hardship
 - Standards for determining coverage - Internal EEOC effort to construe third prong of definition to require a person to actually have the "perceived" impairment; need list of "major life activities" to include mental activities
 - Standards for reasonable accommodation, including special needs of people with mental disabilities
- EEOC Guidance on Insurance -
 - Mental health limitations in health insurance coverage
 - Need guidance on Longterm Disability Insurance (wage replacement)
- Interaction between Reasonable Accommodation Requirements and Collective Bargaining Agreements -
- Determination of Substantial Impairment when taking Medication to ameliorate problem -
- Need guidance on Episodic Disorders
- Relationship of Family and Medical Leave Act (FMLA) and ADA - Coordination with DOL in rulemaking on FMLA

Rehabilitation Act of 1973 (Federal Sector)

Federal Sector Enforcement

- Part 1614
- Federal Employee Fairness Act

Federal Sector EEO Leadership Responsibilities - Executive Order 12067

- Federal Sector Affirmative Action Requirements -
- Coordination between EEOC & OFCCP - Memorandum of Understanding giving OFCCP authority to negotiate damages under CRA'91 in individual cases discovered during compliance reviews

Miscellaneous

- **Affirmative Action/Quotas** - (Kerry Scanlon to get Deval's briefing material)
- **Inclusion of Religion in the Proposed Consolidated Harassment Guidelines**
 - **Religious Freedom Restoration Act of 1993 (RFRA)** - effect of RFRA on Religious Harassment Guidelines
- **Employment Non-Discrimination Act of 1994 (ENDA)** - prohibits discrimination in employment on basis of sexual orientation; introduced June 23, 1994; principal sponsors Senator Edward Kennedy and Representatives Gerry Studds and Barney Frank NT
- **Use of Testers** -
- **Glass Ceiling** - current status of efforts within federal government (DOL Glass Ceiling Commission); EEOC initiatives
- **Healthcare** - Employer discrimination in health benefits (Kassebaum)

Commission Operations

- **Charge Processing** -

Breakdown of types of charges: discharge vs. hiring, promotion, retaliation, harassment

- **ADR**

- **Triage** - e.g., Identify strong cases or cases with potential for broad impact early (like EHN' ELI); identify cases for early mediation by neutral party

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

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

- **Problems with Charge Processing** -

- CP sworn statement; respondent does not have to be sworn to
- Confidentiality Restrictions (Royko) - parties cannot see investigative file during investigation

- **Accessibility Issues** - Obstacles in administrative process for language minorities, physically and mentally disabled people

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

- **Roles/Relationships of Chair, Commissioners, General Counsel**

- **Commission Meetings** - frequency, format, content

- **Policymaking Process** - currently no formal process, no centralization; tends to be reactive, in response to issues arising in the field; any good policy is undercut in implementation

Commission Operations

- **Controversial Standing Policies** -
 - **Full Investigation**
 - **Full Relief (v. lesser voluntary settlements)**
 - **Emphasis of Individual Charges over Sytemic/Class**
- **Mission of the Agency** - current view is solely law enforcement focus, no education /outreach focus
- **Jurisdiction/Autonomy of Field Offices** - all litigation decisions have to be made by HQ, field offices cannot proceed on their own
- **State & Local FEPA Worksharing Contracts** -
- **Royko/Chicago ADEA Case** - issues involving administrative process and confidentiality requirements and policies in investigations
- **Computer Capacity - Charge/Litigation Tracking Systems** -
 - **Additional \$1 Million for iRMS - what was done?**
- **Performance Reviews/ Awards** -
- **Improving Commission Service to Traditionally Underserved Communities**
- **Commission's Technical Assistance Role**

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

FAX TRANSMITTAL FORM

DATE : 9/19/94

TIME: 3:15

TO : Steve Warnath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Clare Gonzales

CHECK ONE:

OCLA
(202) 663-4900

SURVEYS
(202) 663 - _____

OFO
(202) 663 - _____

OH
(202) 663 - _____

OGC
(202) 663 - _____

OLC
(202) 663 - _____

OEO
(202) 663 - _____

DOCUMENT: Notice of Withdrawal of
Harassment Guidelines

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 2

Phone # (202) 663-4915

SPECIAL INSTRUCTIONS:

The Commission voted today to withdraw
The Proposed Harassment Guidelines in their
entirety from consideration.

Please call if you have any questions.

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

[Billing Code 6750-01-M]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1609

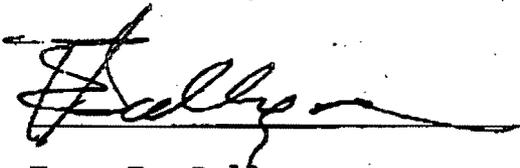
Guidelines on Harassment Based on Race, Color, Religion, Gender,
National Origin, Age, or Disability

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Withdrawal of the Proposed Guidelines.

SUMMARY: The Proposed Guidelines on Harassment Based on Race,
Color, Religion, Gender, National Origin, Age, or Disability (58
F.R. 51266, October 1, 1993) are being withdrawn from
consideration.

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Deputy
Legal Counsel, or Dianna B. Johnston, Assistant Legal Counsel,
Office of Legal Counsel, EEOC 1801 L Street, NW., Washington, DC
20507; telephone (202) 663-4679 (voice) or (202) 663-7026 (TDD).



Tony E. Gallegos

Chairman

Equal Employment Opportunity Commission.

I. TITLE VII ISSUES

A. PENDING LEGISLATION

1. Legislation to Eliminate Caps On Damages Under Title VII and the ADA: The Equal Remedies Act

Equal Remedies

Q: Legislation to amend the damages provision of the Civil Rights Act of 1991 and remove the caps on damages which were enacted as part of that law is pending before this Committee. What are your views on this legislation.

A: As I understand the Equal Remedies Act, it is designed to bring the provision providing damages in cases of intentional discrimination under Title VII and the Americans With Disabilities Act into conformity with other federal law which provides damages for intentional discrimination on the basis of race and national origin and which does not subject the damages to arbitrary limits or caps. I can see no reason why there should be different standards for the award of damages for intentional violations of the different employment anti-discrimination laws.

Revo testified Deval will

2. Legislation to reverse St. Mary's Honor Center v. Hicks (addressing nature of plaintiffs' burden to prove intentional discrimination in absence of direct proof.)

Q: In its 1993 decision in St. Mary's Honor Center v. Hicks, the Supreme Court addressed the proof of intentional discrimination under Title VII and related statutes. Legislation has been introduced to reverse this decision and restore the preexisting standard for the proof of intentional discrimination where direct evidence of discrimination is not available. What are your views on the legislation.

harder to use circumstantial evidence to meet burden of proof

A: It is likely that Hicks will make the proof of intentional discrimination more difficult for victims of discrimination. I believe that legislation may be necessary to address this problem. I am not familiar with the particular legislation but look forward to reviewing it carefully.

3. Legislation to bar mandatory arbitration agreements as a condition of employment

Q: In the Gilmer case, the Supreme Court held that courts will compel arbitration of employment civil rights claims where the employee has signed an employment agreement providing for

such mandatory arbitration. What is your view of mandatory arbitration of civil rights claims.

OK
A: ~~I am concerned about requiring employees to waive their rights to bring civil rights claims in court in order to get or keep a job.~~ There was recently a very troubling article on this subject in the Wall Street Journal, which reviewed what happened to sexual harassment complaints brought by women who worked in the securities industry and were forced into binding arbitration procedures by contracts including these waivers. As the article set out, the arbitrators were almost exclusively older white men who had very little experience with or understanding of sexual harassment. As a result, it was almost impossible for the complaining parties to prevail although, according to the newspaper story, there were some very compelling cases.

While, in my view, alternate dispute resolution mechanisms can be extremely valuable for the early and efficient resolution of claims, this does not extend to requirements that employees give up their right to raise a civil rights claim in the courts as a condition of employment. [possible mention of OWEPA issues?]

4. Justice for Wards Cove Workers Act (legislation to apply new standard of disparate impact discrimination to the Wards Cove case)

A supports
Q: As you know, when Congress passed the Civil Rights Act of 1991, it reversed the Supreme Court's decision in Wards Cove v. Atonio regarding the proof of disparate impact discrimination. However, it also provided that the new standard would not apply to the Wards Cove case itself, which is still in litigation. Legislation is pending which would apply the Civil Rights Act's disparate impact standard to the Wards Cove litigation. Do you have a position on the legislation.

A: ~~I share the concerns~~ about failing to make the amendment reversing the decision in the Wards Cove case applicable to the workers at the Wards Cove plant and leaving that case to be resolved under the pre-existing law. While I understand that the question is in litigation, legislation may well be necessary to resolve the problem.

5. Legislation Regarding Retroactivity of the Civil Rights Act

Q: Would you support legislation to reverse the Supreme Court's recent decisions in Landsgraf and Rivers and provide that the amendments of the Civil Rights Act of 1991 apply to pre-Act

A - Solicitor General

conduct?

A: I am troubled by the fact that the Civil Rights Act Amendments have not been available to assist many of the very people whose plight motivated Congress to act in the first place. I would, of course, have to review any such legislation before offering any further opinion regarding it.

6. Federal Sector Legislation

Q: Do you support the pending legislation to shift much of the responsibility of handling federal sector EEO claims to the EEOC?

