

4-28-1982

OFCCP and Affirmative Action

J. Clay Smith Jr.

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



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

Recommended Citation

Smith, J. Clay Jr., "OFCCP and Affirmative Action" (1982). *Selected Speeches*. Paper 70.
http://dh.howard.edu/jcs_speeches/70

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 lopez.matthews@howard.edu.

BEFORE THE
AFL-CIO CIVIL RIGHTS INSTITUTE
AT THE
GEORGE MEANY CENTER FOR LABOR STUDIES
SILVER SPRING, MARYLAND

OFCCP AND AFFIRMATIVE ACTION

I. INTRODUCTION.

A. ON APRIL 23, 1982, THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAM (OFCCP) ISSUED PROPOSED RULES WHICH WOULD REVISE CERTAIN IMPORTANT SECTIONS OF THE DEPARTMENT'S REGULATIONS GOVERNING AFFIRMATIVE ACTION REQUIREMENTS FOR FEDERAL CONTRACTORS AND FEDERALLY ASSISTED CONTRACTORS. IT SHOULD BE NOTED THAT WHILE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ALLEGEDLY AGREED TO THE PUBLICATION OF THIS NOTICE OF PROPOSED RULEMAKING, THE COMMISSION HAD STRONGLY URGED THAT ITS PRE-PUBLICATION COMMENTS PROVIDED UNDER E.O. 12067 BE INCORPORATED IN THE NOTICE OF PROPOSED RULEMAKING. BUT, THEY WERE NOT. HENCE, THE AGREEMENT FAILS FOR LACK OF CONSIDERATION.

B. ~~THESE PROPOSED REVISIONS TO THE OFCCP~~
AFFIRMATIVE ACTION REGULATIONS HAVE BEEN THE
~~SUBJECT OF MUCH PUBLIC COMMENT AND CONCERN.~~
FINAL COMMENTS ON THESE REGULATIONS MUST BE RECEIVED BY MAY 24, 1982. THE PROPOSED REVISIONS CAN BE BROKEN DOWN INTO THREE BROAD CATEGORIES:
1) REVISED REQUIREMENTS FOR NON-CONSTRUCTION CONSTRUCTORS; 2) REVISED REQUIREMENTS FOR CONSTRUCTION

CONTRACTORS; AND 3) CHANGES IN THE REMEDIES AND ENFORCEMENT PROVISIONS OF OFCCP.

II. AAP REQUIREMENTS - NON-CONSTRUCTION.

A. BACKGROUND. OFCCP HAS REQUIRED WORKFORCE AND UTILIZATION ANALYSIS COMMENCING WITH A GROUPING OF SIMILAR JOBS FOR ANALYTICAL PURPOSES. JOB GROUPINGS ARE PRESENTLY PERFORMED WITH A CONSIDERATION OF THREE FACTORS - SIMILARITY OF JOB CONTENT, WAGES, AND JOB OPPORTUNITIES. UTILIZATION ANALYSES OF MINORITY AND FEMALE REPRESENTATION PRESENTLY REQUIRE THE CONTRACTOR TO REVIEW EIGHT FACTORS IN DETERMINING THE AVAILABILITY OF MINORITIES AND WOMEN FOR THE VARIOUS JOB GROUPINGS. THESE EIGHT FACTORS INCLUDE BOTH "PRESENT" AVAILABILITIES, BASED ON ACTUAL EXISTING REPRESENTATION IN THE LABOR FORCE AND "POTENTIAL" AVAILABILITY AS DETERMINED FROM RESULTS OF TRAINING PROGRAMS AND SIMILAR FORESEEABLE

~~INCREASES IN AVAILABILITY.~~

B. PROPOSED CHANGES AND COMMENTS.

- JOB GROUPINGS - TWO ALTERNATIVES PROPOSED (ONLY ONE WILL BECOME FINAL RULE).

ALTERNATIVE A - WOULD KEEP JOB GROUPING ANALYSIS AS IT PRESENTLY IS.

