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Overlapping Jurisdiction of the Equal Employment Opportunity Commission and the National Labor Relations Board

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OVERLAPPING JURISDICTION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE NATIONAL LABOR RELATIONS BOARD

My topic concerns the overlapping jurisdiction of the EEOC and the NLRB. By overlapping jurisdiction, I mean those situations where the conduct of an employer or a union may violate both the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, as amended. In these situations, how should the government respond? Should both the EEOC and the NLRB process and investigate these complaints and then seek or allow relief in independent forums? Or, in the interest of efficiency and avoiding duplicative processing of complaints, should one agency cede its jurisdiction over the complaint to the other so that the charged party has to deal with a single governmental agency?

I cannot give simple yes or no answers to these questions, but I will share with you a consideration that influences my answers. In preparation for today, the most overwhelming impression I came away with after studying overlapping jurisdiction is that the Equal Employment Opportunity Commission and the National Labor Relations Board should work more closely

together to eliminate invidious employment discrimination. Our two agencies must better utilize each other's resources and expertise. We in government and the academic community need to focus on how agency collaboration can further the respective missions of both the EEOC and the NLRB. The very nature of the government, however, precludes a quick response to this challenge. In the interim, this paper sets out in a cursory fashion how the EEOC and NLRB have responded to discrimination issues, labor-management decisions of particular interest to the Commission, and issues on which the two agencies differ and agree.

1. BACKGROUND.

Beginning in 1935, and continuing for approximately the next thirty years, the National Labor Relations Act was the dominant piece of legislation in the field of labor law. There was, of course, activity under the Fair Labor Standards Act such as minimum wage, overtime and child labor disputes and there was litigation under various state Fair Employment Laws. The bulk of labor practice, however, was in the labor-management area.

In 1964, a far-reaching piece of civil rights legislation was passed. One of the sections of that Act, commonly referred to as Title VII, makes it unlawful for employers, unions, and employment agencies to discriminate against employees and job applicants on the basis of race, color, sex, religion or national origin. It is safe to say that Title VII law now

shares pre-eminence with the law under the NLRB, and that these are the two dominant areas of labor law.

The growth of Title VII law is nothing short of phenomenal. There has never been anything like it. In 1964 Congress anticipated that the EEOC in its first year of operation, 1965-1966, would receive approximately 2,000 charges. Nearly 9,000 charges were actually filed the first year. From there the number grew exponentially. In fiscal year 1976, nearly 95,000 charges were filed. Title VII requires the EEOC to investigate each of these charges.

In 1976 the Commission refined its charge intake procedure and cut down the number of charge filings. According to the annual reports of both the EEOC and the NLRB, during fiscal year 1979 the National Labor Relations Board received approximately 41,000 unfair labor charges and 13,500 complaints dealing with election representation questions for a toal of 54 to 55,000 complaints. During the same period, EEOC received approximately 69,000 Title VII charges, 2,000 age complaints and another 400 equal pay complaints for a total of approximately 72,000 complaints. Additionally, according to estimates of the Administrative Office of the United States Courts, approximately 5,500 civil rights employment discrimination cases were filed in Federal District Courts in fiscal year 1979.

At this time, no one knows how many Title VII charges also raise issues under the National Labor Relations Act, nor do we know how many complaints filed with the NLRB raise Title VII

issues. However, given the heavy volume of disputes under each Act, it is probable that there are substantial numbers of complaints filed raising factual and substantive issues relevant to or controlled by the law or policies of both the NLRB and the EEOC.

2. ELIMINATING DISCRIMINATION THROUGH COLLECTIVE BARGAINING PROCESSES: EEOC INITIATIVES

On March 25, 1980, the Commission passed a resolution which in brief recognizes good faith efforts by a union or employer to negotiate specific equal employment opportunity provisions as terms and conditions of a collective bargaining agreement without the cooperation of the other party. In recognition of this situation, the resolution states that the Commission will take into account the lack of culpability of this innocent party and refrain from bringing suit against it; the Commission will sue the other party to the collective bargaining agreement.*/

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*/ It should be noted that the gravamen of the resolution is contained in Paragraph 3. At this time, the resolution merely instructs the staff to develop, amend, and modify written instructions to the field staff that clearly reflects that criteria necessary to establish the standards of "good faith" . . . In all instances, no administrative case processing or enforcement actions shall be invoked under the resolution, unless "approved . . . by the Commission." Until the staff presents standards to carry out the intent of the resolution, existing policies remain applicable, in my view.

