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Equal Employment Opportunity Laws and Public Sector Employment Rights

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EQUAL EMPLOYMENT OPPORTUNITY LAWS AND PUBLIC SECTOR EMPLOYMENT RIGHTS

This afternoon my remarks will focus on the application of equal employment laws to the federal government. The United States government has nearly 3 million employees and is the largest single employer in this country. The federal government has been subject to Title VII since 1972.

During the last nine years considerable progress has been made in making the workforce of the federal government more reflective of this country's citizenry. Nonetheless, the federal establishment still has work to do. To this day, through our hearing process and sometimes through our Office of Review and Appeals, Commission staff sees federal agencies which have offices and divisions which have patterns and practices of discrimination. More commonly, however, the bulk of our work is individual discrimination complaints against agencies. We typically see before us cases involving well intentioned agency officials but one particular supervisor who has not gotten the word that stereotyping applicants and workers is not only "out" but unlawful.

Before speaking about current issues affecting the federal sector let me first make some general comments about the present EEOC. As you are aware, EEOC is the lead agency in the field of equal employment opportunity. EEOC is responsible for enforcing

Title VII, which prohibits race, sex, national origin, and religious discrimination; the Age Discrimination in Employment Act - prohibiting age discrimination and the Equal Pay Act which ensures wage parity among the sexes when they are both performing the same or substantially similar jobs. The Commission administers these three statutes for both the private and public sector. Additionally, in the federal sector, EEOC has responsibility for Section 501 of the Rehabilitation Act of 1973. This section prohibits agencies from discriminating against applicants and agency employees who are handicapped. Additionally, under Executive Order 12067 and Reorganization Plan No. 1, all federal agency issuances concerning EEO must be coordinated and cleared by EEOC. The Commission's Office of Inter-Agency Coordination sees, or is supposed to see, every agency issuance in the area of equal employment opportunity. The Commission reviews these regulations and orders to ensure that they are not duplicative or burdensome, and that they are consistent with overall federal policies.

EEOC has specific program responsibilities in several areas of federal employment. I plan to review these and highlight for you some of the issues in each area.

1. FEORP - This acronym stands for the Federal Equal Opportunity Recruitment Program. In 1978, when Congress passed the Civil Service Reform Act it included a provision sponsored by Congressman Garcia to set up a government-wide recruitment program designed to increase the applicant pool of minorities and women from which agencies hire. Under FEORP, Federal agencies must establish affirmative recruitment

programs for minorities and women whenever underrepresentation is found at particular grades within the agency. Recruitment, of course, has long been recognized by EEOC as a key component in addressing the underrepresentation of minorities and women in the workforce. EEOC was gratified that the Garcia Amendment directed EEOC to develop the guidelines to be used by the Office of Personnel Management (OPM), in writing FEORP regulations.

However, the well intentioned objectives of FEORP may be deferred. The Federal workforce is contracting rather than expanding. Thus, no matter how rich the applicant pool is with minorities and women, the fact of the matter is that there are going to be fewer employment opportunities available in the future. Indications are that there will be reductions in force across the government rather than growth.

Moreover, since women and minorities generally occupy the lower grades, are new to government and therefore have the lowest seniority, they are the groups most vulnerable in a reduction-in-force (RIF) situation. These groups will disproportionately bear the brunt of reductions-in-force. A shrinking federal workplace has serious EEO implications.

There are, however, some innovative techniques that can and should be used by Federal agencies to minimize the impact of reductions-in-force and hiring freezes on minorities and women. These include encouraging employees to work part-time, job sharing, furloughing employees and establishing outreach programs to find alternate employment for employees who otherwise would be separated through a reduction-in-force. Although not available to federal

agencies, there is also the concept of worksharing. This is a new concept that has been utilized with some success in California primarily in the private sector. Under worksharing, an employer faced with the necessity of reducing its labor force by 10% would reduce working hours for all employees 10% rather than instituting a layoff of 10% of the workforce. Employees could secure partial unemployment benefits to make up their 10% cut in salary. There appears to be several advantages to worksharing. From an EEO point of view, a worksharing arrangement permits retention on the payroll of most recent hires who are disproportionately minority and female. For an employer, worksharing allows it to keep its incumbent workforce and not fire or layoff anyone. This fact may be particularly appealing to an employer which has made a substantial financial investment in training its workers. An employer utilizing worksharing does not have to train a second group of employees when it decides to increase output. Worksharing also may be of benefit to unions since it would enable union members to retain their job and therefore pay dues rather than allowing a situation in which union members lose their jobs and consequently stop paying dues to the union treasury.

