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ONE-LAW—ONE AGENCY OR MULTIPLE JURISDICTIONS?

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EQUAL EMPLOYMENT OPPORTUNITY ENFORCEMENT:

ONE LAW - ONE AGENCY
OR
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A Policy & Practice Publication

Edited by Rosalind M. Schwartz

INSTITUTE OF INDUSTRIAL RELATIONS
UNIVERSITY OF CALIFORNIA, LOS ANGELES

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FOREWORD

The Institute of Industrial Relations at UCLA is happy to present this latest volume, *Equal Employment Opportunity Enforcement*, in the Policy & Practice Publications series. This series is designed to provide the practitioner of industrial relations with information and analysis of timely issues and relevant subjects.

The current volume, developed from material presented at an Institute conference on that subject in 1976, focuses on the effects of the present system of EEO enforcement--a system under which several agencies, acting under separate statutes or executive orders, attempt to implement a policy of equal employment opportunity.

The problems and benefits involved are viewed by representatives of some of the agencies charged with this effort, e.g., the Equal Employment Opportunity Commission, the Department of Labor Office of Federal Contract Compliance Programs, and the U.S. Civil Service Commission. The U.S. Commission on Civil Rights, which has studied the effectiveness of the above agencies, also presents its appraisal and recommendations. In addition, we have included the remarks made by Professor Reginald Alleyne at our earlier conference on Title VII (of the Civil Rights Act of 1964, as amended). His comments illustrate vividly the remedies available to complainants under a system of multiple jurisdictions.

The area of EEO is dynamic and complex. The Institute has recently published an update to its manual, Equal Employment Opportunity and Affirmative Action in Labor-Management Relations, to aid the practitioner in

understanding and keeping current in this field. (See inside back cover)

The system of EEO enforcement, in particular, has been under scrutiny and changes are expected in the near future. We present this volume to assist practitioners in understanding the current discussions and expected changes.

Frederic Meyers
Director

April, 1978

C O N T E N T S

INTRODUCTION

In the effort to implement the U.S. policy of equal employment opportunity, a multiplicity of agencies had been empowered to enforce the several laws and executive orders banning discrimination in employment. Although the ultimate goal of these laws and agencies are the same--to eliminate discrimination in all phases of employment--the existence of several roads towards this goal has often led to conflict and confusion.

The legal basis on which these agencies act derive from basic rights, many of which are guaranteed by the United States Constitution. The Fifth Amendment prohibits the federal government from depriving any person of "life, liberty or property, without due process of law." The Fourteenth Amendment extends these prohibitions, along with the prohibition of denying any person equal protection of the law, to state and local governments.

Two early civil rights laws, now applied to employment discrimination situations, were enacted to enforce constitutional amendments. The Civil Rights Act of 1866, enacted to enforce the Thirteenth Amendment banning slavery, guarantees to all persons the same rights of full and equal benefits of all laws, including the right to make and enforce contracts as can white citizens. The rights guaranteed here have been applied to cover the right of any person to freely contract for employment. The Civil Rights Act of 1871, enacted to enforce the Fourteenth Amendment, prohibits, among other things, representatives of state or local governments from depriving anyone of "any rights, privileges, or immunities secured by the Constitution and laws."

Starting in the 1960's several laws were passed and executive orders issued which dealt more directly with the problem of discrimination in employment. The major ones will be briefly reviewed.

The Equal Pay Act of 1963 prohibits wage discrimination based on sex. It is administered by the Wage and Hour Division of the Department of Labor.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, prohibits any form of discrimination in employment based on race, color, religion, sex or national origin by public or private employers, employment agencies, labor unions or apprenticeship committees. Title VII is administered by the Equal Employment Opportunities Commission, an independent government agency. Responsibility for enforcing Title VII provisions in the federal sector was given to the U.S. Civil Service Commission. This is of particular note because the Federal government is the largest employer in the United States. Executive Order 11478 (1969) specifically provides for equal employment opportunity and affirmative action in employment for all government agencies, prohibiting discrimination on the basis or race, color, religion, sex or national origin.

Executive Order 11246, as amended, prohibits discrimination by non-exempt government contractors or subcontractors on the basis of race, color, religion, sex or national origin. The Office of Federal Contract Compliance (OFCC) programs was established within the Department of Labor to administer the Order. The OFCCP works with compliance agencies within the federal government for enforcement.

The many agencies, federal and state, concerned with the enforcement of equal opportunity in employment, only some of which have been specifically referred to above, have set up guidelines, regulations and criteria for equal employment opportunity (EEO). Among the problems encountered in EEO enforcement are those arising from overlapping coverage and jurisdiction, and those arising from differences in definitions of employment discrimination and the appropriate remedies to eliminate discrimination.