The Commission believes that this resolution is in keeping with the Supreme Court's holding in Weber (United Steelworkers of America v. Weber, 99 S.Ct. 272 (1979). In Weber, the Court held that labor and management should be provided with a climate conducive to the voluntary elimination of unlawful employment practices. The Commission feels that through the resolution it is providing an incentive for parties to collective bargaining contracts to voluntarily eliminate discriminatory practices.

Some observers felt that in the past EEOC too often included in an enforcement action as a defendant, the very party -- be it labor or management -- that had argued that a discriminatory practice be corrected. To their dismay, these parties often found themselves as co-defendants with the alleged wrongdoer. After further staff consideration the EEOC may now refrain from prosecuting these parties if they have in good faith attempted to eliminate discriminatory practices. The Commission defines a good faith effort as those "actions of a compelling and aggressive nature evaluated on a case-by-case basis." The Commission instructed the General Counsel and the Office of Field Services to develop written instructions for implementing this policy.

I voted for this resolution because I believe:

(1) the elimination of employment discrimination is an urgent national goal, however achieved. See Alexander v. Gardner Denver Co., 415 U.S. 36 (1974);

(2) despite progress in eliminating discrimination from the workplace, it still exists; discrimination is pervasive, deep rooted, intractable;

(3) the more fronts the government can bring to bear on this problem, the sooner our society will truly be just and fair.

I share my colleagues' view that this resolution is another weapon in the battle to eliminate employment discrimination. Yet even with these feelings, I nonetheless had an uneasiness about the resolution. Initially, I was hesitant to vote for it because I felt there were some troublesome areas in the collective bargaining processes which had not been sufficiently explored requiring more study prior to the vote on the resolution.*/

Indeed, if not handled correctly, adverse consequences could flow from this resolution -- the most serious being "forms of industrial strife or unrest, which have the . . . effect of burdening or obstructing commerce . . . . " Such eventualities would of course impair collective bargaining

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*/ To this end, while the staff back-up memorandum was published by the trade press, the Commission did not vote on or approve the staff paper.

and thwart the very purpose of the National Labor Relations Act. This resolution will raise some difficult questions for the Commission: whether "actions of a compelling and agressive nature" means that a union should strike rather than accede to discriminatory terms? To escape Title VII prosecution, should a union be compelled to first inform an employer that if it does not alter a policy the union will file a Title VII charge against the employer? Should the standard be that if an employer is unable to negotiate with a discriminatory labor organization, the employer should refuse to bargain with the union and risk an unfair labor charge? On the otherhand, if parties to a collective bargaining contract do not have to take actions anywhere approaching the gravity of those listed above, than the Commission may have relinquished its prosecutorial discretion for little in return.

To properly implement the collective bargaining resolution, the Commission should fully understand all those circumstances in which EEO issues arise during the collective

bargaining processes. Under the resolution,*/ at a minimum, Commission staff is going to have to secure a greater appreciation of the dynamics involved in collective bargaining just to ensure that the government does not intrude where it ought not to be. I believe one possible consequence of this resolution is that the EEOC may become or be called upon to become more involved in labor-management disputes. The Commission may file more amicus briefs before the National Labor Relations Board or actually intervene in the administrative process so that our views are on record.

