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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

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AUG 18 1981

THE HONORABLE PRESIDENT OF THE SENATE

THE HONORABLE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Gentlemen:

Enforcement responsibility for the Equal Pay Act of 1963, as amended (EPA), was transferred to the U. S. Equal Employment Opportunity Commission (EEOC) from the U. S. Department of Labor (DOL) on July 1, 1979. That transfer was part of the Federal government's Reorganization Plan No. 1 of 1978 that was designed to streamline and strengthen the government's equal employment opportunity programs.

To meet the statutory requirements mandated by Section 4 (d)(1) of The Fair Labor Standards Act of 1938, as amended, I am reporting to the Congress the Commission's activities under EPA from July 1, 1979, through September 30, 1980.

Prior to assuming its new enforcement responsibilities--which also include jurisdictional authority for the Age Discrimination in Employment Act of 1967, as amended (ADEA), coordination of all Federal efforts to assure equal employment opportunity and responsibility for oversight and enforcement of EEO laws in the Federal sector--EEOC in 1977 took a number of innovative steps relating to its structure, operation and programs. Systematic internal reform focused on rapid charge processing and backlog reduction systems and integration of investigators and attorneys in the field. The new systems were tested, refined and then adopted Commission-wide in January 1979. Twenty-two district offices housing investigative, legal and administrative personnel and 27 area offices with basic intake and early settlement programs were established.

As a result of these changes, by the end of Fiscal Year (FY) 1980 the January 1977 backlog of 100,000 charges had been reduced to 35,000, the average processing time for resolving new charges dropped to under four months, the remedy rate had risen to 50 percent from 14 percent in 1977 and annual benefits to individuals exceeded \$43 million. Further, a new systemic program to address broad patterns and practices of employment discrimination had been implemented, with 125 new systemic cases initiated pursuant to specific and coordinated selection standards.

At the same time that EEOC was undergoing internal changes, it also began to prepare to assume its new EPA responsibilities. The Commission worked closely with DOL to assure continuity of both policy and programs during the transition and that EPA units were operational in EEOC district offices at the time of the transfer. During this period, EEOC staff also met with representatives from public interest groups to keep them informed about its EPA activities and to seek their input.

In October 1978, EEOC and DOL developed a memorandum of understanding delineating procedures for transfer of EPA cases and personnel. It provided for:

- A policy statement concerning continuous aggressive and effective enforcement of the law;

- Immediate initiation of detailed planning for the transition, with instructions to be issued within 90 days;

- Each agency's participation in enforcement processings, both prior and subsequent to July 1, 1979;

- Training of enforcement staff at both EEOC and DOL;

- Minimizing the impact of organizational changes on affected employees, including providing early information to affected employees on various possibilities and options; and

- Availability of DOL enforcement action files to EEOC before and after July 1, 1979.

In the spring of 1979, implementation of the memorandum was begun. DOL detailed senior staff specialists to the Commission to provide technical assistance in the transition. EEOC and DOL field office directors met in Washington in March to develop local transition schedules. In May, Department of Labor EPA specialists were designated as EPA unit supervisors and assigned to EEOC field offices to plan operations. A major recruitment effort resulted in filling the majority of EPA supervisory professional staff vacancies before the transfer date.

Nearly half of DOL's wage and hour division employees, including virtually all supervisors, transferred with the function. In June, just prior to the transfer date, orientation and training were provided for key supervisory and

professional staff, and EPA unit supervisors participated in an EEOC management planning and budget conference. By September 30, transfer of the enforcement function from DOL to EEOC was substantially complete.

Equal Pay Act legal enforcement responsibilities were assigned to district offices and, as in the area of Title VII of the Civil Rights Act of 1964, as amended, attorneys worked alongside investigators. Comprehensive EPA litigation strategies, including specific procedures to insure early attorney involvement in the investigation of complaints with litigation potential, were developed. Because of the overlapping jurisdictions of EPA and Title VII, mechanisms were developed to assure full protection of complainants' rights under both statutes, while at the same time seeking to eliminate the duplication often attendant upon simultaneous enforcement of two separate, yet similar, statutes.

The pre-transfer preparations enabled EEOC to enforce EPA successfully during FY 80, the first full year the Act was under jurisdiction of the Commission. In FY 80, the Commission received 2,303 individual complaints and initiated 390 directed investigations, i.e., investigations undertaken as a result of the Commission's independent investigative authority (400 investigations had been transferred to EEOC from DOL in July 1979). Administrative closures were obtained in 1,614 cases, resulting in benefits of \$1,926,000. In addition to 98 EPA lawsuits in process, 58 new cases were filed; and 27 were resolved, with benefits of \$1,300,000. These achievements were noteworthy because resources available to the Commission for EPA enforcement were inadequate to handle the workload, which increased beyond planned estimates. To remedy this situation partially, staff from Title VII units were reassigned to EPA units.