A: As matter of policy, I think this legislation will add much to the fairness and effectiveness of the federal employee EEO process. However, it is essential that adequate resources accompany such shift. Without providing the EEOC with the necessary resources, employees with discrimination claims will be worse off than they were under the previous procedures -- as will everyone else who must bring their claim to the EEOC.

wrong door as judge

B. INTERPRETATIONS OF CIVIL RIGHTS ACT PROVISIONS

1. Race-Norming

Q: ~~The Commission has not yet issued an interpretation of the Civil Rights Act's prohibition of race-norming in standardized tests. What are your intentions in this regard?~~

A: This is obviously a complex and important question which will have to be carefully addressed by the Commission. It is premature for me to discuss at this point what form a policy interpretation would take except to say that I am aware of the need for agency attention to this question. ~~[should answer go further: i.e., it will be a priority?]~~

- no EEOC policy

← yes

2. Disparate Impact Guidance

Q: Although, in 1991 the Civil Rights Act codified a cause of action for disparate impact discrimination, the Commission has yet to issue any interpretive guidance on this subject. Please describe your intentions with regard to this matter.

A: I am aware that ~~policy has not been issued on this important subject. Again, I am not in a position of discussing this any further except to say that I am aware of the need for action. [should answer go further, i.e., state that it will be a priority?]~~

- no EEOC formal policy

C. ADDITIONAL POLICY QUESTIONS

1. Comparable Worth

Q: Do you support the doctrine of comparable worth, meaning equal pay for jobs of comparable or equivalent worth?

A: The question, of course, is not what I support but what the law requires. I view pay discrimination as a serious matter which is still very much with us. For example, in 1963, women earned 59 cents for every dollar men earned. In 1992, women were only up to 71 cents on the dollar. And this was the aggregate figure for all women -- African American women earned 64 cents for every dollar men earned and Hispanic women earned only 55 cents.

Launch into Equal Pay Act answer

I intend to assure that the EEOC takes an active stance against such discrimination. This, for starters, includes expanding our Equal Pay Act docket from the two cases filed in 1992 (down from 79 cases in 1980). [I recommend that the best answer is to concentrate on equal pay issues; we can certainly discuss further. Note that Representative Norton has scheduled hearings on her comparable worth bill for the same day as the confirmation hearings.]

Stay away from discussion of "Comparable"

2. English-only Workplace Rules

Q: As you know, the Ninth Circuit Court of Appeals has recently ruled that English-only workplace rules do not violate Title VII, declining to follow the EEOC Guidelines on the subject. Could you please give the Committee your views on this subject.

① prob of a following gasches
② EEO '91 CRA

A: [for discussion]

3. OMB Directive 15

Q: What is your view on the whether any revisions should be made to OMB Directive 15, the Standards For The Classification Of Federal Data On Race And Ethnicity

A: [for discussion]

① should racial issue
② groups who want to be identified
Comments provided by OMB by Chair's predecessor 4-5 mo ago

4. Sexual Harassment [Most likely, any harassment questions will focus on the religious harassment guidelines. However, these issues might come up.]

a. First Amendment Issues

Q: Some argue that not only the religious harassment guidelines, but the guidelines addressing sexual and racial

Also considered re: religious harassment

one hot issue: in case of...



harassment as well, implicate first amendment protections. What is your view on this question.

A: On this question, I agree with Justice Scalia who has recognized that the categories of speech and conduct can overlap. In his majority opinion in R.A.V. v. City of St. Paul (1992), Justice Scalia held that a statute directed at conduct rather than speech -- such as Title VII -- can constitutionally proscribe harassing speech which is incidental to the prohibited conduct. The alternative view -- that speech can never be restricted -- would make it impossible to prohibit the great majority of harassment. This is because, of course, it is speech-based. The Supreme Court has consistently rejected this point of view and I fully concur with that result.

b. "Reasonable Person" vs. "Reasonable Woman"

Q: In sexual harassment cases, do you think the harassment should be analyzed from the point of view of the "reasonable person" or the "reasonable woman."

A: The Supreme Court answered most of this question when it held unanimously in Harris v. Forklift that the harassment must create an environment that a "reasonable person" would find hostile or abusive. While the Court rejected the "reasonable woman" standard which had been advanced by some courts, however, it gave no further guidance on who, exactly, that reasonable person is. In my view, such person must incorporate broad social perspectives, certainly including those of the victim.

*Rich
had
question*

5. Pregnancy/Abortion

Q: The question has recently arisen under the Pregnancy Discrimination Act regarding whether an employer may terminate an employee for having an abortion, considering an abortion or otherwise advocating abortion rights. What is your view on this subject?

A: As I understand the PDA, it defines discrimination on the basis of sex to include discrimination on the basis of pregnancy, childbirth, or related conditions. It includes a proviso which states that an employer is not required to pay for health insurance benefits for abortion, other than where the life or health of the mother would be endangered. This is a limited exception to the broader rule, however, and does not permit an employer to discriminate against an employee because she or he may be considering an abortion.

5. Uniform Guidelines On Employee Selection Procedures

Q: Do you believe that the Uniform Guidelines should be revised?

A: At this point, it is premature for me to express an opinion on this question. However, the question of whether we should pursue any revisions to the Uniform Guidelines will be part of a broader review of what EEOC policies need to be developed and/or addressed.

D. ENFORCEMENT ISSUES/OPERATIONS

(1) General

Q: What do you see as the key management issues facing the EEOC?

A: There are obviously extremely serious issues to address in this regard. My top priority, if I am confirmed, will be to address these problems and get the agency working efficiently and effectively. While I am, of course, not in a position at this juncture to present an actual plan of action, let me lay out some of my key concerns:

1. Charge processing: from the moment a charging party first has contact with the Commission, that person must be treated with professionalism, dignity and respect by well-trained staff who know how to conduct a thorough and efficient investigation. This is true for everyone who comes to the agency, whether or not they have a disability or whether or not they speak English. At the same time, local offices must be able to distinguish between claims which have merit and those that do not. We cannot -- and should not -- continue the current policy of fully investigating every charge.

2. Training: We must develop programs to properly train our investigators and all other Commission staff. We also need to carefully examine options for training the employees of the local and state fair employment agencies.

3. Emphasis on quality and not just quantity: I am concerned about an evaluation system which focuses on the number of investigations without also reviewing their quality.

4. Increased attention to pattern and practice claims: It is critical that the agency recognize that discrimination does not always occur separately case by case; unfortunately,

violations often come as part of a pattern and practice of discrimination which must be addressed on a systemic basis. Moreover, the agency does not -- and will likely never have -- the resources to pursue every meritorious individual case that comes before us. As a result, it is of utmost importance to develop strategies and management techniques to assure that charge processing, conciliation and litigation activities, along with policy development and other Commission functions, will recognize and address these critical pattern and practice issues.

5. Strategic planning: If we are to effectively leverage our resources and enhance the effectiveness of the agency, we must undertake careful strategic planning in connection with litigation, policy development and all of our other activities. In part, this means identifying cases that will have an impact beyond their particular facts, to enhance the development of the law and the Commission's enforcement presence.

6. Effective and efficient data collection and analysis: It is not possible to be strategic or effective if we don't know what's out there. It is critical to review all of our data systems from the point of view of how their contribution to strategic planning and enhanced enforcement can be maximized.

8. Outreach to protected communities: It is key that the Commission enhance its outreach to the communities it is charged with protecting. I am particularly concerned that we address communications with language minority and other national origin minority communities who, historically, have had little interaction with the Commission.

2. Backlog

Q: How do you intend to address the backlog?

A: [all or any of the above points, as well as ADR, see below, shift resources from headquarters to the field, otherwise for further discussion]

3. Alternate Dispute Resolution

Q: Do you believe that ADR has a place within the EEOC, and, if so, explain your views on ADR.

A: ADR is an extremely important tool, although we should not view it as a panacea to the backlog and other charge processing problems. [for further discussion]

4. Systemic vs. individual enforcement

Q: What is your view on the proper balance between individual and systemic enforcement?

A: Clearly, both are important. However, given the Commission's long absence from the area of systemic enforcement, we will, of necessity, focus efforts on developing effective strategies for identifying and targeting cases of systemic discrimination and implementing an active enforcement strategy.

5. Commission Meetings

Q: How often do you intend to schedule Commission meetings?

A: [for discussion]

Q: How do you intend to conduct Commission business?

A: [for discussion; include discussion of open processes, etc.]

6. Equal Pay Act cases

Q: What are your views on the Commission's enforcement of the Equal Pay Act?

A: I ~~view pay discrimination as a serious matter~~ which is still very much with us. For example, in 1963, women earned 59 cents for every dollar men earned. In 1992, women were only up to 71 cents on the dollar. And this was all women -- African American women earned 64 cents for every dollar men earned and Hispanic women earned only 55 cents.

I ~~intend to assure that the EEOC takes an active stance~~ against such discrimination. This, for starters, includes expanding our Equal Pay Act docket from the two cases filed in 1992 (down from 79 cases in 1980). [see also discussion of comparable worth.]

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

FAX TRANSMITTAL FORM

DATE: 9/18/94 TIME: 3:30

TO: ~~Mr~~ Steve Warnath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Clare Gonzalez

CHECK ONE:

OCLA
(202) 663-4900

SURVEYS
(202) 663 - _____

OFO
(202) 663- _____

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(202) 663- _____

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(202) 663 - _____

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(202) 663- _____

OEEO
(202) 663- _____

DOCUMENT: New Schedule - please note changes

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 3

SPECIAL INSTRUCTIONS: _____

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

CONFIRMATION WEEK SCHEDULE
as of 7/18/94 - 3:30 p.m.

● Indicates Change or Addition

Tuesday, July 19

- 9:30 a.m. Presentation of Oral Statements by all three nominees, followed by
- 12:30 p.m. Q & A's as needed.

EEOC Headquarters, 1801 L Street
Ph. (202) 663-4915

Claire will meet participants in the lobby at 9:30. We may not need or use the entire three hours, but please block this time off just in case.

