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Dissent of Commissioner J. Clay Smith, Jr. to Section 32.15 of the Final Draft of the Department Of Labor's Regulations Implementing Section 504 of the Rehabilitation Act of 1973

J. Clay Smith Jr.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISSENT OF COMMISSIONER J. CLAY SMITH, JR.
TO SECTION 32.15 OF THE FINAL DRAFT
OF THE DEPARTMENT OF LABOR'S REGULATIONS
IMPLEMENTING SECTION 504 OF THE
REHABILITATION ACT OF 1973
SEPTEMBER 23, 1980

The purpose of this statement is to record my dissent to Section 32.15 of the Final Draft of the Department of Labor's Regulations Implementing Section 504 of the Rehabilitation Act of 1973; and to reiterate my opposition of placing the item on the September 23, 1980 closed agenda.

Simply stated, I am of the opinion that only so much of Section 32.15 as appears below and which concerns "pre-employment inquiries" should have been adopted by the Commission,

. . . /A/ recipient may not conduct preemployment medical examinations or make preemployment inquiry of an applicant for employment or training as to whether the applicant is a handicapped person or as to the nature or severity of a handicap.

Adoption of this rule would be consistent with the recent vote of this Commission concerning the Religious Discrimination Guidelines. In those Guidelines (see Section 1605.3(b)), the Commission concluded, "that the use of pre-selection inquiries into an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices." In connection with the Religious Guidelines, the Commission also stated that the "new language . . . clarifies that where an employer cannot show that the employer's use of

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these inquiries, in fact, did not have an exclusionary effect on its employees or prospective employees, it must justify the use by business necessity." See BNA Daily Labor Report, (No. 176), September 9, 1980, at F1, F3. Regretably, the majority of the Commission has voted to allow employers to conduct preemployment medical examinations under certain conditions. Under several exceptions of Section 32.15--the full text which is attached thereto--an employer receiving federal funds can conduct preemployment medical examinations or make a preemployment inquiry of a handicapped person "when [inter alia] a recipient is taking remedial action to correct the effects of past discrimination...." However, the exceptions allowing preemployment physicals create a likely, potential for abuse.

On their face, the exceptions appear harmless, and since a preemployment physical or inquiry is allowed under the umbrella of affirmative action, the exception appears to further an important societal goal. However, it is my view that the exception will consume the general rule prohibiting preemployment inquiries as stated in 32.15(a) and reduce the general prohibition to a rule without the force of meaning. Employers may use a pre-employment inquiry allowed under 32.15 as a pretext to discriminate against handicapped applicants. Under the rule as adopted, such discriminatory conduct will be extremely difficult to prove. In short the rule prohibiting preemployment inquiries may be more honored in the breach and

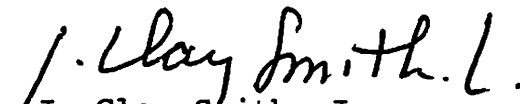
3.

discrimination against handicapped persons will continue under the rule approved by the majority.

I believe the Commission can best fulfill its mandate to protected groups by a policy of treating them similarly. If pre-employment inquiries regarding accommodation are prohibited in the context of religious discrimination this same prohibition should apply when protecting handicapped groups. This Commission has frequently touted its desire for consistent and even application of EEO rules. In connection with the handicapped, this Commission put on its blinders by approving 32.15 as proposed. I am opposed to no other provision of these Final Section 504 rules and therefore wish to stress my dissent is limited to only Section 32.15 as approved by the Commission majority.

The second basis of this dissent goes to the question of taking the Final Draft of the Department of Labor's 504 Rules up in closed session. (See attached Public Notice). There is no basis for it under the Sunshine Act and no valid reason for not giving the public the requisite notice required under the Sunshine Act.

For reasons stated above, I respectfully dissent, and intend for this dissent to be made part of the official minutes.


J. Clay Smith, Jr.
Commissioner

Attachments

(b) Whenever a recipient applies physical or mental job qualifications in the selection of applicants, employees or participants for employment or training or other change in employment status such as promotion, demotion or training, which would tend to exclude handicapped individuals because of their handicap, the qualifications shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safe performance. The recipient shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

§32.15 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct preemployment medical examinations or make preemployment inquiry of an applicant for employment or training as to whether the applicant is a handicapped person or as to the nature or the severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination, when a recipient is

taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally-assisted program or activity, or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment or training to indicate whether and to what extent they are handicapped if:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts.

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant, employee or participant to any adverse treatment, and that it will be used only in accordance with this part.