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*/ One of my personal concerns is the extent to which the EEOC may make a "good faith" determination comparable to the NLRB "good faith" standard without a hearing mechanism -- since good faith is solely a question of fact. Is "good faith" as we have used the term in the resolution really comparable to the use of that term under NLRB policy? In the context of the administrative processing of a charge during which good faith becomes an issue -- should that charge be settled during fact finding? By voting to absolutely require ourselves to take good faith into account, in nationwide or regional bargaining where the give-and-take in the collective bargaining process is critical to reach accord and industrial peace, will we really have the investigatory capacity to review a process which may cover a number of months and during which certain equal employment opportunity gains may have been achieved, but not in the area subject to the charge investigated? Will the good faith notion become a bottom line concept? By using the term good faith in the manner applied by the NLRB, will the EEOC create a judicial standard for review or de novo hearings, which could effect its own prosecutorial discretion? Ought the EEOC be careful not to adopt a good faith principle like the NLRB if the nature of the good faith doctrine is to reach a common agreement as opposed to one focusing on "specific terms"? Could EEO fall within a specific term category? In areas where the Supreme Court has limited the scope of the good faith doctrine, as exercised by the Board, if the EEOC uses this standard do we run the risk of waiving our discretionary power to sue or by this policy do we create an affirmative defense which may shift the burden of persuasion to the EEOC? Hopefully, these questions will be considered by the General Counsel, Field Services and Policy Implementation arms of the EEOC in any future proposals made to the Commission.

3. THE NLRB'S RESPONSE TO RACE AND SEX DISCRIMINATION ISSUES

A. Bekins - Handy Andy

The NLRB has consistently taken a strong and vigorous approach on discrimination issues arising in the context of unfair labor charges. However, the Board retreated from an activist approach in dealing with equal employment opportunity issues in the context of representation proceedings. Bekins Moving and Storage Co. of Florida, Inc., 211 NLRB 138 (1974) and the Board's subsequent reversal of that decision only two and a half years later in Handy Andy, 228 NLRB 447 (1977), illustrates the retrenchment.

By way of background, Bekins and Handy Andy both had their genesis in two earlier cases -- one decided by the Supreme Court the other by the Eighth Circuit. In Steele v. Louisville & Nashville Co., 323 U.S. 192 (1944), a union which was the bargaining agent for a group of railroad workers entered into an agreement with an employer which virtually prohibited blacks in the unit from working solely because of their race. The Supreme Court ruled that the union, as the bargaining representative of all employees in a given unit, must act for all members of that class "without hostile discrimination, fairly, impartially and in good faith", and cannot sacrifice the interests of minority and women workers. The union has a duty of fair representation.

The Eighth Circuit's decision in NLRB v. Mansion House

Center Management, 473 F.2d 471 (1973), actually set the stage for the Bekins-Handy Andy controversy. In Mansion House, the Board ruled that the company's failure to bargain with the union was an unfair labor practice. The Board then petitioned the Court of Appeals for enforcement of its order to the company to bargain. The company's defense to the NLRB petition was that the union was discriminating. The Eighth Circuit refused to enforce the Board's order and stated:

> . . . the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination. Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Id at 477.

Hence, the Eighth Circuit held that the enforcement machinery of the Board and the Courts could not, consistent with the constitutional requirement of equal protection, be made available to discriminating unions. The court felt that enforcement of a Board order in favor of a discriminating union was analagous to court enforcement of a restrictive convenant outlawed by the Supreme Court in Shelley v. Kraemer, 334 U.S. 1 (1948).

The Board's decision in Bekins Moving expanded the rationale of Mansion House -- that the Constitution precludes the NLRB from bestowing any benefit on a discriminating union. The Board in Bekins declared that not only would it refuse to aid unions which discriminated but that even if a discriminating union was selected by a majority of workers in the bargaining unit, the Board might refuse to certify it as the official bargaining unit. Bekins Moving and Storage Co., 211 NLRB 138 (1974).

In its ruling, the Board instructed employers that after the vote in the bargaining unit they could file an objection to union certification based on discrimination and that this objection would be analyzed in the same manner as any other conduct objected to affecting an election. The Board would then determine on a case-by-case basis whether evidence of discrimination voided a union election victory. Bekins meant that unions' racial and sexual practices frequently could come under close scrutiny.

