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Equal Employment Opportunity and the Business Community

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EQUAL EMPLOYMENT OPPORTUNITY
AND
THE BUSINESS COMMUNITY

The time has come for employers throughout the United States to awaken to the realization that a whole new dimension has been added to labor-management relations. By the enactment of the 1972 amendments to Title VII of the 1964 Civil Rights Act, the Equal Employment Opportunity Commission (EEOC) has been given teeth rivaling those of the NLRB. Thus, employers will now have to familiarize themselves with a whole new area of "unfair employment practices, which, in many cases, carry far stiffer penalties than "unfair labor practices." It appears that the days of purely voluntary compliance are to be replaced by a whole new policy of affirmative enforcement of the equal employment opportunity laws through all available sanctions.

I. The E.E.O.A. of 1972—A Change of Direction.

A. *Legislative Forerunners of the E.E.O.A. of 1972.*

Legislation by the federal government in the area of equal employment opportunity has had somewhat of a stair-step approach. Immediately following the Civil War, a merit system was established for Civil Service employees. These efforts were confined solely to federal government employees, however, and many years were to pass before legislation would be passed forcing other employers to follow suit.

With the dawn of the New Deal era, there came a variety of acts and executive orders attempting to expand equal employment practices to those contractors doing business with the federal government.¹ These programs met with only marginal success, as the vast majority depended on either voluntary compliance or limited and sporadically enforced sanc-

¹ U.S. Gov't Printing Office, Legislative History of Titles VII and XI of the 1964 Civil Rights Act. 2-5 (1965).

tions to achieve their goals. All of this was to change abruptly upon the inauguration of President John F. Kennedy.

Elected to office upon a traditional Democratic coalition of minority groups, President Kennedy was particularly sensitive to the complaints of his minority constituents. Thus, one of his first acts was to establish the President's Committee on Equal Employment Opportunity,² the forerunner of the present-day Office of Federal Contract Compliance.³ This new committee differed radically from its predecessors, as it was not limited solely to the seeking of voluntary compliance or issuance of limited sanctions. Instead, the Committee was empowered not only to impose severe penalties, including contract cancellation, against offenders, but was also authorized to require each contractor to engage in an affirmative plan of minority recruitment. Thus, for the first time, "affirmative action" entered the nation's vocabulary.

Then, in 1963, an act was introduced in Congress by the Kennedy administration which sought for the first time to regulate the employment practices of private businesses engaged in interstate commerce. The initial bill was designed to establish an administrative agency similar to the NLRB to cope with the new "unfair employment practice."⁴ However, such a plan met with a cool reception in Congress, and the bill was quickly watered down to provide for a two-pronged approach, with primary emphasis on voluntary compliance. As modified, the bill overcame its opposition and became enacted into law in the form of Title VII of the Civil Rights Act of 1964.

Title VII forbade the discrimination against employees on account of their race, color, religion, sex or national origin by any employer with 25 or more employees, where the employ-

² Executive Order No. 10925, 3 C.F.R. 448 (Supp. 1959-63).

³ Executive Order No. 11246, 3 C.F.R. 418 (1972).

⁴ Legislative History of Titles VII and XI of the 1964 Civil Rights Act, *supra* note 2.

er was engaged in interstate commerce. These prohibitions were to be enforced either by private suits by the aggrieved party after attempted conciliation by the EEOC or by pattern-or-practice suits prosecuted by the Justice Department. Most cases were to be initiated by complaints of individuals to the EEOC, which would in turn attempt to achieve a voluntary settlement. If no agreement were reached, then the EEOC would issue a right-to-sue letter authorizing the aggrieved party to bring suit in federal district court within 30 days thereafter.⁵ Although the EEOC often acted as *amicus curiae* in these proceedings, it had no power to bring suit on its own motion.

The second avenue of enforcement was through suits by the Justice Department against those employers or industries which were believed to be engaging in a pattern or practice of discrimination. These suits, in the nature of class actions, were to become tremendous practical tools not only to enjoin future discriminatory practices in large segments of the economy, but also to implement affirmative remedial programs designed to eliminate the effects of past discrimination.

Neither of these approaches proved to be wholly satisfactory. Because of manpower limitations, the Justice Department naturally devoted most of its resources toward major employers in major industries. This, of course, left a large segment of the work force dependent entirely on the EEOC for assistance.

For several reasons, dependence solely on the EEOC proved to be unsatisfactory both from the employer's and employee's point of view. First of all, the EEOC was deluged with so many complaints that it was often two or three years before the case even reached the conciliation stage. Not only did this delay provide little solace to discharged employees, it proved to be a severe thorn in the side of employers due to the Act's notice requirements.

⁵ Civil Rights Act of 1964 § 706(e), 42 U.S.C. § 2000(e)-5(e) (1970).

Second, the EEOC was not required to notify an employer of charges against him within any set period of time. Thus, the EEOC adopted a policy of sending a copy of the charge only a short time before the conciliation process was scheduled to begin. This presented great practical difficulties to employers who had long since destroyed or mislaid evidence necessary to present a defence.

Additional problems were created by the requirement that the individual aggrieved party finance a private suit should the EEOC fail in its conciliation efforts. Because many plaintiffs had limited resources for prosecuting such suits, an employer could often defeat a meritorious claim by simply engaging the complainant in an endurance contest.