As the Commission's experience in enforcing EPA increased, it became apparent that the best enforcement strategy is an active rather than reactive one. Enforcement of EPA is similar to the systemic authority in the Title VII area; the equal pay law is intricate and identification and proof of a violation may often be very complex. Thus, respondents for investigation must be identified systemically and investigations must be carefully structured.

To develop strategies for directed activity and to respond appropriately to individual complaints, EEOC embarked on procedural reforms designed to make maximum use of its independent authority under EPA and to assure coordination with its Title VII program. Utilizing these procedures, EPA enforcement resources will be devoted to selection and resolution of the most promising cases. Through

this process, the Commission will contribute to the development of meaningful case law under the Equal Pay Act.

In its first year of administration of EPA, the Commission sought to provide continuity of many of the policies of the Department of Labor. On June 29, 1979, EEOC published a notice in the Federal Register (44 FR 37974) which continued in effect DOL's EPA interpretations and opinions until further action could be taken by EEOC.

On July 2, 1979, the Commission published in the Federal Register (44 FR 38670) procedures regarding administration of EPA (investigations, enforcement and recordkeeping) and its position regarding employer reliance upon existing interpretations and opinions of DOL.

On April 7, 1980, EEOC published a notice in the Federal Register (45 FR 23520) regarding its administration of EPA in the Federal sector, delegating principal responsibility to field offices.

During the early part of FY 80, Commission staff comprehensively reviewed all of DOL's interpretations of EPA to determine the extent to which revisions were necessary or appropriate. In particular, the Commission explored the manner in which existing Title VII guidelines and EPA interpretations could be meshed, thereby eliminating all duplication and inconsistency. This review culminated, in the latter part of FY 80, with the drafting of proposed interpretations. Proposed major changes, reflecting relevant case law developments of the past several years, would bring the interpretations in line with statutory amendments and harmonize the requirements of EPA with those under Title VII, to the extent their jurisdictions are overlapping. This approach seems the only appropriate one, especially when court decisions such as Los Angeles Department of Water and Power v. Manhart, 435, U.S. 702 (1978), decided by the U.S. Supreme Court are considered.

In Manhart, the Court rejected DOL's interpretation of the requirements of EPA with respect to employee pension plans. It noted the inconsistency between EEOC's position with respect to employee pension plans--as set forth in Commission Title VII guidelines--and that advanced by DOL. The Court held that the Commission's interpretation was proper under both Title VII and EPA. In response, DOL acted promptly to issue revised interpretations, in order to comply with Manhart. However, the transfer of authority became effective before DOL was able to publish the interpretations in final form. Thus, the Commission agreed to consider DOL's proposed interpretations, which would be consistent with the requirements of Title VII, when adopting its own interpretations of EPA.

LITIGATION ACTIVITIES

In June 1979, EEOC and DOL entered into a memorandum of understanding that was designed to facilitate the smooth transfer of litigation authority under the Equal Pay Act (EPA). The memorandum provided guidance in handling EPA cases transferred to EEOC as of July 1, 1979, and established a mechanism for assuring ongoing consultation and cooperation between the two agencies in the administration of EPA. Specifically, the memorandum called for:

A training program in EPA court enforcement for EEOC attorneys, to be planned and conducted by the Office of General Counsel of EEOC and the Solicitor of Labor;

Meetings between the legal staffs of both agencies regarding transfer of cases to EEOC;

Filing by DOL of certain EPA lawsuits, in which considerations relative to the statute of limitations made immediate action imperative;

Retention by DOL of certain other lawsuits which had progressed to stages of litigation where transfer to the Commission would be ineffective and counter-productive; and

Ongoing cooperative efforts, including regular meetings by a permanent liaison committee to handle common legal problems arising during litigation and to assure consistency in interpretations of EPA.

