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THE EEOC TODAY - AN UPDATE FOR THE 1980's: A NEW CREATIVITY

I.

In preparing for my assignment, "The EEOC Today - An Update For The 1980's", I spent considerable time simply reflecting on the topic. The assignment was atypical in that I could not read a few cases in one area and "get up to speed" in that one subject. Today's assignment forced me to focus on the future of civil rights and to try and find a common theme to various loose ends. My deliberations have led me to a somewhat simplistic conclusion: the mission of the EEOC in the 1980's will remain the same as it has since the EEOC opened its doors 15 years ago. However, the Commission's pursuit of that mission will by necessity be more creative.

Let me first offer some general observations. One of my fellow Commissioners recently remarked that the "Bull Connors of employment discrimination are gone." I am inclined to agree. The easy employment discrimination cases have been successfully litigated or settled. The work ahead will

be more difficult. There is of course still pervasive discrimination against racial minorities, against women, against the aged, against persons of color, against persons born outside the United States and against persons of different religions. The discrimination is frequently embedded in institutionalized practices which are time consuming to uncover and difficult to prove. Analyzing and proving discrimination is becoming increasingly sophisticated. I frequently hear of situations where the plaintiff's case in chief consists of various expert witnesses and ironically little testimony from the victims themselves. All of us who work in the employment discrimination area are going to have to learn a great deal more about econometrics, standard deviations, and labor pool availability. This education, both for the government and the private bar alike, will not be cheap. The costs associated with litigating employment discrimination cases are going to rise dramatically. The defense bar has tightened up significantly. Both the EEOC and the private bar may have to regroup and assess the extent to which social scientists, psychologists, economists, statisticians, and along with them -- the courts who interpret the law, have redrawn the boundaries in employment discrimination cases.

I view the Commission today in a fashion somewhat similar to how I view those young idealists now in their 30's and

whom we heard so much from on college campuses in the late 1960's. The EEOC and these young adults both have a strong sense of idealism -- the Commission's mission is the very cornerstone of our country -- to ensure that every man and that every woman--regardless of his/her race, or color-- his/her age or religion--should be judged on his/her own innate abilities; that employers should measure the man or woman seeking a job on the basis of that individual's abilities rather than on preconceived stereotypes. This was the purpose of Title VII of the Civil Rights Act of 1964 and it steadfastly remains the mission of EEOC today. That mission will usher the EEOC into the third century.

But while the idealism remains, it is tempered by the realities of recent years. Foremost among those realities is the fact that when the EEOC was conceived and established in 1964-1965, this country was experiencing unparalleled economic growth. That is not the situation today. The country's growth is marginal while its unemployment level is disturbingly high, especially among minority youth.

This condition has made my job as a Commissioner more weighty. We in government are faced with the difficult task of developing fair and equitable strategies for access to the pie, when, in fact, the pie itself is shrinking. The EEOC's dilemma is how to push forward equal employment opportunity policies when economic indicators tilt towards

a diminishing economy.

In response to the economic climate, I think the Commission has taken a first creative step by suggesting means of averting lay offs through work-sharing programs. This proposal will be discussed later. However, it is my belief that economic considerations must permeate Commission decisions at all levels. For example, the EEOC should refrain from disproportionately allocating resources for litigation against companies where future growth is expected to be minimal. An injunction setting forth a hiring goal is valuable only if the company in the future will hire. If a company will have no growth in its workforce and little turnover, a hiring injunction may be an empty victory. The EEOC in the future needs to be more selective in choosing litigation vehicles and must take into account how many jobs will be opened up by means of a suit.

Additionally, Commission staff attorneys are going to have to become more sensitive to business cycles, particularly the down turn side. Future consent decrees should contain provisions protecting minorities and women from lay offs to the greatest extent possible. It makes little sense to expend resources to ensure that women and minorities are hired and then a few months later at the first sign of a declining or fluctuating economy have them all laid off. Under these facts, the government raises the expectations of protected

groups by having them hired only to dash hopes by standing idly by while they are disproportionately, but lawfully laid off.