These diverse problems finally led Congress to reconsider the effectiveness of a program which relied primarily on voluntary compliance. As a result, Congress enacted a series of amendments to Title VII of the 1964 Civil Rights Act, in the form of the Equal Employment Opportunity Act of 1972.⁶

B. Changes Made By The E.E.O.A. of 1972.

As will be seen, the Equal Employment Opportunity Act of 1972 has created a comprehensive scheme for regulation of employment practices in virtually every segment of the economy. For the first time, civil service employment practices in state and local governments are to be regulated by the Act.⁷ Federal civil servants and members of the military are to be protected by special provisions similar to those of the 1964 Civil Rights Act.⁸ Meanwhile, the private business sector is to be subject to the new enforcement powers of the EEOC,⁹ with only the smallest of businesses being excluded.¹⁰

⁶ Pub. L. No. 92-261 (March 24, 1972).

⁷ Pub. L. No. 92-261, § 701(a) (March 24, 1972).

⁸ Pub. L. No. 92-261, § 717 (March 24, 1972).

⁹ 42 U.S.C. § 2000e-5 (1970), *as amended*, Pub. L. No. 92-261, § 706 (March 24, 1972).

¹⁰ 42 U.S.C. § 2000e(a) (1970), *as amended*, Pub. L. No. 92-261, § 701(b) (March 24, 1972).

It is these new enforcement powers which will be the principle focus of this section, because these powers mean that the businessperson may no longer ignore the mandates of Title VII.

1. *Who is covered*: All businesses affecting interstate commerce and all labor unions with 25 or more employees or members (after March 24, 1973, the number will be reduced to 15);¹¹ all employment agencies;¹² and most employees of state and local governments.¹³

2. *Proscribed activities*: It is an unfair employment practice to discriminate against an employee or applicant for employment because of their race, color, religion, sex or national origin.¹⁴

3. *Alterations in enforcement procedures*: The entire enforcement section of the Act was revamped so as to provide for three main avenues of enforcement: private suits by the aggrieved party or his representative;¹⁵ suits on behalf of the aggrieved by the EEOC;¹⁶ or pattern-or-practice suits by the EEOC or the Justice Department.¹⁷ Briefly, the major changes in procedure are as follows:

a. The complaint may now be filed not only by an ag-

¹¹ 42 U.S.C. §2000e (e) (1970), as amended, Pub. L. No. 92-261, §701 (b) (e) (March 24, 1972).

¹² 42 U.S.C. §2000e (c) (1970), as amended, Pub. L. No. 92-261, §701 (c) (March 24, 1972).

¹³ 42 U.S.C. §2000e (a) (1970), as amended, Pub. L. No. 92-261, §701 (a) (March 24, 1972).

¹⁴ 42 U.S.C. §§2000e-2, 2000e-3 (1970), as amended, Pub. L. No. 92-261, §703, 704 (March 24, 1972).

¹⁵ 42 U.S.C. §2000e-5 (f) (1970), as amended, Pub. L. No. 92-261, §706 (f) (1) (March 24, 1972).

¹⁶ 42 U.S.C. §2000e-5 (f) (1970), as amended, Pub. L. No. 92-261, §706 (f) (1) (March 24, 1972).

¹⁷ 42 U.S.C. §2000e-6 (1970), as amended, Pub. L. No. 92-261, §707 (March 24, 1972).

grieved party, but also by the EEOC or by third parties acting on behalf of the aggrieved.¹⁸

b. Persons charged with unfair employment practices (UEP's) are now entitled to notice of the charge within 10 days,¹⁹ thereby partially alleviating one of the problems discussed earlier.

c. Should an employer somehow discover the identity of the complainant, in spite of the non-disclosure of Form #131, and take some punitive actions towards the aggrieved party, the EEOC is now empowered to seek temporary injunctions to force reinstatement, or other appropriate action pending the outcome of any court action.²⁰ It bears note that the EEOC has already used this new power to force the reinstatement of a female employee fired for filing charges with the EEOC.²¹

d. The EEOC has greatly expanded investigative powers under the new Act and all hearings are now to be conducted under Section II of the National Labor Relations Act²² which authorizes the subpoena of witnesses, books and records, and the taking of testimony under oath.

e. Finally, the aggrieved party has the option of either waiting for the EEOC to proceed with a suit or proceeding by himself in those cases where the EEOC has failed to act within 180 days after the charge was filed.²³ Thus,

¹⁸ 42 U.S.C. §2000e-5 (b) (1970), *as amended*, Pub. L. No. 92-261, §706 (b) (March 24, 1972).

¹⁹ 42 U.S.C. §2000e-5 (b) (1970), *as amended*, Pub. L. No. 92-261, §706 (b) (March 24, 1972).

²⁰ 42 U.S.C. §2000e-5 (f) (1970), *as amended*, Pub. L. No. 92-261, §706 (f) (2) (March 24, 1972).

²¹ *E.E.O.C. v. Liberty Mutual Life Ins. Co.*, 346 F. Supp. 675 (N.D. Ga. 1972).

²² 42 U.S.C. §2000e-9 (1970), *as amended*, Pub. L. No. 92-261, §710 (March 24, 1972).

