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Affirmative Action Has Received Bum Rap

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by

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In the past four years there has been much written about affirmative action. Oddly enough, there has been little if any discussion on the Affirmative Action Guidlines, published by the Equal Employment Opportunity Commission (EEOC) in 1979. (44 Fed. Register 4422) These Guidelines spell out the voluntary nature of affirmative action, and the protections afforded employers implementing them.

The purpose of this article is to describe the Guidelines as they were intended to be explained, implemented and interpreted. The Affirmative Action Guidelines describe the circumstances in which persons subject to Title VII may voluntarily take or agree upon actions to improve employment opportunities of minorities and women, and describe the kind of actions they may take consistent with Title VII.

In 1964, Congress passed legislation to improve the economic and social conditions of minorities and women: the 1964 Civil Rights Act. A major feature of this bill was Title VII. Title VII makes it unlawful for an employe or union to discriminate on the basis of race, color, religion, sex or national origin.

The way in which Title VII is triggered and comes into play deserves some discussion. The statute provides that job applicants and employees can file charges of discrimination against employers with the EEOC. The EEOC will

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investigate these charges and if it finds there is reasonable cause to belive an employer's conduct is discriminatory, the EEOC attempts to settle the charge by conciliation and formal methods of persuasion. If no agreement between a charging party and the employer is reached, the employee has the right to sue in Federal court.

In 1972, Congress amended Title VII to also permit the EEOC to sue employers who violate Title VII. Prior to filing a lawsuit, the EEOC, pursuant to statutory requirements, attempts to informally resolve the dispute between the charging party and the employer. In a nutshell, this is how Title VII operates.

In 1972, when Congress gave the EEOC the power to sue, Congress expressed its hope that the preferred method of resolving employment discrimination disputes would be by voluntary settlements and conciliation rather than by litigation. Voluntary compliance was and still in encouraged. Law suits were to be a last resort. Congress, however, clearly intended that where informal resolution of disputes failed, the EEOC would sue employers to enforce the anti-discrimination provisions of Title VII. Against this backdrop then, let me explain the Affirmative Action Guidelines in detail.

There are three significant features of the Affirmative Action Guidelines. First, the Guidelines provide a climate in which employers can undertake voluntary affirmative action. By affirmative action, I mean those employment decisions appropriate to enable past victims of discrimination -- primarily minorities and women -- to overcome the effects of past or present employment

policies which operate as barriers to equal opportunity. An example of affirmative action is an employer setting aside jobs for women and minority groups because in the past they had been excluded from the employer's workforce. The Affirmative Action Guidelines encourage this type of voluntary action. This is extremely important because Congress' intent in Title VII was for employers to voluntariy improve the employment opportunities for past or present victims of discrimination.

A second feature of the Guidelines is that discrimination against all individuals because of race, color, or sex is illegal under Title VII. Charges of discrimination filed by non-minorities are not ignored, nor are they processed in a manner different from those filed by females and minorities. Title VII protects all persons from race, color, and sex discrimination.

The third feature of the Guidelines is the most important. The Guidelines are the EEOC's way of instructing employers on how to harmonize two apparently conflicting themes — affirmative action and the duty not to discriminate. If employers adhere to the Guidelines, they can institute affirmative action and at the same time be immunized from claims that they unlawfully discriminated. The Guidelines provide employers who take affirmative action with protection from liability to the greatest extent possible. They harmonize Congress' intent that employers take voluntary affirmative action and its prohibition against discrimination.

At this point, a fair question is what do the Guidelines require of employers so that they can receive this immunity?

The answer lies in the three "R's". The three "R's" are what the Guidelines require in the formulation of affirmative action plans in order to invoke the statutory defense under Section 713(b)(1) of Title VII. The required components of an affirmative action plan are:

1. a reasonable self-analysis;
2. a reasonable basis for concluding action is appropriate; and,
3. reasonable action.