One issue seen arising out of the overlap of coverage and jurisdiction includes the possibility of an alleged victim of discrimination seeking remedy through more than one agency. This possibility is vividly demonstrated in the initial selection in this publication where Reginald Alleyne presents a hypothetical case of alleged race and sex discrimination, where the complainants could pursue four legal remedies simultaneously. The reasons and wisdom of multiple remedies are then discussed.

The following selections contain the remarks of representatives of four federal agencies concerned with equal employment opportunity: the United States Commission on Civil Rights, the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs of the Department of Labor and the Untied States Civil Service Commission. Representatives of these agencies were brought together for the first time publicly at a conference presented by the UCLA Institute of Industrial Relations April 1, 1976. The focus of their discussion was the report of the U.S. Civil Rights

Commission, To Eliminate Employment Discrimination (Volume V of the Commission's series, the Federal Civil Rights Enforcement Effort--1974). The contents of the report are briefly described in the letter of transmittal which accompanies the report and is reproduced below.

LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C., JULY 1975

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

This report evaluates the civil rights activities of most Federal agencies with major responsibilities for ensuring equal employment opportunity: the Civil Service Commission, the Department of Labor, the Equal Employment Opportunity Commission, and the Equal Employment Opportunity Coordinating Council. It is the fifth in a series of seven reports to be issued by this Commission describing the structure, mechanisms, and procedures utilized by the Federal departments and agencies in their efforts to end discrimination against this Nation's minority and female citizens. This series of publications represents our fourth followup to a September 1970 study of the Federal civil rights enforcement effort.

This report is based on a review of documents produced by these agencies, interviews with Federal officials, and an analysis of available literature. A draft of this report was submitted to the agencies for review and comment prior to publication.

We have concluded in this report that although there has been progress in the last decade the Federal effort to end employment discrimination based on sex, race, and ethnicity is fundamentally inadequate. It suffers from a number of important deficiencies including lack of overall leadership and direction, the diffusion of responsibility to a number of agencies, the existence of inconsistent policies and standards, the absence of joint investigative or enforcement strategies, and the failure of the agencies covered in this report to develop strong compliance programs.

We believe that the Federal Government's experience over the years in this area of law enforcement has established conclusively that basic elements of fairness and efficiency will be best served by one enforcement agency applying one standard of compliance. Therefore, we recommend that the President propose and the Congress enact legislation consolidating all Federal equal employment enforcement responsibilities in a new agency, the National Employment Rights Board. The Board should enforce one law prohibiting employment discrimination on the basis of race, color, religion, sex, national origin, age, and handicapped status. We urge that the Board be granted administrative, as well as litigative, authority to eliminate discriminatory employment practices in the United States. The Board, which would not be reliant upon the receipt of complaints to act, should be allocated, at a minimum, resources equivalent to one and a half times those currently provided in the Federal equal employment effort.

Employment discrimination is a matter of paramount concern in this country today. It impedes the equitable delivery of services by public and private institutions, and it prevents minorities and women from competing economically in our society. As a result it also limits housing and educational opportunities. Of fundamental importance is the damage it causes the self-respect of those adversely affected. To overcome this ingrained problem requires a bold new approach such as the one which we have suggested. We have recommended interim steps to be taken by each of the agencies until a reorganized enforcement program is developed.

We urge your consideration of the facts presented and ask for your leadership in ensuring implementation of the recommendations made.

Respectfully,

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Robert S. Rankin
Manuel Ruiz, Jr.
Murray Saltzman

John A. Buggs, Staff Director

At our conference, the representatives presented their respective agency's viewpoint, particularly in regard to the basic recommendation of the U.S. Civil Rights Commission--the enactment of a single law prohibiting employment discrimination and the formation of a single agency to enforce this law.

It should be noted that many of the views of the agencies represented have been changing. With a change in chairs at the EEOC has come a change in attitude on several issues, including consolidation of the EEO effort, The longstanding conflict over employee testing will soon be ending. The U.S. Civil Service Commission, the Departments of Labor and Justice and the EEOC have jointly put together guidelines for employee selection procedures.

The latest development concerning the EEO enforcement effort are the proposals President Carter is soon expected to make to Congress. If he follows the recommendation of his task force, he will recommend giving the EEOC most EEO enforcement duties. The Labor Department will be given the task of overseeing federal contractors for two years, then the task goes to the EEOC.

However, even as multiple agency and multiple law problems become resolved, new ones appear. Thus we are presenting the proceedings of our conference. The basic problems, conflicts and perceptions put forth remain illustrative of the situations we can continue to expect with the existence of multiple jurisdictions. And perhaps the proceedings will assist in an understanding of new developments in the area of EEO enforcement.