²³ 42 U.S.C. §2000e-5 (f) (1970), *as amended*, Pub. L. No. 92-261, §706 (f) (1) (March 24, 1972).

those parties with sufficient resources for a private suit can now by-pass any conciliatory efforts and proceed to trial if the EEOC fails to act speedily on their claims. For those parties unwilling or unable to proceed privately, the procedure will be much as before. The EEOC will make preliminary investigations, then attempt conciliation where it finds reasonable cause to believe that a person is committing or has committed an unfair employment practice. Finally, where no conciliation is achieved, the EEOC will bring suit in federal district court. Unfortunately for employers, there is still no statute of limitations limiting the period in which suits may be brought by the EEOC.

f. The pattern-or-practice power, the third avenue of enforcement mentioned, has remained essentially unchanged except that the EEOC will have concurrent jurisdiction with the Justice Department to file such suits for two years before taking over this area entirely.²⁴

II. Employment Practices Likely To Be EEOC Targets Under The New Act.

As noted previously, civil rights legislation can no longer be ignored. The growing number of cases filed with the EEOC—almost 30,000 in 1971, up over 60% from 1970—bear silent testimony to the increasing awareness of employees of their rights until Title VII. In addition, it is now becoming more advantageous for unions to press for job equality due to their co-liability with employers for discriminatory contract provisions.²⁵

Set forth below are the areas in which a great deal, if not most, of equal employment opportunity litigation has occurred to date, thereby indicating those practices which are most likely to receive close scrutiny by both employees and

²⁴ 42 U.S.C. §2000e-6 (1970), *as amended*, Pub. L. No. 92-261, §707 (March 24, 1972).

²⁵ 1972 Daily Labor Rep. 146, A-4.

the EEOC. Thus, members of the business community should compare their employment practices with those set forth in the following section. Should a particular practice or practices be found suspect, steps should be made to establish a written plan outlining the course of conduct which the company will follow in order to end the unfair practice. In some instances it may be psychologically advantageous to advertise this plan to the company employees, thereby dissuading them from filing charges upon this showing of the company's good faith intent to comply with the provisions of the Act. In addition, should charges be filed against the company, an employer with a reasonable affirmative action plan can realistically expect a more sympathetic approach from E.E.O.C. investigators than an employer who is either ignorantly or defiantly violating the Act.

A. Illegal pre-employment procedures.

The two pre-employment practices which most often get employers into difficulties are the failure to notify a large segment of the work force of available jobs, and the use of unvalidated screening devices to eliminate disproportionate numbers of those persons protected by Title VII.

1. Failure to advertise employment opportunities.

Failure to adequately acquaint minority groups with current job openings seems to be the most frequent of all unfair employment practices for the simple reason that it enables many an employer to justify a one-race or one-sex work force by innocently saying:

Why, I might have hired someone besides a white, Anglo-Saxon Protestant male, but no one else applied."

Needless to say, the EEOC does not give such statements much weight where the statistics indicate that the employee ratios in the plant are significantly different from the racial or ethnic ratios of the surrounding community, especially where the employer is engaged in a system of "selective recruiting."

The EEOC frowns upon word-of-mouth recruiting, having discovered that employees generally bring in friends of the same race, creed and sex as themselves. By engaging in these practices, the EEOC maintains, the employer in many instances hurts himself by excluding potential applicants who are more qualified than the person hired.²⁶ In any event, word-of-mouth recruiting is definitely taboo for those employers subject to EEOC guidelines.²⁷

Failure to list job openings with employment agencies commonly used by minorities, such as state employment services, may be viewed by the EEOC as evidence of a discriminatory intent, because many minority group applicants are unable to afford the fees of private agencies. Thus, all use of private employment agencies should probably be concurrent with the use of the state agency.

In addition, the employer should insure that any employment agency with which he deals is aware that the company seeks referral of all qualified applicants, regardless of race, color, religion, sex or national origin. In order to protect himself, an employer should see that all job orders are submitted to the agency with a written notation as to the company's employment policies. Failure to take such precautionary measures could implicate an employer in any unfair employment practices of the agency, especially where, by virtue of long use, the employer has reason to suspect that the agency may be refusing to refer certain classes of applicants.

Those employers who do their own recruiting must be careful not to state an unlawful preference in their advertising. Stating a preference for a particular sex is unlawful unless sex is a bonafide occupational qualification.²⁸ Likewise, the stating of a preference for applicants with college degrees may be unlawful unless the employer can show that such edu-

²⁶ E.E.O.C. No. 72-2130 (1972).

²⁷ O.F.C.C. No. 101-68 (1969).

²⁸ 29 C.F.R. §1604.5 (1972).

cational requirements are reasonably related to job performance.²⁹ The methods by which an employer can ascertain whether his educational requirements are valid will be explored in the next section.

In summary, an employer must make a reasonable effort to inform all qualified applicants of available positions. By so doing, not only will the employer be able to make a decision based on a greater number of applicants, but he may also find that the most qualified applicant just happens to be a black, a woman, or a Jew.

B. The use of unvalidated screening devices.

The EEOC views as unlawful the use of any screening device which tends to exclude a disproportionate percentage of groups protected by Title VII, unless such screening procedure is reasonably related to job performance.