. ALTERNATIVE B - WOULD PERMIT CONTRACTOR TO GROUP JOBS "VERTICALLY" - THAT IS JOBS IN SOME LINE OF PROGRESSION FROM ENTRY LEVEL TO HIGHER LEVEL JOBS REQUIRING THE SAME SKILLS.

- COMMENTS ON ALTERNATIVE B.

. MAY ENCOURAGE CONTRACTOR TO OPEN MORE ENTRY LEVEL JOBS TO MINORITIES AND WOMEN.

. MAY LEAD TO CONCENTRATION OF WOMEN AND MINORITIES IN BOTTOM JOBS.

. FLEXIBILITY OF PROPOSAL MAY ENCOURAGE GROUPING OF JOBS WITH VARYING SKILL LEVELS.

. MAY BE DIFFICULT TO GROUP WHERE PLANT-WIDE BIDDING ON A SENIORITY BASIS FOR TRANSFERS AND PROMOTIONS OCCURS.

- UTILIZATION AND AVAILABILITY - PROPOSED CHANGE FROM EIGHT TO FOUR FACTORS, OF WHICH 3 RELATE TO PRESENT AVAILABILITY (I.E., MINORITIES AND FEMALES WHO HAVE ALREADY DEMONSTRATED REQUISITE SKILLS), WHETHER IN THE IMMEDIATE GEOGRAPHIC AREA, THE RECRUITMENT AREA OR THE EMPLOYERS WORKFORCE. THE CONTRACTOR ALSO

CONSIDERS THE PERCENT OF MINORITIES AND FEMALES IN THE CIVILIAN LABOR FORCE IN THE IMMEDIATE LABOR AREA. EACH OF THESE FOUR FACTORS IS WEIGHTED AT THE DISCRETION OF THE CONTRACTOR. AS AN ALTERNATIVE TO THE FOUR FACTOR ANALYSIS, THE CONTRACTOR MAY USE CIVILIAN LABOR FORCE DATA IN THE SMSA AS AVAILABILITY FOR ALL JOB GROUPS.

THE EFFECT OF THESE REVISIONS IS TO NARROW THE GEORGRAPHIC SCOPE OF CONSIDERATION, ELIMINATE THE DIFFERENCE IN DETERMINING AVAILABILITY FOR MINORITIES AND WOMEN, AND PROVIDE DISCRETION TO THE CONTRACTOR IN WEIGHTING THE FACTORS.

- COMMENTS ON UTILIZATION CHANGES - THE CHANGES MAY SIMPLIFY THE ANALYSIS FOR CONTRACTORS TO MEET E.O. 11246 STANDARDS BUT MAY AT TIMES BE AT VARIANCE WITH TITLE VII LAW.

MOST IMPORTANTLY, THE PROPOSED REVISIONS DO NOT ACKNOWLEDGE THE TRAINING PROGRAMS INSTITUTED BY LABOR ORGANIZATIONS, INTEREST GROUPS, AND EMPLOYERS WHICH HAVE AND WILL CONTRIBUTE TO THE AVAILABILITY

OF MINORITIES AND WOMEN IN JOBS IN WHICH THEY HAVE BEEN UNDERREPRESENTED.

ALSO, WITHOUT QUALIFYING LANGUAGE, AS WITH JOB GROUPINGS, OFCCP IS AGAIN PROPOSING AN ACT OF FAITH THAT CONTRACTORS WILL NOT SELECT A METHOD OF ANALYSIS WHICH ARTIFICIALLY EXCLUDES MINORITIES AND WOMEN.

III. AAP REQUIREMENTS - CONSTRUCTION CONTRACTORS.

A. BACKGROUND - THE PRESENT OFCCP REGULATIONS REQUIRE CONTRACTORS WITH CONTRACTS OF \$10,000 OR MORE TO PREPARE AAPS AND FOR SUBCONTRACTORS TO SUBMIT REPORTS. THE PROPOSED RULES RAISE THE THRESHOLD COVERAGE TO \$50,000 AND ELIMINATE THE SUBCONTRACTOR REPORTING REQUIREMENTS. THE CURRENT RULES ALSO COVER A CONTRACTOR WITH A FEDERAL CONTRACT FOR EMPLOYEES WITHIN THE ENTIRE WORKFORCE, NO MATTER WHERE LOCATED. THE PRESENT RULES ALSO SET GOALS FOR THE UTILIZATION OF MINORITIES AND WOMEN IN EACH TRADE REPRESENTED IN THE CONTRACT.