OVERLAPPING JURISDICTIONS AND REMEDIES--AN ILLUSTRATION

REGINALD ALLEYNE*

*Reginald Alleyne is the Associate Director of the Institute of Industrial Relations and is Professor of Law, UCLA

Until just shy of ten years ago, labor unions and employers engaged in many forms of employment discrimination on the grounds of race, sex and nationality without violating any federal law. There were some state laws prohibiting employment discrimination, but they were usually lacking in effective remedies and were not vigorously enforced. Laws banning sex discrimination were almost unknown. It is not unfair to summarize the state of employment discrimination law before Title VII's enactment by observing that employment discrimination in the United States was an accepted local norm.

That is no longer true. Whatever the extent of problems incidental to the enforcement of Title VII--and there are many--it is no longer possible for an employer or union to discriminate openly without running a large risk that a court will ultimately find a violation of Title VII and order the payment of a backpay award and the winning party's attorney's fees.

Title VII of the 1964 Civil Rights Act is now the principal employment discrimination statute in the United States. However, there is much more to employment discrimination law than Title VII. Other statutes and executive orders are being applied in employment discrimination cases, and with sometimes telling effect, even though many of those enactments were not designed to have a direct and exclusive application to cases of employment discrimination.

It is important to reflect on how these enactments, with an incidental but important employment discrimination function, relate to the employment discrimination issue, and how the administrative agencies and other departments of government enforcing these laws relate to each other.

As incredible as it may appear today, as a result of a single event or a single series of related events involving a black or Chicano or female employee, a union and an employer may become simultaneously involved with the federal Equal Employment Opportunity Commission (EEOC), a state Fair Employment Practices Commission (FEPC), the Department of Justice, the National Labor Relations Board (NLRB), the Office of Federal Contract Compliance (OFCC)*, the Wage-Hour Administrator of the Department of Labor, and the arbitration process.

An overview of Title VII and the EEOC along with some of the other major employment discrimination statutes and their enforcement agencies has been presented in the Introduction. How might the EEOC and the other agencies, directly or tangentially involved, affect union officials? How will they affect the employers with whom union officials interact as collective bargaining representatives?

For my purposes here, these agencies fall into three broad categories. First, are those agencies concerned exclusively with employment discrimination based on race, sex, nationality

*This agency is currently called the Office of Federal Contract Compliance Programs (OFCCP).

and religion. Into this category would fall the EEOC, the state FEPCs and the Office of Federal Contract Compliance.

Second, are those agencies with a general law enforcement function that includes the enforcement of some aspect of an employment discrimination law, executive order or policy. Into this category would fall the Department of Justice, whose Civil Rights Division prosecutes violations of Title VII. This category would also include all federal agencies operating under a federal executive order which requires that antidiscrimination clauses be placed in all contracts between employers and the federal government, and in agreements with private or state and local government agencies receiving funds from those federal agencies.

Third, there are agencies concerned with the regulation of relations between management and unions, and which, in that capacity, sometimes cope with racial, national origin, and sex discrimination issues. Included here are the National Labor Relations Board and state labor-management relation agencies, including those with jurisdiction over public employers and collective bargaining in public employment.

A fourth category, nongovernmental, might be the private contractual role established by arbitration clauses in collective bargaining agreements. But even there, the assistance of a government agency like the NLRB is sometimes required before contracts containing grievance arbitration clauses come into existence.

To support my notion that a union or an employer may become enmeshed in some phase of the

operations of all of these agency procedures at the same time, let me describe a case that is part hypothetical and part real.

The hypothetical cast of characters is as follows: Amalgamated Togetherness Union, also known as ATU; Super Company, Inc. (SCI); two white female employees of SCI and one black male of SCI; and Simon Pedigree, an SCI foreman.

SCI manufactures and assembles mechanical parts, many of which are sold under contract to the U.S. Government. SCI operates both a day and a night shift at its plant in a large city. Its day shift workers include men and women on the assembly line. The night shift employees, who perform the same type of assembly work as the day shift employees, receive thirty cents an hour above the day shift hourly rate of pay. All of the night shift employees are white males.

Day and night shift assembly line production workers at SCI are represented by Amalgamated Togetherness Union. A collective bargaining agreement exists between ATU and SCI, containing, among other things, a grievance arbitration clause.