- 3:30 p.m. All three nominees - Courtesy Meeting with Senator Howard Metzenbaum
140 Russell Senate Office Bldg
Contact: Sherri Sweitzer 224-8912

- 5:00 - 5:20 p.m. All three nominees - Courtesy Meeting with Senator Paul Wellstone
717 Hart Senate Office Bldg.
Contact: Dorothy McPeak 224-2159

- 5:45 p.m. All three nominees - Courtesy Meeting with Senator Paul Simon
462 Dirksen Senate Office Bldg.
Contact: Deidre Christenson 224-7024

Wednesday, July 20

- 10:30 a.m. All three nominees - Tentative meeting with Majority Staff

- 11:30 a.m. All three nominees - Courtesy Meeting with Senator Dan Coats
404 Russell Senate Office Bldg.
Contact: Karen Park 224-8724

- 3:00 p.m. Mock Hearing
476 OEOB

If you need to be cleared into the OEOB, please make sure Eric Senunas has your DOB. Eric Senunas can be reached at 456-7848.

Thursday, July 21**9:50 a.m.**

**Gil Casellas - Drop by Senator Arlen Specter's office
at 530 Hart Senate Office Bldg. for walk to confirmation hearing.
Contact: Sylvia Nolde 224-4254**

10:00 a.m.

**Confirmation Hearing for Gil Casellas
430 Dirksen Senate Office Bldg.**

**Senators Specter and Wofford to introduce Gil
(Wofford contact: Carol Chastain 224-7756)**

11:00 a.m.

**Confirmation Hearing for Paul Igasaki and Paul Steven Miller
430 Dirksen Senate Office Bldg.**

**Senators Boxer, Feinstein, and Harkin, and Congressman Mineta to
introduce**

Boxer contact: Stephanie 224-3553

Feinstein contact: Margo 224-9636

Harkin contact: Brendan 224-9260

Mineta contact: Chris Strobel 225-2631

schedl.gil

cg:7/18/94-3:30pm

CONFIRMATION ISSUES OUTLINE
(7/10/94)

DRAFT

Title VII

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

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

ISSUE: delay/way/issue:

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

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

In considering whether to grant cert in the case, the Supreme Court solicited the position of the Administration. On June 1, 1994, the Solicitor General, together with the EEOC, filed an *amicus* brief in support of granting cert. Cert was denied on June 20, 1994. The Congressional Hispanic Caucus and the new Congressional Asian Pacific American Caucus are considering developing legislation to address the issue.

[See attached briefing material]

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

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

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

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

[See additional briefing material in section on ADEA.]

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

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

- UGESP - cont.

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

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

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

- Guidance Needed on Intersection of Bases -- Race/National Origin & Gender and/or Disability and/or Age

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

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

WOMEN'S ISSUES -

● Sexual Harassment Issues -

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

What?

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

no - Women's groups would be satisfied being kept w/ other harassment even if religion is treated separately

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

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

is EEOC's role here?

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

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

The most significant recent Supreme Court decision regarding the PDA is *International Union, UAW v. Johnson Controls* (1991), which involved fetal protection issues.

•[SUMMARY OF JOHNSON CONTROLS TO COME]

- Pregnancy Discrimination Act of 1978 (PDA) - cont.
 - Abortion Exception - In a recent case, *Turic v. Holland*, 1994 U.S. Dist. LEXIS 4997 (W.D. Mich., Mar. 7, 1994), a federal district court held that discharging an employee because she is considering having an abortion is a violation of the Pregnancy Discrimination Act. These cases are rare, but women's groups believe this is a good example of how the PDA can apply to abortion.

Civil Rights Act of 1991 -

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

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

Pending Legislation:

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

◆ **Formal Administration Position?**

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

Suggested Legislation:

- Make CRA '91 Applicable to ADEA - CRA '91 amended only Title VII and the ADA; application to the ADEA was not addressed. Experts witness fees not available under ADEA; fix for *Lorance* on challenge to seniority system not applicable under ADEA. [Refer to summary of CRA '91]
- Retroactivity -- Effect of *Landgraf v. USI File Products* - April 1994 Supreme Court decision that the damages provision of CRA '91 cannot be applied retroactively to cases arising prior to passage of the Act.

Civil Rights Act of 1991 - cont.Continuing Policy Issues:

- Discriminatory Tests and Prohibition of "Race Norming" - Effect of race norming prohibition in CRA'91 on use of separate physical ability and psychological tests for different genders.
- EEOC Policy not to inform CPs of availability of damages and not to negotiate damages in settlement - Based on theory that settlements allow for "no fault," therefore, there can be no intentional discrimination for which damages can be recovered.

Equal Pay Act (EPA)

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

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

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

- EEOC's Record on EPA - During the last 14 years, the EEOC has had a dismal record on EPA enforcement. In 1980 under Eleanor Holmes Norton, the EEOC brought 79 EPA cases compared to only 2 that the Commission brought in 1992.
- Recommendations - The EEOC is urged by women's groups to make EPA enforcement a priority, particularly in its systemic litigation efforts. EEOC is also encouraged to work with OFCCP to include EPA compliance in OFCCP's compliance reviews of federal contractors.

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

Equal Pay Act (EPA) - cont.● **Comparable Worth -*****[Summary of opposition arguments on Comparable Worth to come]**

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

*DA
comment***[See attached briefing material prepared by WLDF]**

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

*Claire -
what's
the
problem?*

Age Discrimination in Employment Act (ADEA)

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

- Charge Processing - AARP argues that there is no statutory requirement of "cause" determination under the ADEA. The EEOC processes age charges the same way it does Title VII charges with the overwhelming majority of charges dismissed through "no cause" finding.
- Age Discrimination Amendments of 1993 (H.R. 2722) - Police and firefighters exemption from the ADEA allowing use of mandatory retirement age; sponsored by Owens, opposed by Metzenbaum. The bill seeks to extend permanently the temporary exemption to ADEA granted to police and firefighters in 1987. Owens has attached the bill to the Crime Bill, which is stuck in conference. Metzenbaum has threatened (promised) to filibuster the Crime Bill if the amendment stays on.

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

- Effect of Reductions in Force (RIFs) on Older Workforce - Many ADEA charges are related to RIFs. While the ADEA clearly prohibits targeting groups on the basis of age or treating members of protected age group differently in a RIF, the issue becomes more complex when "proxies for age" are used.

The 1992 Supreme Court decision in Hazen Paper has complicated the matter because it held that there is no disparate treatment under the ADEA, when the factor motivating the employer is some feature other than age, even when the factor used is empirically correlated with age.

- Disparate Impact Theory under ADEA - While the EEOC and most courts of appeals have applied disparate impact theory under the ADEA, there is no Supreme Court decision on the issue. The Court's decision in Hazen Paper may be a signal that it would not support the use of disparate impact theory under ADEA. A legislative fix is being considered by AARP.
- Pension Benefit Accruals under the ADEA - ADEA was amended in 1978 to raise maximum age limit from 65 to 70 and to forbid mandatory retirement under pension plans. The legislative history for the amendment indicated that pension plans could stop benefit accruals at normal retirement age. In 1986, Congress amended ADEA, the Internal Revenue Code, and ERISA in the Omnibus Budget Reconciliation Act of 1986 (OBRA 86) to require pension accruals regardless of age and required EEOC, IRS, and DOL to coordinate regulatory efforts.

will enforce -
Congress
plans

Follow
the
law
Any legis?

?
Problem?

OLDER WORKERS BENEFIT PROTECTION ACT - [See attached background memos]**• OWBPA Rulemaking Options -**

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

• Effect of Title I of OBPA on:

- **Early Retirement Incentives -** OWBPA authorized many qualifying voluntary early retirement incentive plans. The issue remains whether ADEA, after OWBPA, permits early retirement incentive offering an incentive only to person under a specified age ("Cipriano" plans). EEOC has opposed an age-capped plan in litigation (*amicus* brief).
- **State and Local Government Disability Retirement Plans -** there is substantial need for guidance in this area because many public employers apparently use a disability retirement plan that may now violate ADEA. (The plan calculates disability retirement benefits by projecting years of service until normal retirement age, which operates to the disadvantage of older individuals.)
- **Severance and Pension Integration -** OWBPA provides that severance pay can be offset by (1) additional pension benefits made available to an employee, or (2) the value of certain retiree medical benefits. The issue remains whether OWBPA is dispositive of all questions dealing with pension/severance integration. EEOC guidance is needed.
- **Ending retiree health coverage at medicare eligibility -** OWBPA does not address this issue, which will likely be the subject of litigation because employer-provided retiree health benefits are often more generous than Medicare.

◆ Administration position?