Bekins was criticized on many fronts. Some thought the decision contrary to the National Labor Relations Act itself because the Board was suggesting that it would withhold certification of a labor organization even though it had been selected by a majority of the unit employees. The agreement here was that this procedure would violate Section (7) rights of employees -- the right to bargain collectively

through representatives of their own choosing. Another criticism was that employers exploited the Bekins holding by injecting charges of discrimination as a delaying tactic so as to avoid collective bargaining altogether rather than being sincere in their efforts to eliminate discrimination. Finally, some observers felt that the constitutional underpining of the decision was simply wrong. They argued that Board certification of a union was not government enforcement or government approval of union activity and hence, there was no state action restricted by the Fifth Amendment.

The Board embraced these criticisms in Handy Andy, 228 NLRB 447 (1977) and reversed Bekins. Handy Andy held that the Board was not constitutionally required to consider allegations about a union's discriminatory practices in a representation proceeding. The Board said that while certification conferred some benefits on a union, the Board by certifying a union was not placing its imprimatur on any union conduct "lawful or otherwise." Certification meant only that in a given unit the majority of employees had selected their bargaining representative. No "state action" was involved.

B. Discrimination Issues in the Context of Unfair Labor Practices

The Board has and continues to take forceful action against employers and unions which practice unlawful discrimination.

Handy Andy stated only that the Board would refrain from hearing discrimination issues in representation proceedings. The decision emphasized that discrimination could and should be raised in the context of unfair labor practice proceedings.

This area simply does not lend itself to a brief discussion. Suffice it to say that an employee can charge their bargaining representative with unfair labor practices where the union has violated its duty of fair representation. For example, in Independent Metal Workers Union, Local No. 1 (Hughes Tool), 147 NLRB 1573 (1964), the Board held that where a union refused to process the grievance of a black worker in the bargaining unit solely because of his race, the union has breached the duty of fair representation and has violated 8(b)(1)(A), 8(b)(2) and 8(b)(3) of the National Labor Relations Act. In Pacific Maritime Association, 209 NLRB 599, the Board held a union violated Section 8(b)(1) and 8(b)(2) of the NLRA by breaching its duty of fair representation when it refused to refer women because of their sex to employment through the union's hiring hall. Of course, where employers have discriminated, they too have been found guilty of unfair labor practices. See, e.g., Farmers' Cooperative Compress, 194 NLRB 85 (1971).

C. An Unfair Labor Practice as a Violation of Title VII: Issue of Dual Remedies

Although I have found no cases directly on point, I believe that a charging party is free to file a Title VII

charge against his or her bargaining representative and at the same time exercise his or her rights under the National Labor Relations Act and charge the union with discrimination and violating the duty of fair representation. The principle of dual remedies was recognized and approved by the Supreme Court in a related context in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (invocation of procedures under a collective bargaining contract do not preclude a charging party from filing a Title VII charge against the employer.)

4. UNION ACCESS TO EMPLOYER EEO RECORDS

The Board has ruled that unions can secure an employer's EEO records if their collective bargaining contract with the employer contains a non-discrimination clause. In Westinghouse Electric Corp., 139 NLRB No. 19 (1978), the Board held that a union was entitled to secure statistical data on minority and female employees and all EEO charges involving unit employees.*/ Westinghouse also held that although the union could not secure the company's affirmative action program, which is required of all government contractors, the union was entitled to the underlying statistical data. In a related case, the Board ruled that the union was entitled to the race and sex of job applicants at the company. East Dayton Tool & Die Co., 239 NLRB No. 20 (1978).

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*/ The petition for enforcement in Westinghouse is presently pending before the D.C. Circuit Court of Appeals - Nos. 78-2067, 2262, Nos. 80-1181, 82, 83.

These two decisions are important to the Commission because they make valuable profile information available to labor organizations. The Commission needs to know whether unions are taking advantage of the Westinghouse decision and requesting EEO charges, workforce profiles, and statistical data. How this information will be utilized is particularly important in light of the previously discussed Commission resolution regarding elimination of discriminatory practices through collective bargaining. Since unions can secure EEO information only in limited situations, will they be able to complain to the EEOC that they were uninformed on a particular practice? Indeed, if information is power than the Commission may be able to better evaluate good faith bargaining on the part of unions, or the lack thereof.