Three day shift workers, the two female employees and the black male in our cast, approached their foreman, Simon Pedigree, and requested assignment to the night shift. Simon said, "There is a certain night shift crowd that likes to keep things the way they are and none of you would fit in on the night shift. Also, this neighborhood is dangerous for a woman at night; we don't want any of the women employees to get hurt." The three employees then asked their union to help them obtain night shift

work. However, for the stated reason that several old-time union members liked the night shift arrangement just the way it was, the union refused to help them. The next day, the three, plus other disappointed employees, began to discuss the night shift problem with their fellow workers, many of whom became very interested in the issue. Production at the plant slowed down slightly as a direct result of worker interest and discussions of the night shift issue. The next day the company fired the three employees who first made the request for night shift work. Their discharge notice said they were fired for "instigating dissension at the plant and interfering with harmonious working relations among employees."

ATU took the discharge cases through all grievance procedure steps preceding arbitration, but did not take the case to arbitration because of pressure from many of the male night shift workers. All three of the discharged employees sought employment through the ATU hiring hall, but the ATU dispatcher told them there was no work available.

On these brief hypothetical facts, the three workers could make an arguable case for the following legal actions.

Legal Action One. An action could be taken against SCI and the ATU for violating the Equal Pay Act of 1963 in the case of the two women who (a) received unequal pay for equal work, and who (b) were denied the opportunity to work a night shift at higher pay. John, the black male, would not be involved in this case, since the Equal Pay Act only prohibits sex-based wage discrimination. The charge would be filed with the Department of Labor, which would investigate and, if warranted,

prosecute in the United States District Court in the state where SCI is located. If the court found that the company had violated the Equal Pay Act, triple damages--that is, three times the amount of earnings actually lost as a result of the discrimination--would be assessed against the company. If the court found that ATU played a significant role in bringing about and maintaining the wage discrepancy, ATU might be successfully named as a co-defendant in the complaint. In that event, the triple damages would be shared equally by the employer and the union.

Legal Action Two. As the Secretary of Labor prosecuted SCI and ATU in the federal court, the two female employees and the black male employee could pursue Title VII charges with the federal Equal Employment Opportunity Commission. There, they would allege that SCI discriminated against the two women on account of their sex and against the black employee because of his race, in that (1) they were refused the use of the union hiring hall because of their sex and race, and (2) that the company deprived women and blacks of the opportunity to earn a wage differential with night shift work.

Legal Action Three. While pursuing the last two remedies, all three employees could file with the National Labor Relations Board charges alleging unfair labor practices by the employer, SCI, in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA), and by the Union, ATU, in violation of Section 8(b)(1)(A) of that Act. The NLRB case against SCI would allege that by discharging the three employees for complaining about their inability to obtain night shift work, SCI interfered with their rights to engage in concerted activities within the meaning

of Section 7 of the NLRA. The United States Supreme Court has held that an employer violates the NLRA by discharging or otherwise discriminating against employees who, in concert, try to remedy employment practices harmful to their working conditions. In the interests of protecting the integrity of the collective bargaining agreement, courts will insist that employees seek a remedy through their union before engaging in concerted activity such as picketing or engaging in a work slowdown to enforce their demands. In the absence of an attempt to give the union an opportunity to remedy the grievance, rightly or wrongly perceived by the employees, the concerted activities charge will usually fail.

In the hypothetical case that is not a problem for the three workers who complained of their inability to work the night shift. They had approached the union--without success--before taking collective action.

While in the NLRB office filing concerted activities charges against the employer, SCI, all three employees could file an NLRB charge alleging that ATU breached its duty of fair representation by failing to fairly represent the three employees, in that the union failed to take their case to arbitration. That, arguably at least, is an unfair labor practice under section 8(b)(1)(A) of the NLRA.

Charges alleging a breach of a union's duty of fair representation are generally very hard to sustain in NLRB actions against unions. Unions, for practical reasons, must be given substantial leeway in determining when and under what circumstances to use the arbitration process. But

cases with overtones of invidious employment discrimination are something else. Allegations of an unfair refusal to arbitrate may be upheld on a finding that the reasons for the union's failure to arbitrate are based on race, sex, nationality or religion. Indeed, the few successful 8(b)(1)(A) NLRB prosecutions are based on refusals to arbitrate and have involved cases in which the union's refusal was based on sex or race.

There is no reason why that kind of union conduct cannot also be alleged as a violation of Title VII and pursued in the EEOC-federal district court phase of this multiple litigation. This would be another example of how the broad anti-discrimination mandate of Title VII reaches matters covered more specifically by other statutes.