~~THE GOAL FOR WOMEN IS ESTABLISHED AT 6.9%. CONTRACTORS~~
PARTICIPATING IN A HOMETOWN PLAN ARE TO MEET THE GOALS ESTABLISHED UNDER THE PLAN.

B. PROPOSED CHANGES AND COMMENTS.

- THE GOALS FOR MINORITIES WILL CONTINUE TO BE SET FOR EACH TRADE, ALTHOUGH THE LANGUAGE IN THE NOTICE IS AMBIGUOUS ON THIS

ISSUE. THE GOALS FOR WOMEN WILL BE APPLIED TO THE CONTRACTOR'S ENTIRE WORKFORCE RATHER THAN BY TRADE.

- COMMENT - APPLICATION OF A GENERAL GOAL FOR WOMEN TO THE ENTIRE WORKFORCE MAY MEAN THAT THOSE CRAFTS IN WHICH WOMEN ARE NOW WELL REPRESENTED MAY ALLOW THE CONTRACTOR TO MEET ITS GOALS DESPITE THE FACT THAT WOMEN ARE SIGNIFICANTLY UNDERREPRESENTED IN OTHER CRAFTS.

- OFCCP WILL REFRAIN FROM ISSUING A NEW GOAL FOR MINORITY UTILIZATION UNTIL THE RESULTS OF THE 1980 CENSUS DATA CAN BE ANALYZED. THE GOAL FOR REPRESENTATION OF WOMEN WILL REMAIN AT THE PRESENT 6.9% . A GOOD FAITH EFFORT TO MEET THE 6.9% GOAL WILL BE PRESUMED IF THE 6.9% IS ACHIEVED IN ENTRY LEVEL POSITIONS.

- COMMENT - THE DELAY IN SETTING GOALS FOR MINORITY REPRESENTATION WILL ALLOW OFCCP TO ~~CONSIDER THE ADVANCEMENTS MADE BY THE~~ INDUSTRY AND UNIONS IN CORRECTING PAST DISCRIMINATORY PRACTICES. ADOPTION OF THE 6.9% GOAL FOR WOMEN DOES NOT ADDRESS THE CONCERNS WHICH HAVE BEEN VOICED ABOUT THIS GOAL.

WHEN APPLIED ON A WORKFORCE RATHER THAN A TRADE-BY-TRADE BASIS, THE 6.9% GOAL DOES NOT TAKE INTO ACCOUNT THE VARIATION IN WAGE RATES AMONG THE CRAFTS AND MAY MASK CONTINUED UNDERUTILIZATION IN SOME CRAFTS.

THE PRESUMPTION THAT A GOOD FAITH EFFORT IS MADE IF THE GOAL IS REACHED IN THE ENTRY LEVEL JOBS DOES NOT TAKE INTO ACCOUNT THE INCREASED AVAILABILITY OF WOMEN FOR JOURNEYMAN LEVEL POSITIONS, THANKS TO THE APPRENTICESHIP AND TRAINING PROGRAMS ALREADY IN EXISTENCE.

OFCCP SHOULD BE ABLE TO CHALLENGE A SHOWING OF GOOD FAITH IF WOMEN ARE BEING ARTIFICIALLY EXCLUDED FROM CERTAIN TRADES.

- THE OFCCP PROPOSES TO MODIFY ITS RULES WITH RESPECT TO HOMETOWN PLANS TO REQUIRE THAT A CONTRACTOR MEET "ITS FAIR SHARE" OF THE GOALS FOR MINORITIES AND WOMEN.

- COMMENT - "FAIR SHARE" HAS NOT BEEN DEFINED IN THE REGULATIONS.