There are a variety of these devices which the EEOC has found to be unlawful. Among them are:

1. Disqualification due to poor credit records.

The EEOC has found that one discriminates against minorities by a refusal to hire based on poor credit records. This decision was based on the 1967 Census Bureau figures showing that 35.4% of non-whites are below the poverty line as compared to 10.3% for whites. Thus, the EEOC reasoned, more non-white than whites would get into credit difficulties, and a refusal to hire based on such a poor credit record constituted discrimination on the basis of race.³⁰

2. Refusal to hire based on sex or marital status.

It is unlawful to exclude a person from a job based on the sex of that person except where preference for one sex can be shown by the employer to be a bonafide occupational qualification (BFOQ). It has been the policy of the EEOC to con-

²⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

³⁰ E.E.O.C. No. 72-0427 (1972).

strue such exceptions narrowly, prompting one commentator to write that, ". . . the only permissible B.F.O.Q. based upon sex is that of a wet nurse to exclude a male and a sperm donor to exclude a female."³¹ Thus it is safe to say that, unless an employer is engaged in either of these businesses, any exclusion of one sex from his staff bears close scrutiny, as the burden of proof is on the employer to prove that exclusion of one sex is not arbitrary.

The EEOC also regards as unlawful the exclusion of one sex from certain occupations, regardless of customer preference. Thus, a hospital cannot refuse to hire a male nurse to care for female patients.³² Neither may a female be denied the job of sales manager because she would be required to accompany male clients on company-sponsored hunting trips.³³

It is also forbidden to require males and females to maintain different appearances. Thus, if female employees are permitted to have long hair, then an employer may not refuse to hire a male who also wears his hair long.³⁴ Presumably, such prohibitions extend to dress codes which forbid women to wear trousers to work.

Meanwhile, state protective laws, limiting the hours which women may work and the weights which they can lift, are being overturned in droves where these laws serve to prevent women from being judged on their individual abilities.³⁵ As more and more of such legislation is overturned, employers are becoming less and less sure of which laws to ignore and which to obey. The Eighth Circuit recently laid down some guidelines which may be useful. If the law prevents the

³¹ Murphy, *Sex Discrimination In Employment — Can We Legislate a Solution?*, 17 N.Y.L.F. 437, 454 (1971).

³² *Wilson v. Sibley Memorial Hospital*, 340 F. Supp. 686 (D.C. 1972).

³³ E.E.O.C. No. 71-2338 (1971).

³⁴ *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357 (C.D. Cal. 1972).

³⁵ Murphy, *supra*, note 31, at 445.

woman from performing some job, it is unconstitutional. However, if it confers a special benefit upon women, then the law is not only deemed to be in full force and effect, but its special benefits must be extended to men as well.³⁶ While it may be argued that extension of these special benefits to male employees places an onerous burden on an employer, the employers should not expect too much sympathy from the courts, for, ". . . federal labor legislation enacted over the last thirty odd years has placed many onerous burdens on employers."³⁷

Finally, it is unlawful to refuse to hire an employee based on marital status. The Supreme Court recently indicated that it may be unlawful to refuse to hire a woman with young children where males with young children are hired.³⁸ Likewise, the stewardess cases have declared that it is unlawful to refuse females employment, or to terminate it, solely because they are married, where men with similar jobs are retained after marriage.³⁹ In addition, the EEOC maintains that it is discriminatory to refuse to hire a female with illegitimate children because men are so much more capable of hiding the fact of their parenthood.⁴⁰

3. *Disqualification based on unvalidated educational requirements.*

The United States Supreme Court, in the landmark decision of *Griggs v. Duke Power Co.*,⁴¹ held that educational or testing requirements which tend to exclude disproportionately high numbers of protected groups are unlawful unless the employer can prove that such test is a reasonable predictor of job performance. This rule, as interpreted by the EEOC, applies to all varieties of tests commonly used

³⁶ *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972).

³⁷ *Id.*

³⁸ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

³⁹ *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970).

⁴⁰ E.E.O.C. No. 71-562 (1970).

⁴¹ 401 U.S. 424 (1971).

by employers and employment agencies as screening devices for job applicants. Thus, the word *test*:

. . . includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament.⁴²

As a result of this decision, the entire personnel systems of many companies were turned upside-down. Almost all companies had virtually iron-clad rules that no employee could advance much beyond shop foreman without a high school diploma. In addition many companies used one or more intelligence tests to screen applicants for positions as office clericals. Suddenly, most educational and testing requirements were presumptively unlawful unless the employer could prove that such requirements had been validated in accordance with stringent EEOC guidelines.

According to the EEOC Guidelines on Employee Selection Procedures,⁴³ the validity of a test must be demonstrated by the following:

- a. Statistics demonstrating that the test is predictive of important elements of work behavior which are relevant to the jobs for which the applicant is being evaluated;
- b. Evidence that no alternative, non-discriminatory tests are available;
- c. Evidence that all testing is carried out under carefully-controlled conditions, and that the results are evaluated using uniform, itemized procedures. It is particularly important in the use of scored interview sheets that interviewers be given lists of objective criteria to use in scoring applicants.

⁴² 29 C.F.R. §1607.2 (1970).

⁴³ 29 C.F.R. §1607.2 (1970).

d. Each employer must, where practicable, conduct his own validation tests using generally accepted techniques.

e. Where an employer is unable to conduct his own validity tests due to lack of a significant statistical sample, he may rely on validation tests of a third party if he is able to show that his employees do substantially similar work to that for which the test was validated.