Having established a base of operations at the NLRB office, the three employees, or others similarly interested, would want to watch for another representation election at SCI. Collective bargaining agreements are, of course, a bar to a representation election proceeding, but the NLRB has fashioned a sixty-day open season falling between the 30th and 90th day preceding the expiration of the agreement. During that period another union might challenge ATU, thus raising a representation question with ATU and the rival union. Our three dissidents could charge ATU with racial and sex discrimination in the event of an ATU election victory, and seek to have certification of ATU denied because of discriminatory practices, an action that conceivably could be consistent with the NLRB's recent decision in the *Bekins** case--although it is not at all clear

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**Bekins Moving & Storage Co.*, 211 NLRB 138 (1974).

that rank and file employees as distinguished from the employer, who is an actual party to the election proceedings, can rely upon that theory. But certainly, the NLRB, in step with the growing involvement of government in the anti-discrimination effort has the power--whether they will exercise it or not--to deny certification to a union seeking certification, or to decertify a certified union, as an anti-discrimination sanction.*

Legal Action Four. Our grieving employees could ask the Office of Federal Contracts Compliance to take away SCI's federal contracts. A Presidential Executive Order requires the inclusion of nondiscrimination clauses in all federal contracts and federal assistance agreements. Thus, SCI's contracts could be taken away or held up. Realistically, this remedy has not been used with anything close to its full potential. But times are changing. This may become an effective remedy in the future. While unions are not party to federal contracts, they clearly have an interest in their continued existence. If the contracts are lost, their members lose jobs. At the same time, government contract compliance officials have held that an employer may not escape its obligations under anti-discrimination contract policies by casting the blame for discrim-

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*Since Professor Alleyne's speech, the NLRB in *Handy Andy, Inc.*, 228 NLRB No. 59 (1977), overruled the *Bekins* case. The NLRB will, however, still exercise its power to revoke a union's certification on grounds of racial or sex discrimination. Following *Handy Andy, Inc.*, the NLRB will no longer hold up the certification of a union pending the NLRB's resolution of the discrimination issue.

inatory hiring practices on, for example, a union's operation of an exclusive hiring hall arrangement.

These are the major potential remedies. State agencies could become involved. Revenue sharing funds could be lost to a governmental employer.

Why are all of these remedies available? Why not one anti-discrimination superagency? Can't the problem of overlapping remedies be avoided by some kind of exclusive jurisdiction in one agency, or by mandatory or voluntary policies of deferral of one agency to another? These are fair questions, and this description of the multiple remedies may have raised them in your minds.

All of the agencies I have talked about came into being at different times: the NLRB in 1935, EEOC in 1965--the effective date of Title VII--the Office of Federal Contract Compliance, or at least its forerunner, President's Committee on Equal Employment Opportunity (PCEEO), in 1962, the Equal Pay Act in 1963. That is a partial answer. Also, the functions of these agencies are quite different even though in some cases their ultimate goals are similar. For example, the NLRB, I am convinced, was not originally intended by Congress to decide racial and sex discrimination cases. The Congress of the United States, as I understand its makeup in 1935, was not ready for that--and if asked their intent in that regard would have said, "absolutely no." But legislation, particularly social legislation, with broad standards like those contained in the NLRA, is often interpreted in light of current social needs. Thus,

the NLRB, first through its power over the election process, and then through its unfair labor practice machinery, began to make and is still making--however slowly--inroads into the racial and sex discrimination areas. But the NLRA adheres pretty much to race and sex issues that are tangential to its established functions of regulating relations between management and unions. Inflammatory racial issues raised during representation campaigns--which the NLRB has always policed--is an example, as is regulation of the operation of hiring halls. If a union may not deny the use of its hiring hall to nonmembers of a union, surely it cannot deny its hiring hall services to a black employee who cannot join the union because he or she is black.

Next, as my brief description of these agencies and government departments may have illustrated, their methods of operation are quite different. EEOC waits for charges to be filed. Federal agencies, in theory at least, constantly police the anti-discrimination clauses in government contracts by conducting periodic compliance reviews. They have the power to command affirmative efforts to end discrimination. EEOC must find a violation of the Title VII before ordering affirmative action as a remedy for that violation in a specific case.

Finally, there is the well-known doctrine of bureaucratic growth. Once an agency comes into existence, it doesn't close up shop just because another agency might become incidentally involved in a phase of its work.

The last question to which I would respond in concluding my remarks is this: Is the anti-discrimination effort hurt by this duplication of effort and overlapping remedies?

