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before the
FEDERAL BAR ASSOCIATION, CLEVELAND CHAPTER
BOND COURT HOTEL
MARCH 25, 1981

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 in 1965. 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 Federal 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 viewed 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 unparalled 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

national law, health and safety
Commission policy makers are being
of legal issues. The EEOC will be
areas which to date we have not
represent this interplay of Title

1. Title VII and International
decisions of the Second and Fifth
with the issue of whether Japanese
in the United States are exempt from
language found in treaties signed
Japan. The Japanese corporations
are exempt from Title VII because
state that Japanese employers are
of their choice. The United States
maintaining similar language with several
the "of their choice" language in
treaties and because many foreign
American businesses, the issue of
are immune from Title VII has involved
two cases.

hired, 1.
protected
suggests
lay offs
an employer
makes it
series of
OFCCP or EEOC
invested
because
result of
will lose
Finally
would keep
the union
members
are inflexible
The most
Commission
on in a
rights

I believe last September
in developing creative methods
in adverse economic climates
a panacea but it is a first
issued a policy statement
Reg. 60832 (Sept. 12, 1980)
and labor organizations
alternatives to lay offs
harsh impact on minorities
recessionary periods. In
the Commission urged employer
sharing -- a procedure which
for example, from five to
one day's unemployment in
This alternative is part of
which allow partial payment

The Commission is
settings work-sharing is
bargaining agreements are
Court's decision in Teamsters
Brotherhood of Teamsters
the same time, the Commission

the Federal Rules of Civil Procedure. 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 Supreme Court refused to require the plaintiff to pay the difference between the amount offered and judgment. Since the plaintiff lost, the court held that Rule 68 does not apply.

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 into 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.

4. The Burden of Proof in Title VII Cases - Texas Department of Community Affairs v. Burdine, No. 79-1764 (S.Ct., filed March 4, 1981). The Supreme Court in Burdine has clarified the nature of the burden borne by a defendant in a Title VII action alleging disparate treatment after the plaintiff has established a prima facie case. In McDonnell Douglas and its progeny, the Court held that the defendant was required "to articulate some legitimate, non-discriminatory reason" for its action, which the plaintiff could then prove was a pretext for discrimination. Here, the Court holds that this burden is satisfied if the defendant "produce[s] admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Slip Opinion at 9. This holding--that the defendant bears the burden of production of evidence--ratifies the prevailing appellate court interpretation of McDonnell Douglas. It rejects the Fifth Circuit's interpretation in this case, viz., that the defendant bears (1) the burden of proving by a preponderance of evidence the existence of legitimate, nondiscriminatory reasons for the employment action; and (2) the burden of proving by objective evidence that those hired or promoted were better qualified than the plaintiff. The Court holds that this second requirement erroneously

exposes an employer to Title VII liability whenever it fails to hire or promote a woman or minority whose qualifications are equal to those of a white male applicant. Slip Opinion at 10-11. "Title VII," it concludes, "does not obligate an employer to accord this preference." Slip Opinion at 11.

The Burdine opinion further elucidates the precise contours of a defendant's burden of production. It states that an articulation of reasons not admitted into evidence, e.g., one that appears in an answer to the complaint or in argument of counsel, will not suffice. Slip Opinion at 6 n.9. The evidence itself must be sufficient to "raise[s] a genuine issue of fact as to whether [defendant] discriminated" so as "to justify a judgment for the defendant." Slip opinion at 6. It "must be clear and reasonably specific." Slip Opinion at 9. The defendant is not required, however, to produce evidence sufficient to persuade the Court "that it was actually motivated by the proffered reasons" (id.), or otherwise "that the employment action was lawful." Slip Opinion at 9. The Court concludes that, overall, the sufficiency of defendant's evidence will be evaluated by the extent to which it "meet[s] the plaintiff's prima facie case presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Slip Opinion at 7.

Because the result reached by the Supreme Court in Burdine had already been adopted by virtually all federal courts outside the Fifth Circuit, the decision will not have a significant impact on the conduct of Title VII cases. Essentially, the decision clarifies the Court's previous holding in Board of Trustees of Keene State College v. Sweeney, supra, by describing the elements of the defendant's rebuttal burden in more detail. Insofar as the Court in so doing makes it clear that the defendant's articulation of a legitimate reason must be clear and specific, and must be supported by legally sufficient evidence, the Burdine opinion will be useful to plaintiffs.

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 last year. 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 1979 the Commission 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 the Office of Management and Budget 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. 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." They are no more harsh, however, than the malady they were 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. The Supreme Court has recently granted cert. in a comparable worth case. Hopefully, the decision will add clarification to this 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.