All this is not to say, however, that there are no problems with worksharing. There are problems. In the first place, it amounts to a modification of the seniority system. Longtime employees with the federal government may have certain expectations regarding their own job security. They may believe that since they have been loyal to the government for a number of years they should be the last to be affected by a layoff. Accordingly, they may resist the idea that they have to share bad economic times and unemployment with someone who has

been on the job for just a few months or even a few days. This problem may not prove to be insurmountable; nonetheless, I present the concept for your consideration.

II.

A major EEOC responsibility in the area of equal employment opportunity is oversight of affirmative action planning and programming by federal agencies with respect to women, minorities and the handicapped. Section 717 of Title VII states that the Civil Service Commission is to annually review federal agency affirmative action programs at the national and regional level. This responsibility was transferred to EEOC in 1978 by the President's Reorganization Plan No. 1.

Upon assuming responsibility for this function, EEOC set up a transition period running from January 1979 through fiscal year 1981. During this period the Commission's primary goal was to introduce, via our directives to Federal agencies, the basic concepts and methodology necessary to guide them in developing a systematic approach to affirmative action planning. These directives were structured so that management, personnel, EEO and data-processing units were fully integrated into the planning process thereby enabling agencies to draw up meaningful affirmative action plans. Based on our review and analysis of agency affirmative action plans and other contacts the Commission has had with federal agencies, the Commission believes that agencies have now acquired the methodology necessary to develop viable affirmative action plans and that they are committed to their implementation.

A second goal of the transition period was to instill the idea that accountability for meeting goals must be set at the lowest, i.e., local management levels, if affirmative action planning is to succeed. The transition period demonstrated that local managers are familiar with the planning process, are capable of using it to develop local affirmative action plans, and understand that they will be held accountable for meeting their plans' goals.

The beginning of FY'82, two weeks ago, ushered in something new for affirmative action in the federal sector. The Commission is requiring federal agencies to submit five year affirmative action plans. Agencies are expected to fully utilize the systematic approach and methodology they learned during the transition period so that they can, as quickly as possible, eliminate the underrepresentation of minorities and women existing in many jobs. Agencies are of course expected to make good faith efforts to achieve their goals. As you might imagine, the Commission has encountered some problems in proposing and implementing an extended and comprehensive affirmative action plan for all federal agencies.

EEOC has issued several directives to Federal agencies on how to develop affirmative action plans since the beginning of the transition period in January 1979. All of these directives have been subject to the approval of the National Archives and Record Service (NARS), the agency charged with the responsibility of assuring that new interagency reporting requirements do not duplicate existing data systems. In January 1981, the

Commission issued a directive to federal agencies explaining the five year affirmative action plan that they were to implement at the beginning of FY'82. Some five months after our provisional instructions for FY'82 through 1986 were issued, NARS informed the Commission that it disapproved the instructions, explaining that the data the Commission was requiring agencies to submit in their affirmative action plans would duplicate data already maintained by the Office of Personnel Management. Since EEOC's directive had required that agencies submit their five year plans to us by August 1, 1981, on June 15, 1981, I informed the heads of all federal agencies of NARS' ruling. However, I also advised them that EEOC would allow certain variances from its directive issued in January so that agencies could continue to develop their affirmative action plans until the NARS matter was resolved. NARS eventually concluded that OPM's data would not meet affirmative action needs and therefore it approved the Commission's directives with slight modifications. The Commission informed all agency heads of NARS' approval and it expects all agencies to have submitted their affirmative action plans to us in the near future.