- **Title II of OBPA – ADEA Waivers -** Title II provides that unsupervised waivers may be valid and enforceable if they meet several requirements and are otherwise knowing and voluntary.
 - **Must Consideration be Returned to Challenge Waiver -** Remaining issue is whether an individual may challenge a waiver while retaining the consideration given in return for signing agreement. Courts and the Congress are split on the issue.
- **Title II of OBPA – ADEA Waivers - cont.**

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

Americans With Disabilities Act (ADA) - Title One

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

- **ADA Fact Sheets on:**
 - **Definition of Disability**
 - **Employment Provisions**
 - **Coverage of Drug and Alcohol Users**
 - **Remedies**
- **Existing EEOC ADA Guidances:**
 - **Preemployment Disability-Related Inquiries and Medical Examinations under the ADA**
 - **Interim Enforcement Guidance on the Application of ADA to Disability-Based Distinctions in Employer Provided Health Insurance - States that a different level of benefits in an employer-provided health insurance plan for "mental/nervous" conditions is not a "disability-based distinction" that violates ADA.**
 - **Mental health limitations in health insurance coverage**
 - **Need guidance on Longterm Disability Insurance (wage replacement)**
- **Future EEOC ADA Guidances Currently Under Development :**
 - **Definition of the Term "Disability" - A draft EEOC Compliance Manual section is in the final stages of development. The draft provides an analytical framework for determining whether an individual has a "disability" as defined by the ADA.**

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

- **Future EEOC ADA Guidances Currently Under Development** - cont.
 - **The ADA and Psychiatric Disabilities** - [Summary attached]
 - **Reasonable Accommodation and Undue Hardship** - A draft EEOC Compliance Manual section is being reviewed within OLC. Outstanding issues include reasonable accommodation for people with mental disabilities, which may involve "significant difficulty" rather than "significant expense."
- **Unresolved Issues:**
 - **"Mental/Nervous" Distinctions in Long Term Disability (LTD) Plans (wage replacement)** - LTDs usually limit benefits for "mental/nervous/conditions to two years, but do not similarly limit benefits for physical conditions. Does this violate ADA as a "disability-based distinction" unless shown not to be a subterfuge to evade the Act? Unlike health insurance which provides for treatment, LTD is wage replacement and is available only to people with actual disabilities. An options paper is being developed on this issue by OLC.
 - **Interaction Between ADA Reasonable Accommodation Requirements and Collective Bargaining Agreements** - Is it an undue hardship for an employer to provide a reasonable accommodation that is inconsistent with the terms of the applicable collective bargaining agreement? This issue includes the conflict between issues related to seniority and reasonable accommodation.
- **Coordination of the ADA and the Family and Medical Leave Act (FMLA)** - The ADA and FMLA both impose leave-related obligations on covered employers. The EEOC has been working with DOL during its FMLA rulemaking to coordinate implementation of both laws. When DOL issues its final FMLA rule, EEOC's OLC will finalize an enforcement guidance on the ADA/Title VII and FMLA.

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

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

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

Civil Rights Issues in Health Care Reform

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

- **For a short summary of the issues see the attached Questions and Answers About Civil Rights Issues in Health Care Reform**

For more detail, see the following attached fact sheets:

- **Gaps in Existing Civil Rights Laws**
- **Language Discrimination in Health Care**
- * **Summary of Kassebaum Amendment to come**

Federal Sector Enforcement

[Briefing material previously distributed]

- **Part 1614** - New EEOC federal sector equal employment opportunity complaint processing regulations, issued pursuant to Section 717 of Title VII. Part 1614 attempts to make the process more fair and timely by, among other things, limiting to 180 days the length of time in which the complaint is solely within the agency, thereby reducing the dominance of the agency in the process.
- **Federal Employee Fairness Act** - S. 404 (Glenn)/H.R. 2721 (Ed & Labor/Post Office & Civil Service) - Legislation to change the federal sector complaint process by significantly reducing the authority of federal agencies over internal eeo complaints and by transferring the majority of the process to the EEOC. This legislation is in response to many years of Congressional concern and discussion about the unfairness of allowing federal agencies to retain jurisdiction over the processing of eeo complaints brought by their own employees. Issues of fairness, due process, and timeliness are the principal issues raised from time to time by Congress about the federal sector eeo process.

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

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

Federal Sector EEO Leadership Responsibilities - Executive Order 12067

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

[See attached briefing material]

Miscellaneous● **Affirmative Action/Quotas -**

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

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

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

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

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

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

● **Inclusion of Religion in the Proposed Consolidated Harassment Guidelines**

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

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

- **Religious Harassment Guidelines** - cont.

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

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

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

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

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

Currently, HUD has a \$9 million private enforcement program which includes the use of testers by private and "substantially equivalent" state/local government fair housing agencies. Kerry Scanlon, Deputy Assistant AG for Civil Rights, has discussed with OMB a \$500,000 testing program for the FY'96 DOJ budget.

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

- EEOC's Responsibilities Under Immigration Reform and Control Act of 1986 (IRCA) -
 - * **Memo on Memorandum of Understanding between EEOC and DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices in Process**
- Glass Ceiling - Need information on the current status of Administration's efforts within federal government, specifically the Glass Ceiling Commission at Labor.

Issues involving Commission Operations - (Provided primarily for reference and outline for discussion; briefing material not provided.)

- Charge Processing - The current EEOC policy of full investigation of all charges is principally responsible for the huge backlog of cases. The Commission is urged by all sectors of the civil rights community to develop an innovative approach to dealing with the backlog and making the administrative process more effective and efficient. Some suggestions include:
 - ADR -
 - Triage - e.g., Identify strong cases or cases with potential for broad impact early (like EHN' ELI); identify cases for early mediation by neutral party
 - "Opt out" alternative - NELA suggestion allowing Title VII CPs to opt out after 60 days instead of 180 days, as with ADA.
 - Variation of Rapid Charge Processing (RCP) and Early Litigation Identification (ELI) -
- Commonly Cited Problems with Charge Processing -
 - CP sworn statement; respondent does not have to be sworn to
 - Lack of training, including multicultural/sensitivity training, of intake and investigation staff; cannot address complex cases and, therefore, discourage CPs from filing them
 - Confidentiality Restrictions (Royko) - parties cannot see investigative file during investigation
- Accessibility Issues - Obstacles in administrative process for language minorities, physically and mentally disabled people
- Systemic Litigation - need to develop and bring major impact cases early to send message; need coordination with other civil rights agencies with regard to targeting

Issues involving Commission Operations - cont.

- **Roles/Relationships of Chair, Commissioners, General Counsel**
- **Commission Meetings** - frequency, format, content
- **Policymaking Process** - currently no formal process, no centralization; tends to be reactive, in response to issues arising in the field; any good policy is undercut in implementation; policy is not made "in the sunshine."
- **Controversial Enforcement Policies** -
 - **Full Investigation**
 - **Full Relief (v. lesser voluntary settlements)**
 - **Emphasis of Individual Charges over Systemic/Class**
- **Mission of the Agency** - current view is solely law enforcement focus, no education /outreach focus
- **Jurisdiction/Autonomy of Field Offices** - all litigation decisions have to be made by HQ, field offices cannot proceed on their own
- **State & Local FEPA Worksharing Contracts** - Under Title VII, the EEOC must contract with qualifying State and Local Fair Employment Practices Agencies (FEPAs) to process charges within the FEPAs jurisdictions. The quality of FEPA performance is a constant issue in Congressional oversight. As noted in the Transition Report, new FEPAs charge that contracts are not awarded competitively and, therefore, there is little incentive for the FEPAs with contracts to perform well. Those FEPAs in turn charge that they are provided with inadequate resources to perform their responsibilities.
 - * **Data on FEPAs and IAOHRA memo to come**
- **Royko/Chicago ADEA Case** - Mike Royko has written a series of articles criticizing the EEOC's administrative process and confidentiality policies in ADEA investigations.

[Briefing material previously provided]
- **Computer Capacity - Charge/Litigation Tracking Systems** -
 - * **Memo on current EEOC computer systems is in process**

Issues involving Commission Operations - cont.

- **Performance Reviews/Awards** - Chairman Major Owens' staff has complained about the reportedly large performance awards given to favored Commission staff, despite record poor performance by the agency.
- **Improving Commission Service to Traditionally Underserved Communities**
- **Commission's Technical Assistance Role**

outline
cg: 7/10/94-8:15pm

CONFIRMATION ISSUES OUTLINE
(6/30/94)

DRAFT

Title VII

- St. Mary's-Honor-Center-v.-Hicks - Burden of proof p. 10
- Garcia v. Spun Steak -
- Gilmer/Protection ~~by~~ Coercive Employment Agreements Act of 1994 (Feingold) - Amends Title VII, ADEA, and ADA to prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration. (*Gilmer* was an age case so this is a high priority for AARP.)
- Sexual Harassment Issues -
 - Guidelines/*Harris v. Forklift*
 - Coordination between EEOC & OFCCP - need clear articulation of standards for employers [Administration Policy suggested]; allow OFCCP's compliance reviews to include individual cases against employers under OFCCP review
- Uniform Guidelines on Employee Selection Procedures (UGESP) - is revision still contemplated by the Commission?
- Pregnancy Discrimination Act
 - Fetal Protection Issues/*UAW v. Johnson Controls* -
 - Abortion Exception -
- Guidance Needed on Intersection of Bases [Race/National Origin & Gender] -

Civil Rights Act of 1991

- Equal Remedies Act of 1993 -
- Justice for Wards Cove Workers Act
- Fixes Not Applicable to ADEA - experts witness fees, fix for *Lorance* on challenge to seniority system not applicable
- Landgraf v. USI File Products - April 1994 Supreme Court decision that the damages provision of CRA '91 cannot be applied retroactively to cases arising prior to passage of the Act.
- Discriminatory Tests - Effect of Race norming prohibition in CRA '91 on use of separate physical ability tests for different gender
- Litigation of Sex-based cases before juries for the first time - EEOC attorneys need training in jury selection to address tendency to devalue claims of minority women by juries
- Failure to inform CPs of availability of damages and failure to negotiate damages in settlement - Based on theory that settlements allow for "no fault," therefore, there can be no intentional discrimination for which damages can be recovered.