Preliminary planning and coordination helped assure orderly transition of authority and enabled the Commission to safeguard the rights of aggrieved persons and protect the interests of the government in maintaining effective enforcement efforts. Consistent with the memorandum, DOL filed approximately 20 EPA lawsuits in the first nine months of FY 79. With one exception, these cases involved allegations of wage discrimination which might have been untimely under EPA had suit not been filed prior to the transfer. On July 1, 1979, DOL transferred to EEOC approximately 100 cases in various stages of litigation and retained 11 which had progressed to a stage where transfer was impracticable. In all cases, EEOC was substituted as party-plaintiff and was directly involved in planning and decision-making. During the remaining three months of FY 79, which were after the transfer, the Commission filed an additional 19 EPA suits. During FY 80, the Commission approved 76 EPA lawsuits, included EPA counts in 22 Title VII sex/wage cases approved for litigation and added EPA counts to more than 50 pending Title VII actions. By the end of FY 80, EEOC had a full portfolio of EPA litigation nationwide.

Typical of those cases filed by DOL in the months just prior to transfer is EEOC (substituted for Marshall, Secretary of Labor) v. Bethlehem Steel Corporation, D. Md., Civil Action No. T-79-494 (filed March 29, 1979, awaiting trial). This case involves a large number of production workers at a manufacturing plant near Baltimore, Maryland. DOL filed suit to toll the statute of limitations. In this, as well as similar cases, attorneys from DOL and EEOC worked together from the outset to develop litigation strategies and to assure a smooth transition of cases from one agency to the other.

Typical of the 11 cases that had progressed to late stages of litigation activity or were very close to settlement and in which DOL continued to participate actively was EEOC (substituted for Marshall) v. Lord & Taylor, Inc., and Associated Dry Goods Corporation, S.D. N.Y., Civil Action No. 74-3336-WK. This case involved alleged equal pay discrimination against women sales employees in four retail stores. On November 13, 1979, after consultations in which Commission attorneys participated, a consent judgment was entered. The defendants agreed to an order requiring future compliance with EPA and the payment of \$360,000, plus interest, in back wages to 88 past and present aggrieved employees.

Among the hundred-plus cases transferred to EEOC from DOL were a dozen or more in various stages of litigation that involved equal pay for college and university faculty members, e.g., EEOC (substituted for Marshall) v. Eastern Kentucky University, E.D. Ky., Civil Action No. 76-15 (filed January 14, 1976, awaiting trial); and EEOC (substituted for Marshall) v. State of Louisiana (McNeese State University), W.D. La., Civil Action No. 79-0111 (filed January 24, 1979, in opening stages of discovery). Several of the lawsuits filed by the Commission after the transfer of authority reflected a continuing concern with the problems of wage-based inequities, in violation of EPA, among college and university faculty members. For instance, the Commission filed suits against Delgado Vocational-Technical College, E.D. La., Civil Action No. 79-2145 (October 18, 1979), and Troy State University, M.D. Ala., Civil Action No. 79-611 (December 14, 1979). The fruits of these special efforts were realized in the first decision in a college faculty case brought under EPA. In Marshall v. Georgia Southwestern College, 489 F. Supp. 1322 (M.D. Ga. 1980), the court ruled that women faculty members received lower salaries than their male colleagues in the Business Administration and Physical Education Departments and ordered back wages and an adjustment in salaries for the women.

Similarly, the Commission maintained a special focus on violations in the area of retail sales. Indicative of these efforts was one of the Commission's suits against Montgomery Ward & Company, D. Ariz., Civil Action No. 79-0831 (October 12, 1979), filed after a series of investigations revealed widespread violations in the pay of departmental sales managers. Although that lawsuit nominally involved one retail store in Glendale, Arizona, it has important nationwide implications, because the Commission's complaint alleges that Montgomery Ward breached a 1976 written agreement with DOL promising future company-wide equal pay compliance for department managers. Among six other pending suits against Montgomery Ward are those in Kansas, Civil Action No. 79-1274 (June 15, 1979); and New Hampshire, Civil Action No. 80-327L (July 7, 1980). While the suit in Arizona seeks a nationwide injunction to prohibit continuing violations of EPA by every Montgomery Ward establishment, separate lawsuits were filed in various districts in order to recover back wages for the affected women employees.

Other major actions against large retailers include the pending Commission suit against Sears, Roebuck & Company, N.D. Ill., Civil Action No. 79-4373 (October 22, 1979). The suit is a combined Title VII and EPA action alleging a company-wide pattern and practice of sex discrimination at all job levels by Sears, the nation's largest retailer. That case, which is the first EPA action under the Commission's systemic litigation program, is now involved in far-reaching discovery proceedings. See 504 F. Supp. 241, (N.D. Ill., 1980). It promises to have significant impact, both in terms of numbers of employees affected and as a vehicle for seeking voluntary compliance on the part of similar employers.