Paradoxically perhaps, I think not--not in our government of divided powers. Another reason for the growth of the multiple remedy concept, which I have left unmentioned until now, is the ineffectiveness of any single anti-discrimination remedy. Employment discrimination is still with us, but not as much as it was ten years ago. Unions and employers might be able to look with some scorn on the political machinations and administrative inefficiency of EEOC, the long-term delays at EEOC and NLRB, the pitifully small number of employers who have lost contracts under OFCC procedures and the downplaying of the role of state FEPCs with their inadequate staffing. True enough, these factors make enforcement of anti-discrimination policies difficult. But what is beginning to take its toll on employment discrimination is the combined effect of these laws. In short, the number of possible anti-discrimination remedies is itself a deterrent. The remedies will continue to operate somewhat inefficiently but inexorably and with collective force on those employers and those labor unions still bent on yielding to pressures for the status quo of keeping blacks, women, and other ethnic minorities away from, or at the lowest range of, the job ladder.

THE VIEWS OF
THE U.S. CIVIL RIGHTS COMMISSION

JOHN A. BUGGS*

*John A. Buggs is the Staff Director of the U.S. Civil Rights Commission.

Employment discrimination is one of the oldest forms of discrimination in the United States. It is as old as the nation itself. All of us are familiar with our deeply rooted tradition of consigning minority groups and females to the lowest paying and least desired jobs in the marketplace. It's a tradition that goes back through slavery, sharecropping, migrant employment, the importation of low-cost labor from foreign lands, and the notion that the female worker has no really suitable place outside the home.

To be sure, there have been gains in recent years, as demonstrated by the appointments of William Coleman as Secretary of Transportation and Carla Hill as Secretary of the Department of Housing and Urban Development. This is little comfort, however, to less fortunate women and minority persons who must face day-to-day discrimination in the job market. The Commission on Civil Rights, which was created by the 1957 Civil Rights Act, has been studying employment discrimination since 1960. In 1961, in making recommendations to the President and to the Congress for an Equal Employment Opportunities Act, the Commission stated:

> Denial of employment because of a person's skin, his faith or his ancestry is a wrong of manifold dimensions. On the personal plane, it is an affront of human dignity. On the legal plane, in many cases, it is a violation of the Constitution, of legislation, or of national policy. On the economic and social plane, discrimination may result in waste of human resources and an unnecessary burden to the community.

You will note that that statement was made in 1961 before the criterion of sex was added to the Act in 1972, or we would have stated: race and sex. Today in 1976, we could still describe the situation facing many Americans in identical words, because we certainly have not yet solved the problem.

One of the most discouraging aspects of the attempt to secure equal employment opportunity has been the lack of commitment and effort on the part of the federal government to enforce the laws enacted in 1964.

Ten years after our 1961 report, and seven years after the enactment of Title VII, the Commission published its first report on the federal government's civil rights enforcement effort. We noted at that time the following:

> Although the legal right to equal employment opportunity is broadly protected, one of the major means of securing it in fact, through enforcement, is frequently lacking. Indeed, the mechanisms established by Federal agencies charged with administering the responsibility and enforcing fair employment laws have been patently neglected.

We published three follow-up reports to that 1971 study. Two years ago, in 1974, having collected a massive amount of new data, we published a series of reports in seven volumes called *The Federal Civil Rights Enforcement Effort*. My remarks today are based on the fifth volume of that study, *To Eliminate Employment Discrimination*. Four of the principle governmental units responsible for enforcing federal laws against employment discrimination were reviewed in our report. These are the Equal Employment Opportunity Commission and the Civil Service Commission,

both independent agencies, and the Department of Labor's Office of Federal Contract Compliance and Wage and Hour Division.

The Equal Employment Opportunity Commission (EEOC) was created to enforce Title VII of the 1964 Civil Rights Act. As you know, it has authority over private employers, employment agencies, labor organizations, joint apprenticeship committees, state and local governments and educational institutions. The EEOC's functions are to investigate charges of discrimination, to attempt to resolve them through conciliation, and when conciliation fails, to bring suit against an employer or a labor organization. Of the four agencies named, EEOC has, without question, made the most aggressive efforts to insure equal employment opportunity as reflected by the number of employees affected and back pay awards. The agency obtained landmark settlements with the American Telephone and Telegraph Company and with the steel industry. However, the EEOC's complaint backlog is estimated to be as high as 120,000 cases and represents a chronic problem for that agency. According to 1974 figures, the median time for an EEOC complaint from receipt to final action was two years and eight months. Although the EEOC argues that its staff has not been able to keep up with the incoming charges, the fact remains that for long periods of time EEOC was staffed considerably below its authorized level. In early 1975, in the face of a growing backlog of discrimination complaints, the EEOC adopted what it termed a resource allocation strategy. Under this plan, charges against major national and regional employers are consolidated for processing. While this strategy has been implemented against national employers at the headquarters level as of July 1975, it has not been implemented at the regional level. Although the EEOC received exclusive power to bring suits alleging patterns or practices of discrimina-

tion in 1972, it has made minimal use of this authority. One year later the Equal Employment Opportunity Commission has begun processing only thirty-nine pattern and practice cases.