In recent weeks there has also been some confusion regarding the appropriateness of goals and timetables. At a recent Congressional hearing, the Department of Justice announced that in employment discrimination cases it would no longer seek relief in the form of goals and timetables except for the actual identified victims of discrimination. Thereafter, the Assistant Attorney General for the Civil Rights Division at Justice wrote a letter

to me explaining that he thought EEOC, in exercising its affirmative action responsibilities, should not fasten employment goals and timetables on federal agencies. Although this letter was addressed to me in my capacity as Acting Chairman of the EEOC, and no cc's were shown, copies nonetheless made there way to other federal agencies. This led to confusion among federal agency officials regarding what was happening to the government's own affirmative action program. Several officials called or wrote to EEOC explaining that they had received the Justice Department letter and wanted to know if their affirmative action plans were to continue containing goals and timetables. The Commission has informed our sister agencies and the Assistant Attorney General for Civil Rights at the Department of Justice that the concept of goals and timetables is still operative; that it conforms to statutory and constitutional norms; and that goals and timetables are nothing new but were instruments fully endorsed by the Civil Service Commission as early as 1972.

III.

A major responsibility of the Commission in the public sector is processing discrimination charges filed against federal agencies by employees and job applicants. Upon assuming this responsibility from the old Civil Service Commission, EEOC adopted the procedural regulations then in effect on an interim basis in order to give it time to determine what changes should be made to make the charge system more effective. Among those regulations adopted by EEOC was a delegation of authority to each agency to investigate allegations of discrimination filed against it.

As you may recall, one of the primary purposes of Reorganization Plan No. 1 of 1978 was to centralize equal employment opportunity authority in one agency, namely the Equal Employment Opportunity Commission. The Commission and others believed that EEOC, a neutral third party, should investigate complaints of discrimination against other federal agencies, thereby eliminating the major impediment to impartial, timely investigations, i.e., self-investigation. To this end, beginning in September of 1979, EEOC conducted a pilot program utilizing some of the same techniques it uses in investigating charges against the private sector. The Commission investigated over 360 charges filed against other agencies. This program demonstrated that when an impartial federal agency processes cases, complaints can be handled far more quickly and voluntary resolution was easier.

Although the Commission had every expectation of making permanent its role of investigating charges against federal agencies due to across-the-board cuts in agencies' budgets, in December of 1980, the Office of Management and Budget decided not to approve the slots which would enable us to implement this plan, and the slots have not been restored since then. Therefore, the Commission has focused its efforts on improving agency investigative procedures. The Commission is currently considering how agencies can adopt some of the methods EEOC utilizes in private sector cases such as encouraging settlement early on in the process, upgrading and professionalizing the intake of charges and holding face-to-face

meetings between complainants and agency representatives shortly after a complaint is filed.

At present EEOC is involved at two stages in the processing of a federal complaint of discrimination. EEOC is responsible for conducting hearings requested by complainants after the agency has investigated the case but before it has issued its decision. EEOC has received an increasing number of requests for hearings:

- o In Fiscal Year 1978, the Civil Service Commission (CSC) received approximately 2,100 requests for hearings;
- o In Fiscal Year 1979, when hearings authority transferred from CSC to EEOC, the two agencies received a combined total of approximately 2,870 requests;
- o In Fiscal Year 1980, the EEOC received 2,959 requests;
- o In Fiscal Year 1981, we believe we will have received 3,167 requests for hearings.

In Fiscal Year 1980, the last period for which we have complete data, of the 2,959 hearings requests the Commission received, it processed 2,764 requests as follows:

- o 1,100 were processed to the point of holding a hearing, at an average cost of $5,000 each.
- o 1,664 were settled or remanded to the agency for further investigation.

Following the hearing, EEOC issues a recommended decision to the agency. During Fiscal Year 1980, 35 percent of EEOC's recommended decisions found discrimination, and agencies report that they adopted some 65 percent of those recommendations in whole or in

part. (We have found, however, that these reports are not wholly accurate.) EEOC found no discrimination in 65 percent of its recommended decisions, and agencies report that they adopted 96 percent of those findings in whole or in part.