Equal Pay Act

- Narrow Interpretation of Supreme Court cases on EPA - Gunther -
- Coordination of enforcement efforts with OFCCP -
- Comparable Worth - Fair Pay Act to be introduced by Eleanor Holmes Norton

Age Discrimination in Employment Act (ADEA)

- Age Discrimination Amendments of 1993 (H.R. 2722) - Police and firefighters exemption from the ADEA allowing use of mandatory retirement age; sponsored by Owens, opposed by Metzenbaum.
- Older Workers Benefit Protection Act -
 - Rulemaking -
 - Waivers - does plaintiff have to tender back consideration received for waiver to challenge? Guidance needed for both employees and employers
 - Accrual of Pension Benefits beyond normal retirement age
- Effect of Reductions in Force (RIFs) on Older Workforce -
- Early Retirement Incentive Programs under ADEA
- Disparate Impact Theory under ADEA - no Supreme Court decision applying disparate impact theory to ADEA; *Hazen Paper*, eligibility for pension benefits found not to be related to age; employers using this case to avoid disparate impact; legislative fix being considered by AARP.
- Charge Processing - no statutory requirement of "cause" determination, yet age charges still processed like Title VII charges with overwhelming majority of charges dismissed through "no cause" finding

Americans With Disabilities Act (ADA) - Title One

- Existing Guidances - Insurance, medical examinations, pre-employment inquiries
Others?
- Areas where guidance is needed -
 - Standards on undue hardship
 - Standards for determining coverage - Internal EEOC effort to construe third prong of definition to require a person to actually have the "perceived" impairment; need list of "major life activities" to include mental activities
 - Standards for reasonable accommodation, including special needs of people with mental disabilities
- EEOC Guidance on Insurance -
 - Mental health limitations in health insurance coverage
 - Need guidance on Longterm Disability Insurance (wage replacement)
- Interaction between Reasonable Accommodation Requirements and Collective Bargaining Agreements -
- Determination of Substantial Impairment when taking Medication to ameliorate problem -
- Need guidance on Episodic Disorders
- Relationship of Family and Medical Leave Act (FMLA) and ADA - Coordination with DOL in rulemaking on FMLA

Rehabilitation Act of 1973 (Federal Sector)

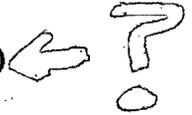
Federal Sector Enforcement

- Part 1614
- Federal Employee Fairness Act

Federal Sector EEO Leadership Responsibilities - Executive Order 12067

- Federal Sector Affirmative Action Requirements -
- Coordination between EEOC & OFCCP - Memorandum of Understanding giving OFCCP authority to negotiate damages under CRA'91 in individual cases discovered during compliance reviews

Miscellaneous

- Affirmative Action/Quotas - (Kerry Scanlon to get Deval's briefing material) 
- Inclusion of Religion in the Proposed Consolidated Harassment Guidelines
 - Religious Freedom Restoration Act of 1993 (RFRA) - effect of RFRA on Religious Harassment Guidelines
- Employment Non-Discrimination Act of 1994 (ENDA) - prohibits discrimination in employment on basis of sexual orientation; introduced June 23, 1994; principal sponsors Senator Edward Kennedy and Representatives Gerry Studds and Barney Frank
- Use of Testers -
- Glass Ceiling - current status of efforts within federal government (DOL Glass Ceiling Commission); EEOC initiatives
- Healthcare - Employer discrimination in health benefits (Kassebaum)

Commission Operations

- **Charge Processing** -

Breakdown of types of charges: discharge vs. hiring, promotion, retaliation, harassment

- **ADR**

- **Triage** - e.g., Identify strong cases or cases with potential for broad impact early (like EHN' ELD); identify cases for early mediation by neutral party

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

- **Variation of Rapid Charge Processing (RCP) and Early Litigation Identification (ELD)** -

- **Problems with Charge Processing** -

- CP sworn statement; respondent does not have to be sworn to
- Confidentiality Restrictions (Royko) - parties cannot see investigative file during investigation

- **Accessibility Issues** - Obstacles in administrative process for language minorities, physically and mentally disabled people

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

- **Roles/Relationships of Chair, Commissioners, General Counsel**

- **Commission Meetings** - frequency, format, content

- **Policymaking Process** - currently no formal process, no centralization; tends to be reactive, in response to issues arising in the field; any good policy is undercut in implementation

Commission Operations

- **Controversial Standing Policies** -
 - **Full Investigation**
 - **Full Relief (v. lesser voluntary settlements)**
 - **Emphasis of Individual Charges over Sytemic/Class**
- **Mission of the Agency** - current view is solely law enforcement focus, no education /outreach focus
- **Jurisdiction/Autonomy of Field Offices** - all litigation decisions have to be made by HQ, field offices cannot proceed on their own
- **State & Local FEPA Worksharing Contracts** -
- **Royko/Chicago ADEA Case** - issues involving administrative process and confidentiality requirements and policies in investigations
- **Computer Capacity - Charge/Litigation Tracking Systems** -
 - **Additional \$1 Million for iRMS - what was done?**
- **Performance Reviews/ Awards** -
- **Improving Commission Service to Traditionally Underserved Communities**
- **Commission's Technical Assistance Role**

**THREE EEOC NOMINEES APPEAR HEADED
FOR CONFIRMATION AFTER LOW-KEY HEARING**

Three attorneys named by President Clinton to serve on the Equal Employment Opportunity Commission appear headed for prompt confirmation by the Senate, after a low-key hearing before the Labor and Human Resources Committee July 21, where the nominees promised to look at new approaches to address the crisis situation of the beleaguered agency.

"We're going to look at the commission with a clean sheet approach," said Chairman-designate Gilbert Casellas, a Philadelphia attorney who has been serving as general counsel of the Air Force for the past eight months. "We have to come up with something creative, something different, or the system is going to crash."

Casellas, formerly a litigation partner with Montgomery, McCracken, Walker & Rhoads, was named to the chairman's job in June, capping an 18-month search by the administration (113 DLR A-13, 6/15/94).

Of Puerto Rican descent, Casellas, 41, has been active in Hispanic bar and community activities and was praised by both Senators from Pennsylvania for a "commitment to equality, opportunity, and justice."

Two nominees for commissioner's posts—Paul M. Igasaki and Paul Steven Miller—also appeared before the committee. Igasaki, who will be designated vice-chairman of the commission, is executive director of the Asian Law Caucus in San Francisco and was previously a representative of the Japanese-American Citizens' League and the Asian-American Community Liaison on the Chicago Commission on Human Resources.

After his activity in the Clinton-Gore campaign, Miller most recently was deputy director of the U.S. Office of Consumer Affairs and White House liaison to the disability community. He was previously director of litigation for the Western Law Center for Disability Rights, a Los Angeles-based non-profit, legal services center.

Simon: 'Aggression' At EEOC

Sen. Paul Simon (D-Ill), who chaired the hearing, expressed dismay over the administration's delay in filling the key civil rights job, but said he was pleased with the final selections and called for the nominees to be "aggressive in a sensible way" in dealing with the commission's backlog of complaints and delays in charge processing.

With similar support voiced by Sen. Nancy Kassebaum (R-Kan), ranking minority member of the committee, and no opposition from civil rights organizations, the nominees should face an easy confirmation. Following the hearing, Simon told BNA that the committee is likely to vote on the nominations at its next meeting and that the full Senate should act before Congress adjourns for its August recess.

The three nominees will join two seated Republican commissioners, bringing the commission up to its five-member full strength. Ricky Silberman, who currently serves as vice-chairman, has a term expiring in July 1995 and Commissioner Joyce Tucker's term runs until August 1996.

The general counsel's job, which also requires Senate confirmation, remains vacant and has been held by career employee James R. Neely Jr. in his role as deputy general counsel since June 1993.

Casellas: Fixing What's Broken

In brief opening remarks, Casellas promised to examine new approaches and to "fix what's broken" at the commission.

"We must examine how we do our work and, if necessary, fix our operations to assure timely and quality work," he said, promising to "engage myself personally in any search for a new model of organizing our work."

Although he did not outline specific approaches, Casellas also assured the committee that the process would be "a collaborative one and will include our many constituent communities and Congress. In short, if I am confirmed, to those who have felt excluded, we are open for business; to those who criticize how we operate, we will operate as a business; and to those who doubt our commitment to vigorous enforcement, we mean business."

Responding to questions from Simon and Kassebaum, however, he said that expansion of EEOC's pilot alternate dispute resolution program would be one likely goal of the new commission. "A key to success is early intervention and to do it selectively," Casellas said, adding that disability discrimination cases involving reasonable accommodation might be one area where ADR could be applied and "handled in a less adversary" manner.

Casellas promised to take a close look in reviewing the controversial proposed guidelines on religious harassment, asserting a need to "strike an appropriate balance" on a "very complex, very sensitive issue."

He also assured the committee that the commission would hold more public hearings, engage in dialogues, and "discuss issues openly."

"It's a matter of credibility," he told the committee. "The public has to be able to see what you do, if there is to be any credibility."

Recalling Discrimination

All three nominees recalled their own early experiences with discrimination.

Casellas, the son of a letter carrier and seamstress, who grew up in Tampa, Fla., attended a segregated school established to educate black and Hispanic students for his first six years, before eventually going on to Yale and the University of Pennsylvania Law School.

He recalled the 30th anniversary of the Civil Rights Act of 1964 as the year when he first attended "school with white children" and could join a neighborhood boys club and go to downtown movie theatres that had been off limits. "I have a personal affiliation with the types of issues that I will confront as chairman," Casellas said.

Igasaki, the son of Japanese-American parents who met at an interment camp during World War II, said the experiences of "wartime hysteria and racial hatred" faced by his ancestors prompted him to pursue a career in civil rights law. "As a Japanese American, no other experience has had a greater influence on me and my view of the law and of civil rights," he said.

Miller, who is a little person, found that after graduation from Harvard Law School in 1986 "the very law firms that had pursued me would immediately lose all interest in employing me as soon as they saw me or learned of my size." He recalled one incident where he was told that the firm would have no problems, "but feared that their clients would think they were running 'a circus freak show' if they were to see me as a lawyer in their firm."

End of Section

EEOC nominees vow to revitalize agency

By Ruth Larson
THE WASHINGTON TIMES

President Clinton's long-awaited nominees for chairman and two commissioners of the backlogged Equal Employment Opportunity Commission testified before the Senate yesterday and vowed to bring the agency back up to speed.

"These nominations have been a long time in coming, and I regret it's taken so long," Sen. Paul Simon, Illinois Democrat and chairman of the Labor and Human Resources Committee, told Gilbert F. Casellas, Mr. Clinton's nominee to head the EEOC, and Commissioners-designate Paul M. Igasaki and Paul S. Miller.