I believe last month the Commission took a first step in developing creative methods to ensure equal opportunity in adverse economic climates. I don't believe it to be a panacea but it is a first creative step. The Commission issued a policy statement in the Federal Register (45 Fed. Reg. 60832 (Sept. 12, 1980)) for comments which urges employers and labor organizations to make voluntary efforts to find alternatives to lay offs that may have a disproportionately harsh impact on minorities, women and older workers during recessionary periods. In suggesting alternatives to lay offs, the Commission urged employers and unions to consider work-sharing -- a procedure whereby the work week may be reduced, for example, from five to four days and the worker collects one day's unemployment insurance for the day laid off. This alternative is particularly attractive in those states which allow partial payment of unemployment insurance benefits.

The Commission is fully cognizant that in many settings work-sharing is not viable because of existing collective bargaining agreements and their status under the Supreme Court's decision in Teamsters. See, International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977). At the same time, the Commission's policy statement puts

employers and unions on notice that the EEOC will closely scrutinize the routine use of lay offs on a last hired, first fired basis that have an adverse impact on protected groups.

Also, in its policy statement, the Commission suggests several affirmative reasons for avoiding routine lay offs by seniority. First, even if the lay off was lawful, an employer who is in a situation of hiring new workers, makes itself vulnerable again to private litigation or a new series of investigations and enforcement actions by either OFCCP or EEOC. Additionally, employers have frequently invested considerable time and money in training an employee because of the increased sophistication of machinery. As a result of a lay off, there is the possibility an employer will lose its investment in a trained and experienced workforce. Finally, from a union's perspective, alternatives to lay offs would keep more of their members on the job and thereby provide the union with the strength that an active dues paying membership provides.

There are factors other than economic conditions which are influencing Commission decisions and merit discussion. The most important of these is a greater awareness on the Commission's part that civil rights enforcement is not carried on in a vacuum. No longer is there an area of law--civil rights in employment-- which is apart and isolated from other

substantive areas. Commission personnel recognize that there is substantial interplay between anti-discrimination law and other substantive areas such as traditional labor law, international law, health and safety law and telecommunications law. Commission policy makers are being exposed to this wider array of legal issues. The EEOC will have a greater presence in areas which to date we have not ventured. The following issues represent this interplay of Title VII and other subject areas.

1. Title VII and International Law -- There are presently cases before the Second and Fifth Circuit Court of Appeals which raise the issue of whether Japanese corporations doing business in the United States are exempt from Title VII because of certain language found in treaties signed by the United States and Japan. The Japanese corporations take the position they are exempt from Title VII because the treaties in question state that Japanese employers are free to engage the personnel of their choice. The United States has signed treaties containing similar language with several other countries. Because the "of their choice" language is commonly found in other treaties and because many foreign corporations are acquiring American businesses, the issue of whether foreign corporations are immune from Title VII has implications well beyond these two cases.

The Commission's position is that if an employer conducts business in the United States than it is subject to this country's anti-discrimination in employment laws and it must hire, promote, etc., in accordance with them. My point is that in the first fifteen years of Title VII, there were few occasions for Title VII practitioners to study the implication of international law. Now, Commission personnel are becoming more familiar with these issues.

2. Title VII and Hazardous Substances -- The Commission and two divisions of the Department of Labor, OFCCP and OSHA, are jointly working on guidelines to address situations where employers exclude all fertile women from particular jobs because the jobs in question involve working with substances which may injure the fetus. Employers reason, among other things, that if a pregnant worker were exposed to these hazardous substances and a deformed infant was born, the company might be subject to tort liability to the infant. Guidelines, or for that matter any statement in this area, requires the Commission to become involved in the occupational health and safety area. EEOC is working closely with OSHA on this issue. Because of the potential ramifications of any guidance in this area, the Commission is proceeding cautiously.