The Office of Federal Contract Compliance (OFCC), an entity of the Department of Labor, is responsible for implementing Executive Order 11246. This order prohibits employment discrimination on the basis of race, color, creed or national origin by firms holding federal contracts. It requires contractors to take affirmative action to insure that equal opportunity is provided. Subsequently, Executive Order 11375 added sex as a protected class. The OFCC has issued regulations implementing these orders. The regulations require most federal contractors to establish affirmative action programs and specific non-discrimination guidelines. These regulations are adequate in many respects, but they do have important deficiencies. For example, with the exception of medical and educational facilities, the regulations exempt many facilities of state and local governments. Firms with contracts valued at less than $10,000 are exempted entirely. In addition, the Office of Federal Contract Compliance in Revised Order No. 4 exempts construction contractors from the requirement of a written affirmative action plan. Revised Order No. 4 also fails to require the contractors it covers to conduct utilization analyses or to set goals separately for different minority groups or separately for women and men within minority groups. In addition to issuing deficient regulations, OFCC has failed to carry out its responsibility to oversee and guide the Contract Compliance program based on those regulations. As a result, only a very small number of contractors ever received sanctions, although hundreds, and perhaps even thousands, have been found to be in violation of OFCC's regulations. This program covers supply and service contractors which employ the vast majority of workers protected

under executive orders. OFCC has also failed to establish an effective enforcement program covering construction contractors exempt from Revised Order No. 4, and has, on occasion, obstructed efforts by state and local governments to secure enforcement. Moreover, OFCC does not require goals for hiring women in the construction compliance program, although women are seriously underrepresented in that industry. We will publish within the next few months a comprehensive study of discrimination by labor unions which will involve women as well as minorities.

Another division of the Department of Labor, the Wage and Hour Division, is responsible for the enforcement of the Equal Pay Act, which requires that men and women receive equal pay for equal work. Enforcement of the Equal Pay Act has been delegated to the Department of Labor's regional offices, but the Wage and Hour administrator, who has primary responsibility for enforcing the Act, has no line authority over his or her own regional staff. Thus, there has been little monitoring of regional office enforcement and it has been impossible to develop a regional enforcement program.

The Equal Pay Act is only one of the responsibilities of the Department of Labor compliance offices. Despite the fact that coverage under the Act has broadened in recent years to include a large number of employees originally exempt, the number of compliance offices has not significantly increased. Furthermore, the Department of Labor's Equal Pay enforcement policies raise substantive questions. For example, the Department has adopted such a narrow interpretation of wages that it exempts maternity benefits from the scope of the Act, despite the fact that these benefits, like pension rights, are derived as a direct result of employment.

The Civil Service Commission is responsible for employment practices in the civilian sector of the federal payroll. Under Title VII, the Civil Service Commission is given the authority to insure that federal employment procedures are non-discriminatory. There is a basic disagreement between the Civil Service Commission and the Commission on Civil Rights on the question of what positive duty rests with the federal government for eliminating the vestiges of discrimination and assuring the non-discriminatory practices are followed, and what should be required of employers in order to ensure these results. The Commission on Civil Rights maintains that federal agencies must be required to establish goals and timetables to remedy the under-utilization of women and minorities. Such a requirement is not tantamount to requring a quota, but is simply an attempt to require a good faith effort to overcome the effect of the practices which discriminate against minorities and female applicants.

The Civil Service Commission, on the other hand, maintains that the Civil Rights Commission's position on goals and timetables *does* amount to a quota system and that such an approach is not compatible with the so-called "merit system" used to hire and promote federal employees. The Civil Rights Commission strongly opposes a quota system by which an employer limits his work force to a fixed number or percentage for any race, sex or ethnic group. We recognize that such quotas have historically been used to keep numbers of certain minority groups and women from achieving their full potential. We believe there is no legal or moral justification for such practices. We do feel, however, that the equal employment and affirmative action guidelines applicable to private employers and federal contractors must also apply to the federal government. The Civil Service Commission disagrees, saying that it is not required

to adhere to Title VII guidelines set by the EEOC for all other employers and that it is not required to follow the affirmative action principles which apply to employers who have federal contracts.

The Civil Service Commission's guidelines on agency affirmative action plans are, in our view, clearly inferior to similar procedures applicable under Executive Order No. 11246, as amended, to private employers who are government contractors. The Civil Service Commission fails to require agencies to analyze under-utilization and to establish goals and timetables for eliminating any under-utilization of minorities and women. According to the Civil Service Commission's own statistics, such under-utilization exists in middle and high-level positions at most federal agencies. As the Commission on Civil Rights noted in its 1973 statement on affirmative action for equal employment opportunities, serious under-utilization of minorities or women has long been held to constitute a *prima facie* violation of Title VII, requiring the imposition of broad relief by the court if the employer fails to come forward with sufficient justification.

