7-21-1981

[Brief Outline of Comments on Affirmative Action before the National Urban League Convention]

J. Clay Smith Jr.

68

BRIEF OUTLINE OF COMMENTS ON

AFFIRMATIVE ACTION

BEFORE

THE NATIONAL URBAN LEAGUE CONVENTION

BY

DR. J. CLAY SMITH, JR.
ACTING CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

July 21, 1981 Washington, D.C.

Outline on Affirmative Action

I. Definition of Affirmative Action - Those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.

A. Purpose - designed to encourage employers to self examine and to self evaluate their employment practices and to endeavor to eliminate so far as possible the last vestiges of racism and sexism.

B. Examples of Affirmative Action in the context of employment:

1. Out reach programs designed to enrich an applicant pool by adding women and minorities who would not ordinarily hear of the particular job vacancy;
2. Setting goals for hiring persons in a particular group which has been previously discriminated against;
3. Setting goals for promotion
4. Training programs

II. How Employers should conduct an Affirmative Action Program -- Voluntary for private employers

A. Background - Title VII was designed to provide a climate in which employers can remedy the effects of past and present discrimination.

On the other hand, Title VII does not require an employer to grant preferential treatment on the basis of race or sex when making an employment decision.

Problem - how to harmonize these two conflicting themes.

B. EEOC's Affirmative Action Guidelines - provide employers guidelines on how to undertake appropriate Affirmative Action (program called 3R's)

1. First "R" reasonable self analysis
   a. employer should look at its workforce; are some groups underepresented?

(that is they are a large precentage of the area work-force but very few appear in company's workforce).

b. employer should determine whether any of its employment practices "exclude, disadvantage ... or result in adverse impact of a group previously restricted from the workplace."

c. If the employer administers tests to applicants, do the tests exclude one group disproportionately; is the test job related and fair.

d. employer should determine if all groups are fairly represented in workforce and if not why.

2. Second "R" - reasonable basis for action

a. if employer determines there is underrepresentation, is it caused by discrimination?

Is there a problem in light of the self analysis and therefore the company could be held liable under Title VII.

b. employer can conclude it has a problem if a court or administrative agency "<u>might</u>" find that it has discriminated.

c. employer does not have to admit discrimination in order to implement affirmative action.

3. Third "R" - reasonable action - must be tailored to the problem disclosed by the self-analysis.

a. plan must avoid unnecessary restrictions on opportunities for the workforce as a whole.

1. plan must have time limitation; cannot be permanent

2. plan can not say no whites or males need

apply. Ratios are more appropriate; plan cannot unnecessarily trammel the rights of majority.

C. Employer Insulation from so called reverse discrimination charges.

1. EEOC Affirmative Action Guidelines protect employers (29 C.F.R. 1608).

2. If employer undertakes the 3 r's and puts the reasonable self analysis and plan in writing,EEOC will issue to a charging party claiming reverse discrimination a "no cause finding."

3. If charging party with a"no cause finding"sues the employer, employer can claim there is no liability because it relied on a written opinion of the Commission (AA guidelines) and therefore it is entitled to a statutory exemption.

4. Guidelines allow employer to undertake affirmative action -- to remedy underrepresentation -- without having to wait to be sued by the government or a charging party. An employer can correct a problem without the courts or an administrative agency dictating the remedy.

5. Net result is employers have flexibility in remedying problems while at same time they are immune from so called"reverse discrimination claims."

II. The effect of the Weber decision on Affirmative Action.

A. Majority of legal analysts believe the decision gives employers greater flexibility to undertake affirmative action than EEOC's guidelines.

B. In Weber - the reasonable self analysis was not in writing, yet the Supreme Curt found the affirmative action steps being undertaken there were valid.

C. The facts in the Weber case:
Kaiser Aluminum a plant located in Gramercy, La.
39% of workforce is Black
Only 1.8% of Kaiser's craft workers are Black.
The small number of blacks in craft jobs is due to the fact that craft unions had excluded blacks.
Kaiser and union therefore sign an affirmative action plan providing that company will train craft workers rather than hire them from outside.

Under the plan Kaiser selects 6 white employees with greatest seniority and 7 black employees with longest seniority.

Weber's claim is that he had more seniority than some of the blacks who qualified for the training program.

Weber's claim is that since race is not to be a factor in employment decisions the selection procedure is not neutral and he is being discriminated against because he's white.

Supreme Court holds Weber is not being discriminated against -- companies and unions can take voluntary measures to correct the effects of discrimination.

Supreme Court's reasoning is that the Civil Rights statutes -- Title VII -- was designed to aid blacks in securing employment.

Kaiser has a plan to aid blacks in securing employment but at the same time the plan does not unduly restrict the opportunities for white workers.

The Supreme Court holds the plan in Weber is not discriminatory because:

1. the plan is only a temporary measure (until black craft workers represent 39%)
2. the plan does not absolutely bar white workers; half of those trained will be white
3. plan does not unnecessarily trammel the interest of white employees.

III. Affirmative Action in employment is voluntary for the private sector.

1. Affirmative Action is not voluntary if the employer is a government contractor and subject to Executive Order 11246. OFCCP (Dept. of Labor) enforces the government contract compliance program. This agency can tell an employer if you want a government contract than you must undertake affirmative action.
2. OFCCP is about to change its rules on contract compliance programs.

IV. Affirmative Action in the Federal Government

A. Federal government is the largest single employer; it should be representative of its citizens, and therefore Congress made affirmative action in the Federal government mandatory.

B. Responsibility for enforcement of Affirmative Action formerly lay with the Civil Service Commission; transferred to EEOC in 1979.

C. EEOC now requires each agency to undertake a survey of under representation in each position; agencies must make concerted efforts to aid those groups the most underrepresented; agencies must submit plans annually to EEOC for our review explaining what job catagories they will concentrate on and how they will remedy the problem.