3. Title VII and Federal Common Law Policy -- This term the Supreme Court will decide in Northwest Airlines v. Transport Workers Union, _____ U.S. _____, 48 U.S.L.W. 3820 (1980)

whether an employer, after being ordered by a court to make a back pay award to victims of discrimination is entitled to contribution or partial payment from a union which was a partner to the collective bargaining agreement under which the unlawful discrimination occurred. In short, can an employer under the common law right of contribution sue its collective bargaining partner after the employer has been found guilty of violating Title VII. Although Title VII policy considerations are involved, the issue is really one of common law.

4. Title VII and the Federal Rules of Civil Procedures - Delta Air Lines, Inc. v. August, another case pending before the Supreme Court, illustrates the interplay between Title VII and the Federal Rules of Civil Procedure. See Supreme Court docket No. 79-814, 48 U.S.L.W. 3678 (1980). Regrettably, this case has the potential to severely chill and restrict the Title VII plaintiff's bar--private and government alike. In August, the defendant made an offer of settlement to the plaintiff pursuant to Rule 68 of the Federal Rules of Civil Procedure. The defendant offered \$450 for settlement of all claims. The plaintiff rejected the offer because she estimated her damages at approximately \$20,000, not including her own attorney's fees and possible reinstatement to her old job. Following trial, the court ruled for the defendant, then moved for all costs it had incurred following the settlement offer

of \$450 to the plaintiff.

Rule 68 states that a defendant can recover costs it incurred after making an offer to settle a claim, if the plaintiff fails to obtain a judgment more favorable than the offer. In August, the Seventh Circuit affirmed the district court's ruling that the airline could not recover its costs because the \$450 offer was "not of such significance in the context of the case to justify serious consideration by the plaintiff." August v. Delta Air Lines, 600 F.2d 699, 701 (7th Cir. 1979).

The point I wish to stress is that this case is yet another instance of creatively engrafting a principle of law from another substantive area onto Title VII. I believe that this trend will accelerate in the coming decade. Procedural tactics will continue to be used to confront Title VII and other enforcement claims brought by the government and the private bar.

5. Internal Institutional Changes -- One consequence of the expanded jurisdiction of the EEOC is the tension such diverse jurisdictions may have on the decisionmaking process. After all, the decisionmaking process is at the center of whatever policies emerge from EEOC. I presently feel that a major flaw of the Commission is that there is no institutional mechanism for individual Commissioners to express themselves on questions of policy when they differ

from the majority.

I have had some sleepless nights on major issues before the Commission. After evaluation, I have recently begun to file dissents when I am in the minority. The initial reaction to these dissents was one of dismay. I learned that few, if any Commissioners, had ever filed formal dissents in the form of an opinion for public comment. However, I believe that the differences that a Commissioner may have on any policy decision is one which can and should be aired in a free and open forum.

For example, recently I filed an extensive dissent in order to air my views on the economic consequences of the Commission majority's decision to lift the youth and young adult apprenticeship exemption under the Age Discrimination in Employment Act. In other words, the majority of the Commission voted to have the Age Act apply to all apprenticeship programs, despite the fact that under the Labor Department's interpretation, apprenticeship programs had been exempt for the last twelve years. In my view, the exemption should not have been lifted. The issue of youth unemployment in this nation required the EEOC to evaluate the apprenticeship issue as it relates to youth unemployment. The Labor Department remained silent on the issue, and did not indicate that it favored a shift in policy. However, I could not persuade my colleagues to vote against lifting the exemption; and,

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moreover, I was unable to have the staff prepare any documentation arguing my point of view prior to the vote.

Consequently, after nearly a year of wrestling with the issue for myself, I filed an extensive dissent intended to spell out the dangers facing young people and young adults if the exemption were lifted and invited the public to comment on the dissent as well as the proposal adopted by the Commission during the comment period. My dissent will have little public circulation because the Commission refused to allow it to accompany the notice for publication in the Federal Register. Hence, how will a minority view be heard, evaluated, agreed with, or refuted?