A major advantage from the standpoint of enforcement strategy resulting from the transfer of EPA authority to the Commission is the opportunity to combine Title VII and EPA claims in one suit. Because Title VII has a broader substantive scope than EPA and because EPA has the potential for somewhat greater relief (e.g., the recovery of liquidated, double damages in addition to backpay), the Commission has increasingly resorted to combining EPA/Title VII actions. In cases where a Title VII charge reveals reasonable cause to believe that EPA violations also exist, a cause of action under EPA is now generally added to the complaint before suit is filed. The efficacy of such an approach is demonstrated by private lawsuits alleging violations of both statutes. For example, Gunther v. County of Washington, 602 F. 2d 882 (9th Cir., October 16, 1979), reh. denied 623 F. 2d 1303 (9th Cir., May 1, 1980), affirmed sub nom. County of Washington v. Gunther, _____ U.S. _____, 101 S.Ct. 2242 (Dkt. No. 80-429, granted November 3, 1980), the

district and appellate courts rejected claims by women "matrons" that their work was substantially equal to that of male "jailers" at a county correctional institution. Since the jobs were not substantially equal, there was no violation of EPA. However, the Ninth Circuit reversed the district court on the Title VII count, holding that the sex discrimination provisions in Title VII are not limited by the equal work standard of EPA. The court ruled that Title VII provides a cause of action for pursuing claims of sex-based compensation discrimination, even where the jobs involved are not substantially equal. By contrast, the failure to join Title VII and EPA claims has led to adverse results in several EPA appellate decisions.

In the first 15 months after the transfer, suits brought by the Commission involved unique issues. Pre-eminent among these cases was EEOC v. Lawson Milk Company, N.D. Ohio, D.C. No. 80-1109A (July 10, 1980) in which the Commission sought a preliminary injunction to restrain the defendant from transporting in interstate commerce any goods produced by men and women performing equal work for unequal wages. The injunction was sought pursuant to the "hot goods" provision in Section 15(a)(1) of the Fair Labor Standards Act of 1938. Denying the motion, the trial court in its decision concluded that the Commission had shown a substantial likelihood of success on the merits but that it had not sustained the burden of showing "irreparable injury" warranting preliminary relief because the underpaid women could be fully compensated by payment of back wages and interest after a final decision. See 23 FEP Cases 531 (N.D. Ohio, July 10, 1980). As Lawson demonstrates, many of the lawsuits brought by the Commission, while perhaps utilizing novel approaches, merely represent a continuing effort to eradicate the same types of blatant violations which existed before EPA was enacted in 1963.

The Commission attempts to be particularly vigilant with respect to case law development. The Commission may file a lawsuit that is factually similar to another that is being litigated in the private sector in order to obtain a more favorable decision. See Horner v. Mary Institute, 613 F. 2d (8th Cir., January 14, 1980) and EEOC v. Hobart Township Community School Corporation, N.D. Ind., Civil Action No. H-80-275 (May 2, 1980). The issue in both cases concerned whether the greater bargaining power of a male employee can justify the salary differential between a male and similarly situated women.

Likewise, the Commission succeeded in restricting the potential adverse effect on a negative decision in EEOC (substituted for Marshall) v. Aetna Insurance Company, 616 F. 2d 719 (4th Cir., February 27, 1980). In Aetna, the court upheld pay differentials based on management training programs

from which women had been excluded. Within a few months of the Aetna decision, the Fourth Circuit, relying largely on Commission briefs, limited the Aetna rationale by distinguishing that case on its facts. (See EEOC v. Whittin Machine Works, 633 F. 2d 1095, 4th Cir., 1980.)

Conclusion

The Commission handled the large volume of EPA cases after the transfer effectively and smoothly. The relative ease of the transfer process was due, in part, to the fact that EEOC attorneys were already familiar with EPA by virtue of its similarity to Title VII sex-based wage claims and that both EEOC and DOL were committed to effective enforcement of EPA. The Commission believes that its enforcement efforts were successful during the first 15 months EPA was under its jurisdiction.

SUMMARY

I am pleased to report that the Equal Employment Opportunity Commission has carried out the responsibilities delegated to it under the government's civil rights Reorganization Plan No. 1 of 1978 (43 FR 19807 May 9, 1978) and that the Commission, as envisioned by Members of Congress when that plan was adopted, has become the lead Federal agency for enforcing laws prohibiting employment discrimination.

Sincerely,

J. Clay Smith, Jr.
Acting Chairman