Some of the tests which have specifically been found to have a disproportionate impact on minorities, thus requiring validation as set forth above, are the Bennett Mechanical Comprehension Test,⁴⁴ the Wonderlic Personnel Test,⁴⁵ the Bennett-Gelink Test,⁴⁶ and four sections of the GATB (General Aptitude Test Battery).⁴⁷ An employer who is currently using one of these tests is running a substantial risk of a successful individual action or even a class action, unless appropriate steps have been taken to validate the test. Nor may an employer permit an employment agency to use such tests to screen referrals where the test has not been validated for that particular job in his particular industry.

In summary, a careful review of all criteria used to evaluate applicants for employment should be made. Where a particular test is found to exclude a disproportionate percentage of a class protected by Title VII, and virtually all tests have tendencies in this direction, the test or educational requirement should be validated or discontinued. As a practical matter, a small employer can probably find a test which has been validated for his particular application by shopping around among the various testing services. Homemade tests should be avoided, unless an employer has substantial numbers of job openings each year, as such tests must be validated on an individual basis. Such validation is difficult where the number of new employees is relatively low.

⁴⁴ E.E.O.C. No. YB 19-068 (1970).

⁴⁵ E.E.O.C. No. YB 19-068 (1970).

⁴⁶ E.E.O.C. No. 68-9-327E (1968).

⁴⁷ E.E.O.C. No. 72-0691 (1971).

B. *Illegal Practices During Employment.*

Title VII not only protects those persons seeking employment, but also continues to protect them during the entire employment relation. Thus, employers are required to treat all employees equally as regards pay, promotions, seniority and sick leave. Likewise, appearance and behavior standards must be the same for all groups. Finally, special treatment must be given to those employees whose religious beliefs conflict with usual company policy.

Set forth below are a variety of practices which are coming under increasing attack by several groups, thereby warranting the attention of employers.

1. *Unequal pay for equal work*

The failure to compensate male and female workers equally for the performance of equal work has long been a distasteful practice to civil libertarians, and Congress felt compelled to pass a separate bill, known as the Equal Pay Act, to deal with this practice.⁴⁸ This bill made it unlawful for an employer to pay one sex higher wages than another where the two groups performed substantially equivalent work. As amended, the Equal Pay Act covers all employees subject to the Fair Labor Standards Act, from office clerk to executive, administrative and professional employees. The Wage & Hour Division of the Department of Labor is responsible for the enforcement of the Equal Pay Act, and has been particularly aggressive in carrying out its responsibilities.

Of course, Title VII also requires that female employees receive equal pay for equal work, with the failure of an employer to do so being an unfair employment practice. Thus, Title VII and the Equal Pay Act have overlapping coverage of a substantial number of employees, and an aggrieved employee can file charges with either agency in order to seek restitution.

⁴⁸ Equal Pay Act, 29 U.S.C. § 206 (1970).

Under current EEOC guidelines employers are required to compensate men and women equally for substantially equivalent work.⁴⁹ Thus, the addition of a few *heavy* chores to the duties of the males will not justify a higher salary so long as the basic job duties are similar.⁵⁰ Likewise, employers may not pay higher wages to an employee ostensibly being groomed for a position of greater responsibility, except where the employee is in a bonafide and relatively short-term training program.⁵¹ Indeed, the EEOC may be inclined to view such training programs as inherently discriminatory if qualified females among the rank-and-file are consistently passed over for promotions in favor of male *trainees*.

Finally, once an employer discovers that there is a disparity in the wages being paid to its male and female workers, the wages of the lower-paid employees must be raised. You may not lower the wages of the higher-paid group. To do so will result in a backpay award for the entire group.⁵²

2. *Discriminatory seniority and promotion systems.*

Once the EEOC has determined that an employer has discriminatorily prevented a protected group from working in certain departments of the company, not only will the EEOC insist that this group be allowed into that department in the future, but the EEOC will also carefully analyze any seniority system which serves to perpetuate past discrimination. As a general rule, departmental seniority is considered to perpetuate past discrimination, as it makes transferring employees quite vulnerable to lay-offs even though they have many years of company seniority.⁵³ Thus, company-wide seniority is preferable if business needs make its use feasible.

⁴⁹ 29 C.F.R. §1604.4 (1972).

⁵⁰ *Schultz v. American Can Co.*, 424 F.2d 356 (8th Cir. 1970).

⁵¹ *Schultz v. First Victoria Nat'l Bank*, 420 F.2d 648 (5th Cir. 1969).

⁵² *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972).

⁵³ E.E.O.C. No. 72-1704 (1972).

It goes without saying that separate lines of progression for blacks or whites, or for males and females, is unlawful. Similarly, the use of unvalidated tests for promotion to higher-paying jobs, or admission to training programs, is unlawful for reasons stated previously.

Finally, the employer must be certain that non-discriminatory criteria are used for promotion. In a recent case, General Motors was found guilty of discriminatory promotion practices by relying almost exclusively on the foreman's recommendation for promotions.⁵⁴ The court found that such a system was inherently discriminatory where the foreman was given no written instructions as to what factors (and relative weights) were to be used in evaluating his subordinates. GM was further faulted for its failure to provide safeguards for averting possible bias by foremen, as well as its failure to post promotion opportunities to those who might wish to apply.