In another case, I filed a dissenting opinion when the Commission reversed its policy on the issue of whether an employer should have the right of contribution against a union when both the union and employer may have jointly discriminated against an employee. I have since filed another dissent respectfully disagreeing with my colleagues' decision not to release my dissent on the issue of contribution pursuant to a Freedom of Information Act request.

I recently dissented, in part, to the Department of Labor's Handicap Regulations because I disagreed with a major rule which I believed was inconsistent with a policy decision in another recent EEOC issuance.

Let me assure you that I have voted with my colleagues

on most of the issues before the Commission. However, in the not too distant future, I look forward to a mechanism whereby a Commissioner -- aside from speechmaking to limited audiences and general press coverage -- may raise his or her concerns about issues which will assist that Commissioner in decisionmaking, such as I sought to do on the apprenticeship issue. It seems to be rather counterproductive to spend long hours researching and seeking to find answers to difficult issues only to learn that no one else, save a few, will ever be able to fully understand your point of view. As it stands now, a Commissioner's dissent against a particular issue may be viewed as anti-civil rights or anti-employer - when such is not its intent. In fact, the opposite may be the case -- that is, a Commissioner may really be dissenting because he/she wants a stronger enforcement position taken, or believes that a policy shift is unreasonable, too costly, or not warranted.

In sum, the institutional mechanism for decisionmaking by Commissioners must not be overlooked in the decade of the 1980's. Indeed, with the acquisition of new jurisdiction, and the prospect for more, this phenomenon in itself may force Commissioners to explain their views by the mechanism of written opinions, concurring opinions, or dissents.

II.

Without extended discussion, the Commission has also ventured into the following new areas: our General Counsel's office has evaluated a proposed Memorandum of Understanding between the Commission and the National Labor Relations Board as to how to process complaints filed with the Board which raise Title VII discrimination issues; the Commission has also filed a number of amicus briefs before the Board over the past year. As a result, Commission personnel have become more knowledgeable about traditional labor law. The same situation has obtained with regards to telecommunications law because the EEOC signed a Memorandum of Understanding with the Federal Communications Commission. The FCC has also promulgated EEO regulation for all broadcasters. EEOC has also been working with the Federal Financial Regulatory Agencies (the Comptroller General's Office, Federal Home Loan Bank Board, Federal Deposit Insurance Corporation, and the National Credit Union Association). These agencies have endorsed the principle that one aspect of good banking practices is a fair employment policy. Conversely, these agencies have declared that discriminatory employment practices may affect a financial institution's ability to service a community and therefore employment policies may be a criteria in awarding or withholding bank charters.

The Commission has been involved in these diverse areas as a result of its responsibilities under Executive Order 12067. That Order makes EEOC the centerpiece in the government's equal employment efforts. EEOC is to coordinate all other agencies' EEO policies for consistency and effectiveness.

Another recent development at the Commission is the successful conclusion of several major lawsuits. Moreover, now that the Commission has completed its reorganization of the field and implemented its new case processing procedures, additional resources and attention will be shifted so as to improve our systemic litigation efforts. Commission officials are aware of a general misconception that EEOC only focuses on individual claims of discrimination and has relinquished systemic and pattern and practice activity to OFCCP. That simply is not the case and I want to put that impression to rest.

In particular, I refer you to the settlement EEOC negotiated with the Motorola Company three weeks ago. In that case, the Commission and individual plaintiffs represented by private counsel succeeded in having a class certified of approximately 10,000 Blacks. After a trial on the merits, the district court judge ruled in favor of the Commission and the individual plaintiffs. The parties have settled the case for ten million dollars in back pay, and

another three million for affirmative action efforts. This is the largest Title VII award after a litigated judgment. The monetary awards in the consent decrees which the Commission signed with AT&T and the steel companies, although involving more money, were not obtained as a result of litigation.

Additionally, in the last year, the Commission has settled three other large suits for nearly nine million dollars in back pay. In one suit against a utility company, the Commission secured five million dollars in back pay; against a trucking company, nearly three million dollars in relief; and against a steel company, another million dollars.