IV. REMEDIES - BACK PAY.

A. BACKGROUND - OFCCP AND THE DEPARTMENT OF LABOR HAVE NOW ACKNOWLEDGED THAT THE OFCCP DOES

HAVE AUTHORITY TO OBTAIN BACK PAY FOR DISCRIMINA-
TEES AS PART OF ITS REMEDY FOR VIOLATION OF THE
EXECUTIVE ORDER. THE PROPOSED RULES MODIFY THE
STANDARD FOR BACK PAY AWARDS AND THE PROCEDURES
FOR DETERMINING THOSE AWARDS.

B. PROPOSED CHANGES AND COMMENTS.

- THE MOST SIGNIFICANT CHANGE IN THE
BACK PAY AREA IS THE PROPOSAL THAT AWARDS BE
SOUGHT ONLY FOR IDENTIFIABLE VICTIMS OF
DISCRIMINATION IN AMOUNTS CALCULATED ON
PROVABLE LOSS.

- COMMENT - ALTHOUGH THIS PROPOSAL IS
CONSISTENT WITH THE BACK PAY PRINCIPLES IN
TITLE VII, IT DOES NOT RECOGNIZE THE PRACTICAL
DIFFICULTIES WHICH ARE PRESENTED IN THIS
METHODOLOGY - DIFFICULTIES WHICH HAVE BEEN
TAKEN INTO CONSIDERATION IN TITLE VII LAW.

WHERE THERE IS EVIDENCE THAT A CLASS OF
INDIVIDUALS HAS SUFFERED MONETARY LOSS FROM
SYSTEMIC DISCRIMINATION, TITLE VII LAW HAS
APPROVED THE USE OF A FORMULA OR AVERAGING
BASIS FOR THE DETERMINATION OF INDIVIDUAL
BACK PAY AWARDS. THE TOTAL POTENTIAL MONETARY
EXPOSURE OF THE CONTRACTOR IS DETERMINED AND
THE DISTRIBUTION OF THE RESULTING BACK PAY

FUND IS ACCOMPLISHED BY METHODS WHICH REFLECT THE STANDARD EMPLOYMENT SELECTION CRITERIA OF THE EMPLOYERS. THIS METHOD AVOIDS THE DETAILED EXPENSIVE AND TIME-CONSUMING PROCESS OF PRECISELY CALCULATING INDIVIDUAL AWARDS.

- THE PROPOSED RULES ESTABLISH AN ARBITRATION PROCEDURE IN INSTANCES WHERE OFCCP AND THE EMPLOYER CANNOT AGREE ON INDIVIDUAL ENTITLEMENT OR AWARD OF BACK PAY.

- COMMENT - THE PROPOSED RULES DO NOT DEFINE WHAT CONSTITUTES BACK PAY. TITLE VII AND NLRB PRECEDENT MAKE CLEAR THAT BACK PAY INCLUDES FRINGE BENEFITS, PENSIONS, ETC. IN OTHER WORDS THAT MONETARY AMOUNT WHICH WOULD MOST NEARLY COMPLETELY RESTORE THE DISCRIMINATEE TO THAT POSITION IN WHICH HE OR SHE WOULD HAVE BEEN ABSENT THE DISCRIMINATION. ~~BACK PAY ALSO INCLUDES PREJUDGMENT INTEREST AND PROVISION MAY BE MADE FOR THE CONTINUATION OF THE REMEDIAL PAY UNTIL THE DISCRIMINATEE IS ACTUALLY PLACED IN THE WITHHELD POSITION.~~ THE PROPOSED RULES ALSO DO NOT ADDRESS THE STANDARDS BY WHICH AN ARBITRATOR WILL DETERMINE

AN INDIVIDUAL'S ENTITLEMENT TO BACK PAY UNDER SUPREME COURT DECISIONS IN THE TITLE VII AREA, WHEN EVIDENCE IS SUFFICIENT TO ESTABLISH DISCRIMINATORY PRACTICES, DISCRIMINATEES ARE ENTITLED TO A PRESUMPTION IN FAVOR OF THEIR ELIGIBILITY FOR BACK PAY. THIS PRESUMPTION, IF INCLUDED IN THE OFCCP ARBITRATION PROPOSAL, WOULD CONSIDERABLY EXPEDITE THE PROCESS.