The first "R" of the Affirmative Action Guidelines contemplates that employers will conduct a reasonable self-analysis. A reasonable self-analysis is one in which an employer determines whether any of his employment practices "exclude, disadvantage . . . or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why." An employer should ask, "In light of the pool from which I draw candidates for work, are blacks, women, or Spanish Americans fairly represented in my workforce?" If a group is underrepresented, employers should ask, "Do any of my employment practices discriminate or perpetuate discrimination?" If you have a qualifying test, an employer should ask, "Does the test exclude one group more than others." "Is the test job related?" "Is the test fair?" Employers should ask, "What is the effect of the no transfer rule within my plant on women and minorities?"

A reasonable self-analysis is very much like a blue print. Both contain important specifications and the author knows the underlying reason for each figure. A self-analysis should cover all employment practices and their affect on protected groups. The Guidelines require that the self-analysis and the plan be in writing.

The second "R" is that there be a reasonable basis for the employer's affirmative action. The Guidelines contemplate only that employers evaluate their workforce or employment decisions to determine whether they have a problem which could be in violation of Title VII. An employer does not have to admit or state that he has violated Title VII. However, to implement voluntary affirmative action and secure immunity, an employer must show that there was a reasonable basis for the employment decision. No employer has to state publicly or privately to the EEOC that he has violated Title VII.

Reasonable action is the third "R" contemplated by the Guidelines. The affirmative action plan must be reasonable in relation to the problem disclosed by the self-analysis.

In considering the reasonableness of a particular affirmative action plan, the EEOC generally applies the following standards. First, the plan should be tailored to remedy the problem identified in the self-analysis. Plans should be designed to ensure that employment systems operate fairly in the future while avoiding unnecessary restrictions on opportunities for the workforce as a whole.

If a plan has race or sex conscious provisions, it can be maintained so long as it is necesary to remedy the problem.

Under the Guidelines an affirmative action plan can also include goals and timetables. If they are utilized they must be reasonably related to considerations such as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of qualified applicants, and the number of employment opportunities expected to be available.

The Guidelines also provide that the EEOC will give comity to affirmative action plans developed pursuant to Executive Order 11246. Many employers are government contractors and therefore subject to Executive Order 11246, as well as Title VII. In enforcing the Executive Order, the Office of Federal Contract Comliance Programs may have already required an employer to develop an affirmative action plan. The Affirmative Action Guidelines state that an employer who has had a plan approved in order to come into compliance with the Executive Order, may rely on that plan to demonstrate compliance with our Guidelines. Hence, the government's approach in this area is coordinated and avoids potential conflicts between Federal agencies enforcing anti-discrimination laws.

At this point a fair question for employers to ask is, "If I adhere to the Guidelines, exactly how is my company immunized from liability?"

The Guidelines state that if an employee charges that he was discriminated agaianst because of affirmative action, the EEOC will investigate the charge to determine whether the employer has in fact implemented an affirmative action plan and if that plan contains the three "R's" and therefore conforms to the Guidelines. If the EEOC's investigation reveals a program conforming to the Guidelines, then the Commission will issue a no cause decision which states that the employer is entitled to the protection of Section 713(b)(1) of Title VII. This is extremely important to an employer in the event the charging party decides to sue in Federal court.

Section 713(b)(1) provides employers with a defense to liability. That section states that where an employer can show that he has acted in "good faith, in conformity with, and in reliance on any written . . . opinion of the Commission," the employer may assert a defense which bars a Title VII proceeding. The Guidelines are a written opinion of the Commission. Consequently, employers who in good faith rely on them may claim in Federal court they are immunized from liability.

The concept of affirmative action is initially a free enterprise remedy. The Guidelines make this clear. It is the employer, not the government that is urged to make an analysis of potential problems in the workforce. The government even provides a defense against would be complainants if the employers have complied with the Guidelines.

Affirmative Action has been given a bum rap, and most employers, familiar with Title VII know it, and the Commissioners at EEOC are urged, if not compelled to set the record straight.