Mr. Simon characterized the EEOC as "an agency in trouble," faced with steadily mounting case backlogs and a diminishing role in enforcing laws against discrimination. He noted that the EEOC held 60 meetings in 1980 but just three in 1990.

Mr. Casellas, 41, who has been the Air Force general counsel since November, pledged that he would work to "reclaim our rightful role . . . as the lead agency for equal employment law enforcement." He said his first objective would be to tackle those backlogs

by reorganizing and streamlining the EEOC.

"I will welcome public scrutiny and debate, and I will eagerly engage in and invite discussion of controversial issues," Mr. Casellas said. "The EEOC can only maintain its credibility if its leadership is willing to have open doors and open minds and listen to the many communities that have a stake in what we do."

If confirmed, the nominees would face daunting challenges. The Federal Employees Fairness Act now being considered in Congress, for example, would give the EEOC — not agencies — primary responsibility for investigating charges of government workplace discrimination.

Mr. Casellas was wary of the proposal, saying, "If Congress decides to turn this over to EEOC, it will overwhelm an already overwhelmed system."

He added that the EEOC might need to acquire workers from other agencies.

The issue of religious harassment in the workplace is among the most controversial facing the commission. Critics say proposed EEOC guidelines that rule out any type of religious harassment would, in effect, prohibit workers from expressing their beliefs.

All three nominees agreed that the commission needs to strike a balance: protecting the freedom to express religious beliefs while eliminating discrimination or harassment based on religion. They said they plan to read thousands of statements received during the public comment period before deciding how to proceed.

If confirmed, the three nominees would bring the five-member commission up to full strength. The administration had been under increasing pressure to fill the vacancies at the EEOC, which enforces federal laws prohibiting employment discrimination on the basis of race, color, religion, sex, age, national origin or disability.

Tony E. Gallegos had served as acting chairman since April 1993. The two commissioners' posts have been vacant since Evan J. Kemp Jr. resigned in April 1993 and George Cheria left in July of that year.

Critics say the absence of a permanent chairman and other commission vacancies contributed to an agency unable to focus on mounting caseloads.

About 100,000 complaints are filed annually, and it takes about 18 months to process a claim, compared with three to six months a decade ago.

The nominees spoke movingly of their own brushes with racism and other forms of discrimination.

Mr. Miller, 33, deputy director of the U.S. Office of Consumer Affairs and White House liaison to the disabled community, is less than 5 feet tall. He told of law firms losing interest in employing him when they saw him. One even said they feared clients would think they were running "a circus freak show." Such comments would now be illegal under the Americans With Disabilities Act.

Mr. Igasaki, 38, is executive director of the Asian Law Caucus Inc. in San Francisco. He told how his parents met in an internment camp during World War II, and of his grandparents' journey to make their home in America.

"In 1942," he said, "wartime hysteria and racial hatred led to their losing those homes, losing much of what represented the American dream, to be sent to what amounted to concentration camps in the desert, due only to the color of their skin and the ancestry of their forebears.

"As a Japanese-American," Mr. Igasaki said, "no other experience has had a greater influence on me and my view of the law and of civil rights."

Ruling Deals Setback to Job-Bias 'Testers'

By FRANCES A. McMORRIS

Staff Reporter of THE WALL STREET JOURNAL

Undercover "testers," who pose as job applicants to investigate discrimination claims, can't be plaintiffs in cases against employers, a federal appeals court ruled.

The decision by the U.S. Court of Appeals for the District of Columbia could reduce the potential damage claims that defendants face in such cases. The court said the testers can't seek damages because they weren't legitimate job applicants.

However, the court didn't address whether testers could seek damages for alleged bias after 1991, when the federal job-discrimination law was amended.

The ruling was the first by a federal appeals court on the use of testers in job-discrimination cases. The practice—in which white and minority investigators are used to gauge whether they are treated differently—has been growing since 1982, when the U.S. Supreme Court said testers can be plaintiffs in housing-bias cases. However, the high court didn't address whether those posing as job seekers could sue for discrimination.

The appeals-court ruling came in a case brought by a civil-rights group against a job-referral agency, BMC Marketing Corp. The Fair Employment Council of Greater Washington sent two black testers and two white testers to BMC in search of job referrals. The black testers didn't receive referrals, but the white testers, who allegedly had similar credentials, did. The company allegedly refused to accept an application from one of the black testers.

The federal appeals court in Washington reversed a lower-court ruling that cleared the way for the testers and the Fair Employment Council to be plaintiffs in the case. The individual testers maintained that they should be allowed to sue because BMC violated their civil rights by refusing to provide them with job referrals and that they were deprived of employment opportunities.

The appeals court rejected those arguments, finding that BMC wasn't bound to provide job referrals because the testers misrepresented themselves as actual applicants.

John Irving of the law firm Kirkland & Ellis, which represented BMC, called the opinion a "major blow to the use of testers." The case "demonstrates the court's disdain for a tactic that is rooted in lies and deceit," he said.



The appeals court said the testers couldn't seek monetary damages under Title VII because the alleged discriminatory acts occurred before 1991, when the law was amended to allow such damages. The court also said the testers weren't entitled to other relief, such as an injunction against BMC, because there wasn't evidence that the testers would be discriminated against by BMC in the future.

The court didn't address whether testers would be entitled to damages under Title VII if the alleged violations had occurred after the 1991 amendments. The testers' attorney and an EEOC lawyer said they thought the decision leaves open that possibility.

The court, however, did find that the Fair Employment Council has legal standing to sue BMC under the Title VII federal law against job discrimination. The group's "standing stems from BMC's actions against bona fide employment candi-

dates, not from BMC's actions against the testers," the three-judge panel said in its decision. "The council has adequately alleged that BMC has a pattern and practice of discrimination, and its treatment of the testers may be evidence of such a pattern."

Discrimination lawyers criticized the ruling. Debra Raskin, an attorney at New York law firm Vladeck Waldman Elias & Engelhard, said she views testers as the ideal way in which to discover hiring discrimination. "What could be better? You create the hypothetical, similar individuals," she said.

The Equal Employment Opportunity Commission, which filed a brief in the case in support of the Fair Employment Council, doesn't use testers in employment cases at this time, said EEOC attorney Samuel A. Marcossin in Washington. But the agency has issued policy guidelines stating that testers have standing under Title VII to file charges and lawsuits against employers.

Joseph Sellers, of the Washington Lawyers Committee for Civil Rights, which represented the Fair Employment Council and the testers, said a decision hasn't been made whether to further appeal the case.

(Fair Employment Council of Greater Washington Inc. vs. BMC Marketing Corp., U.S. Court of Appeals for the District of Columbia, 93-7190)

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CONFIRMATION ISSUES OUTLINE
(7/11/94)

Title VII

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

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

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

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

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

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

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

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

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

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

[See additional briefing material in section on ADEA.]

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

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

- UGESP - cont.

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

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

- Coordination between EEOC & OFCCP - Several civil rights and women's groups are urging the EEOC and OFCCP to develop a Memorandum of Understanding (MOU) that would designate OFCCP as the EEOC's agent when OFCCP discovers intentional discrimination by federal contractors in violation of Title VII in the course of a compliance review. This would allow OFCCP to seek appropriate compensatory and punitive damages (as provided by the Civil Rights Act '91) in its negotiation and conciliation efforts involving intentional discrimination. There is already such a MOU between EEOC and OFCCP regarding claims of disability discrimination against federal contractors. This coordination would be appropriate for all covered bases of discrimination.
- Guidance Needed on Intersection of Bases -- Race/National Origin & Gender and/or Disability and/or Age - It is well-documented that discrimination on multiple bases is a serious problem. For example, an employer may hire African American and Hispanic men and Anglo women, but no African American or Hispanic women. That employer may have a defense to either a race or a sex claim under a traditional view of the law (*i.e.*, he hires racial minorities and women and is, therefore, not liable under Title VII).

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

WOMEN'S ISSUES UNDER TITLE VII-● **Sexual Harassment Issues -**

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

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

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

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

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

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

The most significant recent Supreme Court decision regarding the PDA is *International Union, UAW v. Johnson Controls* (1991), which involved fetal protection issues.

***[SUMMARY OF JOHNSON CONTROLS TO COME]**

- Pregnancy Discrimination Act of 1978 (PDA) - cont.
 - Abortion Exception - In a recent case, *Turic v. Holland*, 1994 U.S. Dist. LEXIS 4997 (W.D. Mich., Mar. 7, 1994), a federal district court held that discharging an employee because she is considering having an abortion is a violation of the PDA. These cases are rare, but women's groups believe this is a good example of how the PDA can apply to abortion.

Civil Rights Act of 1991 -

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

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

Pending Legislation:

- Equal Remedies Act of 1993 - Legislation to remove the caps on damages for intentional discrimination as provided in CRA '91. Janet Reno testified in support of ERA at her confirmation hearing and Deval Patrick has indicated that he will testify in support of the bill at Senate hearings expected in the fall.
 - ◆ **Formal Administration Position yet?**
- Justice for Wards Cove Workers Act - Legislation to delete special exemption in the CRA '91 for the *Wards Cove* case, which affects primarily Asian-Pacific Americans who previously worked or are now employed by Wards Cove Packing Company. The Administration has already taken a position in support of the legislation, as evidenced by a 1993 letter from President Clinton.

Suggested Legislation:

- Make CRA '91 Applicable to ADEA - CRA '91 amended only Title VII and the ADA; application to the ADEA was not addressed. Experts witness fees not available under ADEA; fix for *Lorance* on challenge to seniority system not applicable under ADEA. [Refer to summary of CRA '91]
- Retroactivity — Effect of *Landgraf v. USI File Products* - April 1994 Supreme Court decision that the damages provision of CRA '91 cannot be applied retroactively to cases arising prior to passage of the Act.