- THE PROPOSED RULES ALSO PROVIDE THAT BACK PAY WILL BE AVAILABLE ONLY FOR A TWO YEAR PERIOD PRECEDING THE RECEIPT BY THE CONTRACTOR OF NOTICE THAT A COMPLAINT HAS BEEN FILED OR NOTICE OF A VIOLATION.

- COMMENTS - THIS TWO YEAR PERIOD IS ANALOGOUS TO THAT UNDER TITLE VII. HOWEVER, THE OFCCP RULE RUNS FROM NOTICE BY OFCCP TO THE CONTRACTOR RATHER THAN THE DATE OF THE FILING OF A CHARGE. THIS LEAVES THE FATE OF A POTENTIAL DISCRIMINATEE ENTIRELY IN THE HANDS OF THE AGENCY. THE EEOC HAS ADOPTED A REGULATION PROVIDING THAT WE WILL GIVE NOTICE WITHIN 10 DAYS AFTER THE FILING OF A CHARGE. OFCCP SHOULD CONSIDER ADOPTING A SIMILAR PROVISION. FURTHER, BECAUSE IN

RARE INSTANCES THE AGENCY MAY DELAY IN GIVING NOTICE, THE RULE SHOULD ESTABLISH THE CONTROLLING DATE AS THAT ON WHICH THE CHARGE WAS FILED, REGARDLESS OF NOTICE.

V. CONCLUSION.

IN THE SHORT TIME ALLOTTED FOR MY PRESENTATION, I HAVE TRIED TO OUTLINE FOR YOU THE IMPORTANT ISSUES ON WHICH YOU MAY WISH TO COMMENT REGARDING OFCCP'S AFFIRMATIVE ACTION PROPOSED RULES. AS YET, I HAVE NOT MADE UP MY MIND ON THE ISSUES SURROUNDING THE AFFIRMATIVE ACTION RULES. IT IS DIFFICULT TO ASSESS WHERE THE COMMISSION WILL ULTIMATELY COME OUT ON THESE ISSUES WITH THREE NEW MEMBERS. AS ONE OF THE REPUBLICAN MEMBERS OF THE COMMISSION, I WILL BE URGING THE NEW MEMBERS TO TAKE A POSITION WHICH IS CONSISTENT WITH AND COMPLIMENTARY TO THE HISTORY OF TITLE VII ENFORCEMENT.

HOW THE AFFIRMATIVE ACTION AND BACK PAY ISSUES ARE ULTIMATELY RESOLVED MAY GIVE US A CLUE ON HOW OTHER IMPORTANT ANCILLARY ISSUES WILL BE RESOLVED BY THE COMMISSION, SUCH AS ISSUES ON THE UNIFORM SELECTION GUIDELINES, SEXUAL HARASSMENT, CLASS ACTION LITIGATION. I WILL RESERVE MY JUDGMENT ON THE EFFECTIVENESS OF EEOC COORDINATION RESPONSIBILITY UNDER E.O. 12067 UNTIL LATER. WILL THE INTENT OF E.O. 12067 BE FULFILLED? WILL THE

PAGE TWELVE

COMMISSION EXERCISE ITS JUDGMENT AND STAND FIRM AS A COLLEGIAL BODY ON ITS PRINCIPLES? WILL THE OFFICE OF INTERAGENCY COORDINATION BE ALLOWED TO MAINTAIN ITS STATUS AND FLEXIBILITY TO NEGOTIATE EEOC DIFFERENCES WITH OTHER DEPARTMENTS AND AGENCIES? OR, WILL THAT OFFICE BECOME A PAPER TIGER? WILL EEOC BECOME A RUBBER STAMP TO OTHER DEPARTMENTS AND AGENCIES -- IS THIS THE PRICE THAT WILL BE PAID IN ORDER FOR EEOC TO KEEP ITS ROLE AS THE LEAD AGENCY IN CIVIL RIGHTS? TIME WILL TELL.

APRIL 28, 1982