5. UNION SECURITY AGREEMENTS AND RELIGIOUS ACCOMMODATION; THE NLRB'S GENERAL COUNSEL AND EEOC TAKING OPPOSING POSITIONS

Although there would appear to be an enormous potential for conflict between interpretations of the National Labor Relations Act and the Commission's interpretation of Title VII, there has been minimal conflict. The one area where the two agencies have taken opposing positions is on union security agreements and Title VII's duty to accommodate religious beliefs. The problem arises because some employees have religious beliefs which do not allow them in good conscience to join or financially support labor organizations. Section 8(a)(3) of the NLRA permits employees and unions to agree that all employees must pay union dues as a condition of continued employment. The unions feel that all of those who receive the benefits of its

representation and advocacy should contribute to the union and pay dues.

Section 703(c) of Title VII prohibits employers and unions from discriminating on the basis of religion. In 1972, when Congress amended Title VII, it added Section 701(j) which states that the duty to refrain from discrimination on the basis of religion includes an obligation to accommodate the religious beliefs of employees, unless doing so would create undue hardship.

The NLRB's General Counsel, however, has taken the position before the Board in Scandia Log Homes, 19-CA-10925, that since the NLRB protects union security agreements, Section 701(j) does not preclude the discharge of an employee with religious objections to joining a union in a shop which has a union security agreement, regardless of the possibility of accommodation without hardship. The General Counsel points to the specific exemption for health care institutions under Section 19 of the NLRA as proof that Congress did not intend any other employees covered by a union security clause to be exempt from the mandatory payment of dues.

The EEOC has filed an amicus brief with the Board pointing out that the General Counsel's position has been rejected by all three Circuit Courts of Appeals which have addressed the issue. See Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976) cert. denied sub nom.; International Association of Machinists and Aerospace Workers v. Hopkins, 433 U.S. 908 (1977); McDaniel v. Essex International, Inc., 571 F.2d 338 (6th Cir. 1978); Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978).

Also, Congress is now focusing on this "apparent conflict." The House has already passed H.R. 4774 which would amend the National Labor Relations Act. This provision would apply to all employees who can show membership in a bona fide religion which has historically held conscientious objections to joining or financially supporting a union. The bill allows these persons to refrain from joining or paying dues to a union on the condition that they pay an equivalent amount to charity. H.R. 4774 is still pending before the Senate.

6. IDENTICAL APPROACHES TO ISSUES ARISING UNDER BOTH THE NATIONAL LABOR RELATIONS ACT AND TITLE VII

The issue of successor corporations and attendant liability arises under both the NLRA and Title VII. Indeed, in one of the earliest Commission enforcement actions, EEOC found itself suing a successor corporation. The district court granted summary judgment in favor of the successor because the charging party had only filed charges of discrimination against the predecessor. On appeal, the Sixth Circuit reasoned that since the focus of the NLRA and Title VII were similar -- extending protection to workers -- the principle of successorship utilized in NLRA cases should also control Title VII cases. The Appeals Court therefore reversed the dismissal but cautioned that just as in NLRA cases, the liability of a successor must be determined on a case-by-case basis. EEOC v. MacMillan Bloedel, 503 F.2d 1086 (6th Cir. 1978).

The EEOC has also urged the courts to follow the standards promulgated by the NLRB for determining whether separate corporate entities in fact constitute a single employer. Since Title VII's jurisdiction does not attach unless an employer has 15 full time employees, the issue of holding separate corporate entities as one is especially significant. In Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977), the Commission found that a communications firm owned several radio stations and had incorporated each individually and that no single unit employed fifteen workers. The Court, at the EEOC's urging, adopted the NLRB's standard for consolidating separate entities and held there was Title VII jurisdiction.