Civil Rights Act of 1991 - cont.**Continuing Policy Issues:**

- **Discriminatory Tests and Prohibition of "Race Norming"** - Need to determine the effect of the race norming prohibition in CRA'91 on use of separate physical ability and psychological tests for different genders.
- **EEOC Policy not to inform CPs of availability of damages and not to negotiate damages in settlement** - Based on theory that settlements allow for "no fault" and, therefore, there can be no intentional discrimination for which damages can be recovered.

Equal Pay Act (EPA)

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

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

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

- **EEOC's Record on EPA** - During the last 14 years, the EEOC has had a dismal record on EPA enforcement. In 1980 under Eleanor Holmes Norton, the EEOC brought 79 EPA cases compared to only 2 that the Commission brought in 1992.
- **Recommendations** - The EEOC is urged by women's groups to make EPA enforcement a priority, particularly in its systemic litigation efforts. EEOC is also encouraged to work with OFCCP to include EPA compliance in OFCCP's compliance reviews of federal contractors.

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

Equal Pay Act (EPA) - cont.● **Comparable Worth** -***[Summary of opposition arguments on Comparable Worth to come]**

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

[See attached briefing material prepared by WLDF]

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

Age Discrimination in Employment Act (ADEA)

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

- **Charge Processing** - AARP argues that there is no statutory requirement of "cause" determination under the ADEA. The EEOC processes age charges the same way it does Title VII charges with the overwhelming majority of charges dismissed through "no cause" finding.
- **Age Discrimination Amendments of 1993 (H.R. 2722)** - Police and firefighters exemption from the ADEA thereby allowing the use of mandatory retirement age; sponsored by Owens, opposed by Metzenbaum. The bill seeks to extend permanently the temporary exemption to ADEA granted to police and firefighters in 1987. Owens has attached the bill to the Crime Bill, which is stuck in conference. Metzenbaum has threatened (promised) to filibuster the Crime Bill if the amendment stays on. (This is the one issue that Metzenbaum and Thurmond are in complete agreement on.)
- ◆ **Administration Position** - (articulated in letter from DOJ on the Crime Bill, excerpt of letter is attached) Calls for further study on the use of testing in place of age and includes a compromise 4-year temporary extension of the law allowing mandatory retirement age.

ADEA - cont.

- **Effect of Reductions in Force (RIFs) on Older Workforce** - Many ADEA charges are related to RIFs. While the ADEA clearly prohibits targeting groups on the basis of age or treating members of protected age group differently in a RIF, the issue becomes more complex when "proxies for age" are used.

The 1992 Supreme Court decision in *Hazen Paper* has complicated the matter because it held that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than age, even when the factor used is empirically correlated with age.

- **Disparate Impact Theory under ADEA** - While the EEOC and most courts of appeals have applied disparate impact theory under the ADEA, there is no Supreme Court decision on the issue. The Court's decision in *Hazen Paper* may be a signal that it would not support the use of disparate impact theory under ADEA. A legislative fix is being considered by AARP.
- **Pension Benefit Accruals under the ADEA** - ADEA was amended in 1978 to raise maximum age limit from 65 to 70 and to forbid mandatory retirement under pension plans. The legislative history for the amendment indicated that pension plans could stop benefit accruals at normal retirement age. In 1986, Congress amended ADEA, the Internal Revenue Code, and ERISA in the Omnibus Budget Reconciliation Act of 1986 (OBRA 86) to require pension accruals regardless of age and required EEOC, IRS, and DOL to coordinate regulatory efforts.

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

- **OWBPA Rulemaking Options -**

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

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

- **Effect of Title I of OWBPA - cont.**

- **State and Local Government Disability Retirement Plans** - there is substantial need for guidance in this area because many public employers apparently use a disability retirement plan that may now violate ADEA. (The plan calculates disability retirement benefits by projecting years of service until normal retirement age, which operates to the disadvantage of older individuals.)
- **Severance and Pension Integration** - OWBPA provides that severance pay can be offset by (1) additional pension benefits made available to an employee, or (2) the value of certain retiree medical benefits. The issue remains whether OWBPA is dispositive of all questions dealing with pension/severance integration. EEOC guidance is needed.
- **Ending retiree health coverage at medicare eligibility** - OWBPA does not address this issue, which will likely be the subject of litigation because employer-provided retiree health benefits are often more generous than Medicare.

- ◆ **Administration position?**

- **Title II of OWBPA – ADEA Waivers** - Title II provides that unsupervised waivers may be valid and enforceable if they meet several requirements and are otherwise knowing and voluntary.
 - **Must Consideration be Returned to Challenge Waiver** - Remaining issue is whether an individual may challenge a waiver while retaining the consideration given in return for signing agreement. Courts and the Congress are split on the issue.
 - **Arbitration Agreements under ADEA/OWBPA (*Gilmer*)** - Title II of OWBPA, which became effective after *Gilmer*, prohibits prospective waivers of rights or claims under ADEA and it requires that waiver agreements be supported with valuable consideration to which an individual is not already entitled. Issue remains for Commission whether Title II applies to mandatory arbitration agreements.

Americans With Disabilities Act (ADA) - Title One

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

- **ADA Fact Sheets on:**
 - **Definition of Disability**
 - **Employment Provisions**
 - **Coverage of Drug and Alcohol Users**
 - **Remedies**

- **Existing EEOC ADA Guidances:**
 - **Preemployment Disability-Related Inquiries and Medical Examinations under the ADA**

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

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

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

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

- **Future EEOC ADA Guidances Currently Under Development - cont.**
 - **The ADA and Psychiatric Disabilities - [Summary attached]**
 - **Reasonable Accommodation and Undue Hardship - A draft EEOC Compliance Manual section is being reviewed within OLC. Outstanding issues include reasonable accommodation for people with mental disabilities, which may involve "significant difficulty" rather than "significant expense."**
- **Unresolved Issues:**
 - **"Mental/Nervous" Distinctions in Long Term Disability (LTD) Plans (wage replacement) - LTDs usually limit benefits for "mental/nervous" conditions to two years, but do not similarly limit benefits for physical conditions. Does this violate ADA as a "disability-based distinction" unless shown not to be a subterfuge to evade the Act? Unlike health insurance which provides for treatment, LTD is wage replacement and is available only to people with actual disabilities. An options paper is being developed on this issue by OLC.**
 - **Interaction Between ADA Reasonable Accommodation Requirements and Collective Bargaining Agreements - Is it an undue hardship for an employer to provide a reasonable accommodation that is inconsistent with the terms of the applicable collective bargaining agreement? This issue includes the conflict between issues related to seniority and reasonable accommodation. Employers are caught in the middle.**
- **Coordination of the ADA and the Family and Medical Leave Act-(FMLA) - The ADA and FMLA both impose leave-related obligations on covered employers. The EEOC has been working with DOL during its FMLA rulemaking to coordinate implementation of both laws. When DOL issues its final FMLA rule, EEOC's OLC will finalize an enforcement guidance on the ADA/Title VII and FMLA.**

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

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

ADA - cont.

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

Civil Rights Issues in Health Care Reform

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

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

*** [SUMMARY OF KASSEBAUM AMENDMENT TO COME]**

Federal Sector Enforcement

[Please refer to briefing material previously distributed]

- **Part 1614** - New EEOC federal sector equal employment opportunity complaint processing regulations, issued pursuant to Section 717 of Title VII. Part 1614 attempts to make the process more fair and timely by, among other things, limiting to 180 days the length of time in which the complaint is solely within the agency, thereby reducing the dominance of the agency in the process.
- **Federal Employee Fairness Act (FEFA)** - S. 404 (Glenn)/H.R. 2721 (Ed & Labor/Post Office & Civil Service) - Legislation to change the federal sector complaint process by significantly reducing the authority of federal agencies over internal eeo complaints and by transferring the majority of the process to the EEOC. This legislation is in response to many years of Congressional concern and discussion about the unfairness of allowing federal agencies to retain jurisdiction over the processing of eeo complaints brought by their own employees. Issues of fairness, due process, and timeliness are the principal issues raised from time to time by Congress about the federal sector eeo process.

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

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

Federal Sector EEO Leadership Responsibilities - Executive Order 12067

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

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

[See attached briefing material]

Miscellaneous

- **Affirmative Action/Quotas -**

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

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

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

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

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

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

- **Inclusion of Religion in the Proposed Consolidated Harassment Guidelines**

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

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

- Religious Harassment Guidelines - cont.

- Religious Freedom Restoration Act of 1993 (RFRA) - Many members of Congress have expressed concern about the interaction between RFRA and the Religious Harassment Guidelines. Generally, RFRA provides that the government may not substantially burden free exercise, even by a neutral rule, unless the government has a compelling interest and does so using the least restrictive means. Many of the principal sponsors of RFRA do not think that the Religious Harassment Guidelines conflict in any way with RFRA.
- Employment Non-Discrimination Act of 1994 (ENDA) - Legislation introduced June 23, 1994, by principal sponsors Senator Edward Kennedy and Representatives Gerry Studds and Barney Frank, prohibits discrimination in employment on basis of sexual orientation.

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

- ◆ Any indication of Administration position? According to representatives of the G & L community, there have been positive discussions with WH Counsel.
- EEOC's Policy on the Use of Testers in Enforcement - In 1990, the EEOC issued a policy guidance on the standing of "testers" to file charges under Title VII. "Testers" are defined by the guidance as individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices. The EEOC's position is that "testers are aggrieved parties under Title VII where they have been unlawfully discriminated against when applying for employment."

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

- Use of Testers - cont.