(c) An employer who routinely requires medical examinations as part of the employment selection process must demonstrate that each of the requirements of this subsection are met:

(1) The medical examination shall be performed by a physician qualified to make functional assessments of individuals in a form which will express residual capacity for work or training. Such an assessment does not require clinical determinations of disease or disability, but shall provide selecting or referring officials sufficient information regarding any functional limitations relevant to proper job placement or referral to appropriate training programs. Factors which may be assessed may include, for example, use of limbs and extremities, mobility and posture, endurance and energy expenditure, ability to withstand various working conditions and environments, use of senses and mental capacity.

(2). The results of the medical examination shall be specific and objective so as to be susceptible to review by independent medical evaluators and shall be transmitted to the applicant or employee at the same time as the employing official;

(3) The results of the medical examination shall not be used to screen out qualified applicants and employees but to determine proper placement and reasonable accommodation. The employing official using physical or mental information obtained pursuant to this section should be familiar with physical or mental activities involved in performing the

job, and the working conditions and environment in which it is carried out. If the applicant is being considered for a variety of jobs having different requirements or skills, the employing official should make a functional assessment of the physical or mental demands of the jobs in order to match the applicant with the most suitable vacancy;

(4) All of potential employees for the job are subjected to the medical examination;

(5) The procedures for using medical examinations or the medical information shall be constructed in such a manner that:

(i) A conditional job offer was made or the individual was conditionally placed in a job pool or conditionally placed on an eligibility list prior to the medical examination being performed; or

(ii) The results of the medical examination were considered by the employing official only after a conditional decision to make a job offer or the individual had been placed conditionally in a job pool or conditionally placed on an eligibility list; that is the medical results were the last factor evaluated by the employing officials before a final decision to make an offer of employment was made.

(6) Unless a conditional job offer is made prior to the medical examination, all potential employees for the job shall be informed at the time of the medical examination that:

(i) The results of the medical examination are the last factor evaluated by the employing official before a final decision to make an offer of employment is made, and

(ii) The medical examination results shall be transmitted to the employing official only after a conditional decision to make a job offer has been made.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Employing officials may obtain the information after making a conditional decision to make a job offer to the applicant or the applicant was placed conditionally in a job pool or placed conditionally on an eligibility list.

(2) Supervisors and managers may be informed regarding

restrictions on the work or duties of qualified handicapped persons and regarding necessary accommodations;

(3) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(4) Government officials investigating compliance with the Act shall be provided information upon request.

§32.16 Listing of employment openings.

Recipients should request state employment security agencies to refer qualified handicapped individuals for consideration for employment.

§32.17 Labor unions and recruiting and training agencies.

(a) The performance of a recipient's obligations under the nondiscrimination provisions of these regulations may necessitate a revision in a collective bargaining agreement(s).

The policy of the Department of Labor is to use its best efforts, directly or through the recipients, subgrantees, local officials, vocational rehabilitation facilities, and other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under programs



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

AGENCY HOLDING THE MEETING:

Equal Employment Opportunity Commission

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:

S-1739-80

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING:

9:30 AM (Eastern Time), Tuesday, September 23, 1980

CHANGE IN THE MEETING:

The following matter was added to the agenda for the Closed portion of the meeting:

Labor Department's Proposed Regulations

A majority of the entire membership of the Commission determined by recorded vote that the business of the Commission required this change and that no earlier announcement was possible.

In favor of change:

Eleanor Holmes Norton, Chair

Daniel E. Leach, Vice Chair

Ethel Bent Walsh, Commissioner

Armando M. Rodriguez, Commissioner

CONTACT PERSON FOR MORE INFORMATION: Treva I. McCall, Acting Officer
Executive Secretariat, at (202) 634-6748

This Notice Issued September 19, 1980



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

S-1782-80

AGENCY HOLDING THE MEETING:

Equal Employment Opportunity Commission

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:

S-1762-80

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING:

9:30 AM (Eastern Time), Tuesday, September 23, 1980

CHANGE IN THE MEETING:

The following matter was added to the agenda for the Closed portion of the meeting:

Labor Department's Proposed Regulations

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In favor of change:

Eleanor Holmes Norton, Chair

Daniel E. Leach, Vice Chair

Ethel Bent Walsh, Commissioner

Armando M. Rodriguez, Commissioner

Opposed:

J. Clay Smith, Jr., Commissioner

CONTACT PERSON FOR MORE INFORMATION: Treva I. McCall, Acting Executive Officer, Executive Secretariat, at (202) 634-6748

This Notice Issued September 24, 1980