Thus, the basic rules laid down heretofore also apply to promotions and seniority. Every attempt must be made to insure that the company itself treats each employee with absolute equality, while at the same time striving to insure that all employees treat their fellow employees with fairness. Admittedly, this is a difficult task where many of the employees are prejudiced against one or more of the groups protected by Title VII. However, the EEOC has consistently held that it is the duty of the employer to protect the minority employee from harassment. Failure to reprimand the offending employee results in a presumption that such conduct meets with the approval of the company.⁵⁵ It is likewise the duty of the company to insure that employees responsible for the training of the new employee do an adequate job, for an employee may not be discharged due to poor work attributable to inadequate training by a prejudiced co-worker.⁵⁶

⁵⁴ *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

⁵⁵ E.E.O.C. No. 72-0777 (1971).

⁵⁶ E.E.O.C. No. 72-0777 (1971).

3. Failure to accommodate religious beliefs.

The Equal Employment Opportunity Act of 1972 made specific provision that it is unlawful religious discrimination to refuse to make reasonable accommodations to an employee's religious beliefs, unless the employer can show that to do so would cause undue hardship to the conduct of his business.⁵⁷

There are, of course, few decisions since this new section on religion went into effect. However, those decisions interpreting this new section tend to do so broadly. Thus, an employer must assign Seventh Day Adventists to shifts ending before dusk on Friday where such shifts are available.⁵⁸ Likewise, Black Muslim females must be allowed to wear long skirts to their office jobs.⁵⁹

In determining what is a *religious belief*, and therefore who must be specially accommodated, the EEOC has adopted the definition of religion laid down by the Supreme Court for use by draft boards in granting or denying conscientious objector status:

A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . , *United States v. Seeger*, 380 U.S. 163, 165 (1965).⁶⁰

It is, therefore, the law that employers must grant special treatment to those employees whose religious beliefs conflict with standard operating procedure. It is unknown as yet whether this special treatment includes special holiday arrangements. Presumably, non-Christian employees could insist on working on holidays such as Christmas and Easter, then take paid vacations on their own religious holidays. In-

⁵⁷ 42 U.S.C. §2000e (1970), as amended, Pub. L. No. 92-261, § 701 (5) (March 24, 1972).

⁵⁸ *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972).

⁵⁹ E.E.O.C. No. 71-2620 (1972).

⁶⁰ E.E.O.C. No. 71-2620 (1972).

sistence on uniform holidays could be discriminatory in those industries where employees work individually, thus making accommodation relatively easy.

Because the body of religious discrimination law is just developing, employers should be certain to keep abreast of current developments to avoid inadvertently violating the Act. Especially in this new area of the law, it is important to remember that just because a practice is of long standing does not mean that it is legal.

4. *Discriminatory appearance and behavior standards.*

An employer must use the same standards for appearance and behavior as were described in the previous section on Illegal Pre-Employment Procedures. Thus, all employees must be allowed to wear their hair the same length and to dress similarly. In addition, non-whites may not be discharged or disciplined due to illegitimate births, nor may they be discriminated against due to poor arrest or credit records.

All disciplinary actions taken for violation of plant or company rules must be meted out with an even hand. The EEOC recently found unlawful sex discrimination where a female employee was discharged for carrying on a seemingly torrid love affair with a male superior, while the male involved received only a reprimand.⁶¹ Nor may an employer try to force his employees to accept his own, or another's, beliefs against social mixing of the races, even where such beliefs are common in the community. Thus, it is unlawful to discharge a caucasian female employee for dating a black.⁶² It is likewise unlawful to restrict the travel of black employees to those areas or countries where person of that race are most likely to be well-received.⁶³

⁶³ E.E.O.C. No. 72-0697 (1972).

In summary, the theme of this subsection is *equality*. All

⁶¹ E.E.O.C. No. 71-2678 (1971).

⁶² E.E.O.C. No. 71-1902 (1971)

employees must be required to maintain the same dress and appearance standards. Presumably, employers who are offended by male employees with long hair can remedy the situation by requiring both males and females to have short hair. Likewise, should an employer be faced with males wishing to wear skirts to work, he may make a uniform trouser rule for all employees.

As to behavior standards, it has been generally held that employer interference with the lives of employees off the job (including their sex lives) is forbidden. However, the employer may, of course, set behavioral standards within the plant or office which are arbitrary and unreasonable, so long as they are uniformly applied.

5. *Discriminatory allocation of fringe benefits.*

It is, of course, elementary that an employer may not give its white employees more insurance coverage, sick leave, or paid holidays than it gives non-white employees. Until just recently, however, employers felt justified in giving their female employees substantially lower benefits than were given to males. The reasons for such rationalization are not entirely clear. However, one common factor seems to be the assumption among male employers that most female employees work more or less as a hobby.⁶⁴ In addition, this author is of the opinion that female workers contributed in large part to these inequities by their own failure to demand equal benefits.

Be that as it may, it is now unlawful to fail to provide equal fringe benefits for both sexes. Under the revised EEOC guidelines, fringe benefits are defined as including: ". . . medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions and privileges of employment."⁶⁵

⁶⁴ U.S. DEP'T. OF LABOR, *THE MYTH AND THE REALITY* (1971).

