

Howard University

Digital Howard @ Howard University

Selected Speeches

J. Clay Smith, Jr. Collection

4-23-1981

The EEOC Today - An Update For The 1980'S: "A New Creativity"

J. Clay Smith Jr.

Follow this and additional works at: https://dh.howard.edu/jcs_speeches



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Smith, J. Clay Jr., "The EEOC Today - An Update For The 1980'S: "A New Creativity"" (1981). *Selected Speeches*. 33.

https://dh.howard.edu/jcs_speeches/33

This Article is brought to you for free and open access by the J. Clay Smith, Jr. Collection at Digital Howard @ Howard University. It has been accepted for inclusion in Selected Speeches by an authorized administrator of Digital Howard @ Howard University. For more information, please contact digitalservices@howard.edu.

60

DR. J. CLAY SMITH, JR.
ACTING CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
before the
FEDERAL EQUAL EMPLOYMENT OPPORTUNITY COALITION
FEDERAL DEPOSITION INSURANCE CORPORATION
WASHINGTON, D.C.

April 23, 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 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 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

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