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

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

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

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

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

Issues involving Commission Operations -

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

- Charge Processing - The current EEOC policy of full investigation of all charges is principally responsible for the huge backlog of cases. The Commission is urged by all interested parties (civil rights community, business community, Congressional oversight committees) to develop an innovative approach to dealing with the backlog and making the administrative process more effective and efficient. Some suggestions include:
 - ADR - An ADR pilot program was conducted by the EEOC in FY 93 and is currently being evaluated.
 - Triage - e.g., Identify strong cases or cases with potential for broad impact early (like Eleanor Holmes Norton's Early Litigation Identification program); identify cases for early mediation by neutral party
 - "Opt out" alternative - NELA suggestion allowing Title VII CPs to opt out after 60 days instead of 180 days, as with ADA.

Issues involving Commission Operations

- **Charge Processing** - cont.
 - **Variation of Rapid Charge Processing (RCP) and Early Litigation Identification (ELI)** -
- **Commonly Cited Problems with Charge Processing** -
 - The Charging Party (CP) must verify her/his statement; the respondent's statement does not have to be sworn to
 - Lack of training, including multicultural/sensitivity training, of intake and investigation staff; cannot address complex cases and, therefore, discourage CPs from filing them
 - **Royko Issues** - Mike Royko has written a series of articles criticizing the EEOC's administrative process, particularly the confidentiality restrictions (Medici ADEA case) which prevent the parties from seeing the file during the investigation, and the failure to screen out apparently meritless charges (the microchip in the molar case).

[Briefing material previously provided]

- **Accessibility Issues** - discouraging obstacles routinely encountered in the administrative process by language minorities (monolingual and limited-English-proficient), physically and mentally disabled people, those with limited reading skills, and those without access to legal counsel
- **Systemic Litigation** - need to develop and bring major impact cases early to send message; need coordination with other civil rights agencies with regard to targeting
- **Roles/Relationships of Chair, Commissioners, General Counsel**
- **Commission Meetings** - frequency, format, content
- **Policymaking Process** - currently no formal process, no centralization; tends to be reactive, in response to issues arising in the field; any good policy is undercut in implementation; policy is not made "in the sunshine."

Issues involving Commission Operations - cont.

- **Controversial Enforcement Policies -**
 - **Full Investigation**
 - **Full Relief (v. lesser voluntary settlements)**
 - **Emphasis of Individual Charges over Systemic/Class**
- **Mission of the Agency - current view is solely law enforcement focus, no education /outreach focus and no assertion of federal eeo leadership role**
- **Jurisdiction/Autonomy of Field Offices - all litigation decisions have to be made by HQ, field offices cannot proceed on their own**
- **State & Local FEPA Worksharing Contracts - Under Title VII, the EEOC must contract with qualifying State and Local Fair Employment Practices Agencies (FEPAs) to process charges within the FEPAs jurisdictions. The quality of FEPA performance is a constant issue in Congressional oversight. As noted in the Transition Report, new FEPAs charge that contracts are not awarded competitively and, therefore, there is little incentive for the FEPAs with contracts to perform well. Those FEPAs in turn charge that they are provided with inadequate resources to perform their responsibilities.**
 - * [MEMO ON FEPAs TO COME]
- **Tribal Employment Rights Organizations (TEROs) - EEOC contracts with TEROs, which are akin to FEPAs, to process charges on Indian Reservations. The program is relatively new and small, with little attention having been given to it until Acting Chairman Gallegos.**
 - *[MEMO ON TEROs TO COME]
- **Computer Capacity - Charge/Litigation Tracking Systems -**
 - * [MEMO ON CURRENT EEOC COMPUTER SYSTEMS TO COME]

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	Confirmation Issues Outline (partial) (1 page)	7/11/1994	P5

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ds75

RESTRICTION CODES

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P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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personal privacy [(b)(6) of the FOIA]
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purposes [(b)(7) of the FOIA]
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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.

Issues involving Commission Operations - cont.

- Performance Reviews/Awards - Chairman Major Owens' staff has complained about the reportedly large performance awards given to favored Commission staff, despite record poor performance by the agency.
- Improving Commission Service to Traditionally Underserved Communities - Refer to Serrano Amendment of the Civil Rights Act of 1991, which mandates that the EEOC conduct an education and outreach program for historically underserved communities.
- Commission's Technical Assistance Role - The Technical Assistance Revolving Fund was authorized in 1992 to establish a revolving fund to finance the cost of providing education, technical assistance, and training. The Fund's corpus was authorized through a transfer of \$1,000,000 from the Commission's Salaries and Expenses appropriation. The activities sponsored by the Fund for a fee are meant to supplement basic informational materials and services provided free by the EEOC. The Fund became operational in FY 1993 and supported over 40 Technical Assistance Program Seminars (TAPS). These seminars were targeted almost exclusively to the employer community.

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MEMORANDUM

TO: Steve Warnath
FROM: Willie Epps, Jr.
DATE: July 13, 1994
RE: Questions for EEOC Nominees

TITLE VII:

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

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

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

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

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

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

Q4. If you use the Uniform Guidelines on Employee Selection Procedures (UGESP), how will you ensure that its use will not

lead to quotas and undermine efforts to improve and emphasize educational achievement?

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

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

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

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

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

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

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

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

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

WOMEN'S ISSUES UNDER TITLE VII:

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

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

Harassment Guidelines
Q11. How will you ensure that EEOC Guidelines on Harassment do not interfere with religious freedom as guaranteed by the First Amendment?

Q12. Should employers have the right (and do they have the responsibility) to bar fertile women from jobs in which they would be exposed to toxic substances that could harm the fetuses that women might carry?

POST-CIVIL RIGHTS ACT '91 ISSUES:

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

Q13. Do you support legislation to remove the caps on damages for intentional discrimination as provided in the Civil Rights Act of 1991?

Q14. Do you support legislation to delete special exemption in the Civil Rights Act of 1991 for the Wards Cove case, which affects primarily Asian Pacific Americans who previously worked or are now employed by Wards Cove Packing Company?

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

Q15. Do you support legislation that would make the Civil Rights Act of 1991 applicable to ADEA?

Q16. Should the Civil Rights Act of 1991 be applied retroactively to cases arising prior to passage of the Act?

EQUAL PAY ACT:

The Equal Pay Act prohibits unequal pay for equal or "substantially equal" work.

Q17. As a member of the EEOC, will you make EPA enforcement a priority?

Q18. Will you work with other agencies to encourage compliance with the EPA?

Q19. Do you support using the concept "comparable worth" when determining whether an employer has complied with the Equal Pay Act?

Q20. Does "comparable worth" ignore market forces such as supply and demand?

Q21. Does "comparable worth" focus too much on equal results rather than on equal opportunity?

Q22. Is "comparable worth" workable in practice?

Q23. Can jobs be evaluated by fixed standards?

Q24. Is "worth" determined by wages or is it subject to changes in competition, consumer preferences and new technology?

Q25. Do you support legislation that prohibits pay discrimination on the basis of sex, race, or national origin in jobs of equivalent value?

Q26. Is it legitimate to determine "equivalent value" by comparing the skills, effort, responsibility, and working conditions required of the jobs?

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA):

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

Q27. Do you support calls for further study on the use of testing in place of age?

Q28. What tests are available to replace age as a predictor of job performance?

Q29. Should state and local governments be permitted to use age as a basis for hiring and retaining law enforcement officers and firefighters?

Q30. Should there be a mandatory retirement age for federal law enforcement officers and firefighters, Capitol Police, and air traffic controllers?

Q31. How will you ensure that older employees are not treated differently or unfairly when employers reduce their workforce?

Q32. Should the EEOC continue to apply the disparate impact theory under the ADEA?

OLDER WORKERS BENEFIT PROTECTION ACT:

Q33. In your opinion, does ADEA permit early retirement incentive offering an incentive only to persons under a specified age ("Capriano" plans)?

MORE NEEDED

FEDERAL SECTOR ENFORCEMENT

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

Q34. What can be done to eliminate real and perceived conflict of interest in the current process whereby the agency reviews its own discriminatory conduct?

Q35. Do you support efforts to both streamline complaint procedures and provide mandatory time limits for processing as ways to improve the complaint process?

Q36. How can EEOC best deter future discriminatory conduct by federal employees who have discriminated in the past?

Q37. How costly will the reform of the Federal EEO complaint process be for the American taxpayer?

Q38. What can the EEOC do to eliminate discrimination in federal employment on the basis of sexual orientation?

TESTERS:

Q39. What is a "tester" in the employment context as opposed to in the housing context?

Q40. Who generally uses testers?

Q41. Have testers been used intensively in the employment area?

Q42. Should testers be used more intensively in the employment area?

Q43. Do you believe testers have standing to file charges of employment discrimination against employers, employment agencies and/or labor organizations which have discriminated against them because of their race, color, religion, sex or national origin?

Q44. Should standing under Title VII be broadly constructed?

Q45. Should EEOC field offices accept charges from "testers" and/or civil rights organizations filing charges on behalf of testers?

Q46. Should EEOC administer an enforcement program which includes the use of testers by private and "substantially equivalent" state/local government fair employment agencies?

ISSUES INVOLVING COMMISSION OPERATIONS

Q47. As a member of the EEOC, will you attempt to provide more adequate multicultural/sensitivity training for the EEOC staff?

Q48. Will you require staff members to attend additional training sessions in the areas of intake, investigation and complex litigation?

Q49. What will you do to make your staff more accessible to minorities, physically and mentally disabled people, and those with limited reading skills?

Q50. What types or partnerships, if any, will you create with civil rights and advocacy organizations?

Q51. What insights, if any, do you have regarding improving the frequency, format and content of Commission meetings?

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

Q52. What will you do to make the Commission's policymaking process more centralized and proactive?

Q53. What steps can the Commission take to make sure good policy is not undercut in implementation and that policy is made in the open?