⁶⁵ 29 C.F.R. §1604.9(a) (1972).

These guidelines, which are in essence a statement of the position which the EEOC will take in litigation, hold it to be unlawful to condition benefits upon whether or not the employee is the *head of household*, since males are more likely to occupy that status than are females.⁶⁶ Likewise, the EEOC views as unlawful the provision of benefits for males and their families which are not made available to females and their families.⁶⁷ An example might be where males can get low cost life insurance on their wives while females are given no opportunity to acquire similar insurance on their husbands.

By far the greatest development in this area is the definitely established trend towards treating maternity and childbirth as ordinary temporary disabilities which must be handled like any other short-term illness. The repercussions of this development have been widespread. No more may employers force pregnant employees into mandatory leaves at a certain month of pregnancy. Nor can medical insurance policies now fail to cover maternity. Forbidden as well are the sick pay plans which pay on all illnesses but maternity-related ones.

Largely responsible for this rather sharp break with the common law rule that pregnant females should hide their bodies for three or four months before childbirth and for a year thereafter⁶⁸ was the landmark decision of *Cohen v. Chesterfield Cty. School Bd.*, 326 F.Supp. 1159 (E.D.Va. 1971), recently affirmed by the Fourth Circuit.⁶⁹ There the Virginia district court found it to be a denial of equal protection under the fourteenth amendment for a state-supported school

⁶⁶ 29 C.F.R. §1604.9(c) (1972).

⁶⁷ 29 C.F.R. §1604.9(d) (1972).

⁶⁸ See *Cohen v. Chesterfield County School Bd.*, 467 F. 2d 262 (4th Cir. 1972) (dissent), and *Schattman v. Texas Employment Comm'n*, 459 F.2d 32 (5th Cir. 1972).

⁶⁹ 467 F.2d 262 (4th Cir. 1972).

to refuse to treat maternity as a medical disability. In the words of the Court:

Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis and therefore is violative of the equal protection clause of the Fourteenth Amendment. 326 F. Supp.at 1161.

The court went on to hold that, since maternity was just another illness peculiar to females, the length of confinement of the patient should be a matter solely between her and her doctor. Thus, the school board had no more business setting up arbitrary minimum maternity absences than it did in setting up minimum times during which a teacher should be out for routine surgical procedures, such as an appendectomy.

The *Cohen* case was brought on equal protection grounds rather than under Title VII, due to the fact that state agencies had not as yet been included within the Act's protections—a situation remedied by the E.E.O.A. of 1972. However, the fundamental principles are the same and the wording of the Court was quickly seized upon by the EEOC and included in its guidelines.⁷⁰

Since *Cohen*, numerous cases have been filed against a variety of large corporations, alleging violations of Title VII by:

1. Failure to pay females absent due to childbirth the sick pay benefits paid for other illnesses under the collective bargaining agreement;⁷¹

2. Failure to provide female employees with maternity insurance, while insuring males against all of their usual medical disabilities;⁷²

⁷⁰ 29 C.F.R. §1604.10 (1972).

⁷¹ 1972 Daily Labor Rep. 52, A-6.

⁷² 1972 Daily Labor Rep. 75, A-3.

3. Giving preferential reinstatement to employees with illnesses other than maternity-related ones;⁷³

4. Failure to allow accrual of seniority, pension credits, and holiday pay for employees disabled due to pregnancy, while granting males such rights under all of their disabilities.⁷⁴

There seems to be little doubt that many, if not most, of these suits will be successful. They will also be extremely costly to the companies involved, for virtually all suits seek to recover for employees disabled by pregnancy the same sick pay (plus interest and attorney's fees) as was paid to employees disabled by other illnesses. Several suits also seek to recover the costs of confinement which would have otherwise been paid by insurance.

Therefore, an employer would be well advised to change discriminatory pregnancy policies as soon as possible, even if it is necessary to reopen a union contract to do so. In fact, if the union refuses to reopen, then the employer may possibly make the union co-liable for any damages resulting from the discriminatory contract clauses.⁷⁵ In addition, by acting voluntarily to correct these practices, the likelihood of having a disgruntled employee file charges against her employer is somewhat reduced. Thus, by voluntary action, an employer may be able to evade any accrued liability, as well as the costs of defending a class action.

C. *Discriminatory Retirement Policies.*

The final area with which the EEOC has recently found fault is the maintenance of a retirement plan which either: ". . . establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex."⁷⁶ Males were found to be discriminated against

⁷³ *Bravo v. Bd. of Educ.*, 345 F. Supp. 155 (N.D. Ill. 1972).

⁷⁴ 1972 Daily Labor Rep. 146, A-4.

⁷⁵ See 1972 Daily Labor Rep. 131, A-7.

⁷⁶ 29 C.F.R. §1604.9 (f) (1972).

by an employer whose pension plan provided an annuity for females at age 55, but did not give males the same benefits until they reached age 60.⁷⁷

Discriminatory retirement plans also raise potential problems under several other Federal statutes. For instance, it would seem to be a violation of the Age Discrimination in Employment Act to force retirement of employees before age 65.⁷⁸ There is also potential conflict between the Social Security laws and Title VII, perhaps paving the way for an argument that the Social Security laws deny male spouses and their families equal protection under the fourteenth amendment.⁷⁹ These problems are, however, outside the scope of this article, and are only raised here to illustrate that the civil rights-equal employment opportunity field bears continued watching.