Even with these successes, however, I cannot answer a question frequently asked of me. I am unable to tell you unequivocally that OFCCP should be transferred from the Department of Labor to the Commission. My mind remains open on the issue. The most recent development on the subject is that OMB has created a task force studying the possible transfer. The task force is composed of OMB personnel, employees of other Federal regulatory agencies, in particular the Federal Trade Commission, and one representative from both the Commission and OFCCP. All of us in government await the study.

Finally, some mention of the Commission's concern and attention to the problems of women workers should be noted.

In 1970, at the start of the last decade, EEOC received approximately 3,500 charges alleging sex discrimination. Only four years later that number has increased nearly ten fold; approximately 39,500 charges alleging sex discrimination were filed in 1974. It is safe to presume that most of these charges were filed by women. The explosion in the number of charges filed was nothing short of phenomenal.

Now, as a result of the Commission's refinement of the intake process, the number of charges alleging sex discrimination as well as other bases has fallen off. The Commission received approximately 22,000 charges alleging sex discrimination in 1979. This represented approximately a third of the charges filed.

The number of sex discrimination charges filed is significant and so is the form and circumstances of the discrimination alleged. After studying the charges, the Commission concluded that it could address at least one of the practices complained of through the Sexual Harassment Guidelines.

Last month the Commission added a section on sexual harassment to the Guidelines on Discrimination Because of Sex. Although there were judicial decisions holding sexual harassment as a violation of Title VII, the Commission thought it important to comprehensively set out its own interpretation of the issue. The Guidelines state "sexual advances,

requests for sexual favors and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to such conduct is made either explicitly or implicitly a term or condition of employment . . . or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance . . . or creat[es] an intimidating hostile or offensive working environment." The Guidelines, relying on general Title VII principles, state that an employer can be held liable for the acts of its supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer. Liability will be less rigidly applied to an employer if the sexual harassment is being perpetrated by a line employee.

Some have suggested that the Guidelines on sexual harassment are "harsh medicine." It is no more harsh, however, than the malady it was intended to cure. The Commission is prepared to utilize whatever resources it must to ensure that women workers do not have to labor in conditions inferior to their male counterparts.

For example, last June the Commission prevailed on a suit against a realty company, EEOC v. Sage Realty Company, 22 FEP 1660 (S.D.N.Y. 1980). In that case, the company required female elevator operators to wear sexually provocative uniforms. The case was particularly egregious

because the company fired a female for refusing to wear the uniform. Male elevator operators did not have to wear provocative uniforms. It was an important case for the Commission because, although compared to systemic cases the relief obtained was small, the principle was large.

The Commission is also continuing its study of the issue of comparable worth. Simply stated that theory suggests that women and minorities are channeled into specific jobs, in a sense, job ghettos, and these occupations are paid lower wages because the workers are disproportionately female or minority. Proponents of comparable worth argue that wages for a particular job should bear resemblance as to how much the actual job is worth to the employer rather than what the prevailing wage rate is for such jobs. The issue currently in dispute is whether a claim for uneven wages for two different jobs is even cognizable under Title VII. As of this date, the appellate courts are divided and the Supreme Court has recently refused to hear a certiorari petition on the issue.

The Commission has proceeded cautiously on the issue of comparable worth. It held three days of public hearings on the issue last May and it has set in motion the machinery to have those hearings transcribed and published. EEOC has also commissioned the National Academy of Sciences to prepare a multi-disciplined study of comparable worth.

After a year and a half effort, the NAS report is due to be delivered to the Commission by the end of the calendar year.

In short, the Commission is moving on many fronts. EEOC's mission will be more difficult if the economic climate fails to improve. The Commission is now a more efficient agency than it was in the 1970's. Nonetheless, it still must become more creative and flexible. The Commission will also cooperate more closely with other Federal agencies and some of these agencies may not have EEO as their primary function. The Commission will probably focus greater resources in the area of systemic activity and conversely the proliferation of guidelines may slow down.

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