EEOC also becomes involved in the processing of a charge against a federal agency in an appellate capacity. Following a final agency decision adverse to a complainant, the complainant has the right to appeal the agency decision to EEOC. The Commission then determines whether the discrimination complaint was decided correctly by the agency. This review is handled by EEOC's Office of Review and Appeals. Preliminary figures indicate that in Fiscal Year 1981 approximately 3,175 appeals of agency decisions were filed with EEOC. During the same period, 2,611 appeals were processed to completion. In Fiscal Year 1982, the Commission expects to receive over 4,000 new appeals and, with current staffing, to process to completion 2,600 appeals. It has been our experience that in those cases where EEOC reverses an agency's final decision and orders certain action on the part of that agency, there is compliance over 90 percent of the time. In those instances where timely compliance appears not to be forth coming, moral suasion is usually successful.

IV.

The rights of the handicapped is an increasingly important issue. When authority over handicapped discrimination in federal sector employment was transferred from the old Civil Service

Commission to EEOC, again pursuant to Reorganization Plan No. 1, EEOC adopted the Civil Service Regulations in effect at that time. Since then the Commission has amended these regulations on various occasions. One of the most important of these amendments concerns the issue of relief. The CSC regulations stated that a handicapped applicant could not secure backpay as a form of relief even if the agency did in fact unlawfully deny them a job. The Commission's proposed regulations would authorize awards of backpay to applicants for federal employment. EEOC's proposed regulations also make clear that handicapped complainants have individual causes of action and therefore they have the right to file suit in federal court if they are dissatisfied with final agency action or if the agency fails to timely act on their complaint. The Commission believes that these changes are necessary so that the regulations conform to the 1978 amendments to the Rehabilitation Act of 1973. The Commission has approved these amendments in final form and they are currently at the Office of Management and Budget (OMB) undergoing the clearance process under Executive Order 12291.

V.

Up to this point, my remarks have focused exclusively on the federal sector but I do want to discuss one area of particular interest to other public sector employers--state and local governments. The 1980 census revealed that state governments employed 3.8 million workers and local governments employed 9.6 million workers. Jobs are opening up in this sector of the economy

perhaps faster than anywhere else.

In reviewing the Commission's report on FY 1981 litigation, I came across an item that may be of interest to those of you representing state and local governments. You are probably aware that the Department of Justice conducts Title VII litigation against these entities. EEOC processes the administrative charge and Justice decides on which cause findings it will sue. However, with regards to the Age Discrimination in Employment Act (ADEA), the Commission has litigation responsibility against state and local governments.

Last year, EEOC filed 89 ADEA suits--the largest number of actions ever filed by the government in any one year since the ADEA went into effect in 1968. 39 of these suits, or approximately 45% of them, were filed against public sector employers. Compared with the number of Title VII suits filed against public employers, that is an incredibly high statistic.

The Commission has learned that many state and municipal employers have ordinances and statutes requiring the mandatory retirement of their police and firefighters at age limits that conflict with the ADEA. These age restrictions generally apply even to desk jobs in the police and fire departments and simply are irrelevant to many jobs. Other local governments have legislation prohibiting individuals from being hired as firefighters, police or laborers after a certain age. These age restrictions, in all but a few cases are arbitrary and respondents have not been

able to show that they are bona fide occupational qualifications. In short, generalized age restrictions mandated by state and local legislation have proven to be an extremely fertile area of ADEA litigation. Those of you representing state and local governments can inform your clients that this is an area of special concern to the Commission. It is receiving an increasing number of charges in this area.

In conclusion, I am delighted to have an opportunity to discuss the subject of public sector employment rights with you. The federal and state governments have a high duty to assure that their workforces are representative of the American people. This concept must never be eclipsed in our constitutional democracy. The federal government cannot speak with a forked tongue--it must practice what it preaches: That discrimination is unlawful and that the elements of affirmative action--long upheld by the courts, is encouraged.