III. Problems Left Unresolved By The Enactment of the E.E.O.A. of 1972.

Of course, no piece of legislation is perfect, and Title VII, as amended by the E.E.O.A. of 1972, is no exception. The major criticisms of the Act seem to be that there are so many different agencies and forums involved in its enforcement that an employer seeking to comply with the spirit of the Act is often unsure as to which judicial body and which agency to look to for guidance.

The number of agencies involved in administering their own interpretation of Title VII is staggering. While this author will not vouch for the completeness of the following list,

⁷⁷ *Mixson v. Southern Bell Tel. & Tel. Co.*, 334 F. Supp. 525 (N.D. Ga. 1971).

⁷⁸ 29 U.S.C. §620 (1970).

⁷⁹ It is conceivable that an equal protection suit patterned after *Cohen v. Chesterfield County School Bd.*, 467 F. 2d 262 (4th Cir. 1972) might successfully strike down unequal benefits under the Social Security Laws.

it is set forth nonetheless in order to illustrate the magnitude of the problem:

1. The Equal Employment Opportunity Commission;
2. The Justice Department;
3. The Wage and Hour Division of the Department of Labor;
4. State and local fair employment practice agencies;
5. State civil service commissions;
6. Federal civil service commission;
7. The Office of Federal Contract Compliance;
8. The Federal Communications Commission⁸⁰;
9. The Civil Aeronautics Board⁸¹;
10. Various state courts.

With such a variety of agencies involved in the adjudication of equal employment opportunity cases, problems cannot but arise as one agency prosecutes an employer for a practice considered legal by another agency. It would seem that there is also an unnecessary duplication of resources. The only logical solution to this problem is to vest one agency with the exclusive authority to bring unfair employment practice charges against offending employers. Presumably the EEOC would be given this responsibility, as the agency was set up for this very function. Nor would the watchdog effect of having several agencies search out unfair employment practices be lost by giving the EEOC exclusive jurisdiction to initiate suits and levy sanctions, for the other agencies could file charges with the EEOC on behalf of those parties believed to be aggrieved by the alleged unfair employment practices.

There is the further problem of having the EEOC go into the already overloaded court system to seek compliance with the Act. It seems unnecessarily cumbersome to have the

⁸⁰ 1972 Daily Labor Rep. 148, A-8.

⁸¹ 1972 Daily Labor Rep. 150, A-10.

EEOC hold hearings to determine reasonable cause, then to require the whole drama to be replayed for the benefit of the court, when the EEOC could be given the power to issue cease-and-desist orders under procedures similar to those used presently by the NLRB. In addition, the field of equal employment opportunity legislation is fast becoming a very specialized area which may soon require judicial expertise not possessed by the ordinary district court judge. There still exists, as well, the problem of too great a diversity of forums deciding equal employment opportunity matters, for there are quite a number of district courts scattered throughout the United States.

It would seem that the most realistic approach to obtaining effective enforcement of the national employment policy would be through the use of a single agency with the power to issue cease-and-desist order through a quasi-judicial system similar to that of the NLRB. The virtue of the consolidation of the present system to one of the type described is that there would be a great economy of time, effort and money, as well as the development of employment policies which would be predictably enforced. In addition, an agency would be developed which had the necessary expertise to deal with an admittedly rather complex area of the law.

Thus, the creation of an administrative tribunal similar to the NLRB to handle unfair employment practices could be of great practical benefit to employers. The law would be relatively uniform and predictable, and, hopefully, quickly enforced, thereby reducing back pay liability as well as attorney fees and court costs. In fact, if the system were modeled closely after that of the NLRB, the need for allowing successful plaintiffs to recover attorney fees would probably disappear as most complainants would be represented, at least before the Commission, by EEOC staff attorneys. This in itself could be a great savings to employers, as attorney fees in recent cases often are close to the size of the back pay award.

In summary, the Act is a potentially effective piece of

legislation designed to insure not only that employees have equal opportunity to compete for available jobs, but also to insure that employers select the best possible employee for those jobs. However, because the scope of the Act is so broad, many problems will arise in carrying out its underlying policy. It is, therefore, incumbent upon the business community to see that the procedure for enforcing the Act's provisions is as well designed as possible in order that cases are handled quickly and efficiently. It will do no good to wait complacently, hoping that equal employment opportunity legislation will be repealed. Instead, it would be better to seek actively to design a procedure which is workable, rather than waiting to see what further indignities Congress may thrust upon employers. The alternatives suggested may be a palatable solution. However, it is the hope of this author that the business community will become involved in the solution of the problems instead of following the old pattern of waiting to see what comes next, and then recoiling in horror when it becomes clear what the new burdens will be.

IV. Conclusion.

The major emphasis of this article has been on giving examples of types of activities forbidden by Title VII, for an employer must be able to recognize possible conflicts between his present practices and Title VII before attempts can be made for a solution. It is hoped that this article will provide a practical guide for the business community in determining those areas in which their employment practices may be in need of alteration. In addition, it is the hope of this author that the analysis of the remaining problems in the equal employment opportunity area will be of some use to those wishing to devise alternatives to the present system.

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