7. PROTESTING DISCRIMINATION AND EMPLOYER RETALIATION

The Commission and the NLRB recognize that employer retaliation undermines the very operation of their respective statutes. Employees will be reluctant to assert their rights if an atmosphere of fear pervades. They must feel free to protest violations of Federal labor laws. The cases below demonstrate the interplay of Title VII and the National Labor Relations Act in this area.

A. Emporium Capwell Co. v. Waco, 420 U.S. 50 (1975), is the leading NLRA case dealing with employee protests over discrimination. In that case, a department store had a collective bargaining agreement with a union of store clerks and stock persons. The agreement recognized that the union was the sole collective bargaining agent for all covered

employees and it prohibited discrimination.

A group of black employees believed that certain company employment practices were racist and that the collective bargaining grievance procedures were inadequate to remedy this problem. These employees began to picket the store and demanded to meet with the top store management. The company fired the protesting employees after they refused to cease their activities and as a result a complaint was filed against the company alleging that its conduct was retaliatory and violated 8(a)(1) of the NLRA.

In Emporium the Supreme Court defined the issue before it as whether the employees' attempt to engage in separate bargaining was protected by Section 7 of the Act or proscribed by 9(a). The Court decided in favor of the employer. It noted that the Board had found that the union was doing everything it possibly could under the grievance procedures to remedy discrimination. It reasoned that the employees' conduct was not protected because it was in derrogation of the union's status as the designated exclusive bargaining representative. The Court noted that even assuming the company's conduct violated Title VII's prohibition against retaliation "the same conduct is not necessarily entitled to affirmative protection from the NLRA."

B. King v. Illinois Bell Telephone Co., 476 F.Supp 495 (N.D. Ill. 1978), addressed the other side of the issue, specifically whether conduct protesting discrimination in contravention of a collective bargaining agreement is protected

by the anti-retaliation provision of Title VII, Section 704. In King, a black male joined a picket line during work hours outside his employer's plant protesting his company's racial policies. According to the collective bargaining agreement, work stoppages were prohibited. After being ordered to return to work, King continued to picket and was fired. Thereafter, King filed a Title VII charge claiming his employer retaliated against him.

Relying on Emporium, the district court rejected the contention that 704(a)'s right to oppose employment discrimination included the use of a strike prohibited by the terms of the collective bargaining agreement. The Court held that if King's work stoppage was protected by 704(a) the union's promise not to strike would have been devalued and ultimately the collective bargaining process would be impaired.

C. The Federal government needs to be more attentive to the increasing tendency of workers to dual file charges with Federal agencies. This is especially true with regard to retaliation charges. For example, in a non-union setting, if a worker protests his or her employer's discriminatory wages and is then retaliated against and files a complaint with both the EEOC and the NLRB, what are appropriate agency responses? Two independent statutory violations may have occurred -- the employee's 8(a)(1) right to engage in concerted activities and Title VII's 704(a) right to oppose discrimination. In this day of higher costs and the need for

more efficient management, should one agency cede its jurisdiction so as to avoid duplicative investigations?

Executive Order 12067 authorizes the Commission to coordinate the Federal government's civil rights efforts. EEOC is to consolidate overlapping interests wherever it can appropriately do so. I certainly do not believe the situation I posed above falls within the scope of this Order. Furthermore, in view of the important statutory rights involved, I would feel ill at ease if one agency refused to invoke the full extent of its own jurisdiction if by doing so the public good achieves immediate and resolute elimination of discrimination. On the other hand, I feel that in these days of higher costs and the need for more efficient allocation of resources, it is important to air the issue. It warrants study.

CONCLUSION.

The EEOC and the NLRB are vested with independent legislative mandates--the interests of which overlap. In programs and coordination both agencies must, and I am sure will, exercise the full power of the law to eliminate the badges of slavery and all forms of discrimination. Overlapping jurisdictional interests are not per se contrary to the notion of governmental efficiency. It is ignorance of the processes and falling short of our mandate to eliminate discrimination that is inefficient. The EEOC and the NLRB

should strive to work more closely to avoid falling short.