Similarly, under the executive order, unjustified under-utilization requires the establishment of goals and timetables for eliminating such a situation. There is clearly an under-utilization of minorities and women in middle and higher ranks of the federal government and the government has a record of overt discrimination against these groups in the past. In its role as an employer, the federal government should no longer be permitted to evade the affirmative action responsibilities placed on all other employers.

In 1972 when broadening Title VII, Congress expressed deep concern that many of the Civil Service employee selection standards appeared to be discriminatory. Nevertheless, the Civil Service

Commission has failed to carry out its responsibility under Title VII to demonstrate empirically that all federal examination procedures having an adverse impact on minorities and women are related to job performance. In fact, the Civil Service Commission has adopted guidelines on job-relatedness that, in the opinion of many, are substantially weaker than those of the Equal Employment Opportunities Commission. It is noteworthy that the Supreme Court reaffirmed the EEOC's employee selection guidelines in *Albemarle Paper Co. v. Moody*. Even as the Civil Service Commission adopted a new career examination, the Professional and Administrative Career Examination (PACE), it did not empirically determine that PACE was related to job performance, or that PACE lacks cultural or sex biases. It is our opinion that the Civil Service Commission's regulations governing complaint procedures deny federal employees a full and fair consideration of their employment-discrimination complaints. In our *Enforcement Effort Report* we detailed many of those shortcomings.

In a case recently decided by the U.S. Court of Appeals in the District of Columbia, the court ruled that federal employees are automatically entitled to complete hearings in federal courts for racial or sex discrimination complaints, even after the complaint has been rejected by the Civil Service Commission. The Supreme Court will soon rule on the trial *de novo* issue in a similar case. The Court of Appeals' opinion was consonant with our finding that the Civil Service Commission's procedures are inadequate and unfair. The court said:

> These persisting inadequacies at least present an aura of unfairness and appearance of conflict of interest which will continue to discourage federal employees from seeking to vindicate their rights before the Civil Ser-

vice Commission with any prospect of success.

More recently in December of 1975, in the matter of *Barrett v. Civil Service Commission*, a case regarding the right of federal employees to take cases to court on a class action basis, Judge Charles B. Richey relied on the recent enforcement effort report of the United States Commission on Civil Rights in reaching the following decision:

> This Court concludes that the very best which can be said for the Civil Service Commission's regulations is that they are confusing and unclear as to whether they allow for the consideration of class allegations in the context of individual complaints, or vice versa. As the United States Commission on Civil Rights recently noted: The [Civil Service] Commission has not issued clear guidelines specifying what types of allegations are unrelated to an individual complaint. It has held consistently, however, that complaints alleging discrimination against a particular class of employees of which the complainant is a member, are not within the purview of the standard complaint procedures... This Court therefore concludes that the Civil Service Commission has not met its obligations under Title VII of the Civil Rights Act as amended...in that its regulations do not clearly provide for the consideration, processing and resolution of complaints of class discrimination advanced through and in the context of an individual complaint. The regulations must therefore be modified to reflect the Commission's recognition of its aforesaid obligation under the Act.*

Although the Civil Service Commission is responsible for conducting periodic reviews of agency

*11 FEP 1089 (D.D.C.1975)

employment practices, this evaluation program suffers from many flaws. In particular, when the Commission has found discriminatory practices, it has generally failed to order the agency to provide retroactive relief to the victims although such a step is specifically authorized. It is important to point out that there are at least two statutory requirements which act as effective barriers to some affirmative actions that the Civil Service Commission could take. These are Rule 3 with respect to selection of employees, and the veterans' preference requirement. However, we are not aware of any recent efforts on the part of the Civil Service Commission to go to the Congress to have those statutes revised or eliminated.

I could go into greater detail regarding specific findings in our 673 page report. Instead I'd like to turn to summarizing our general findings, and conclusions, about the federal government's efforts to end employment discrimination, which has been with us throughout our 200-year history as a nation.

First, after more than ten years since the enactment of Title VII, there is no one person, no one agency, no one institution which can speak for the federal government in this important area. Thus, employers, employees and aggrieved citizens are left to their own devices in trying to understand and react to a complex administrative structure. Moreover, without comprehensive oversight there is no way to ensure uniformity and efficiency.

Second, current employment discrimination laws do not provide an adequate framework within which federal agencies can operate. Changes must be made to significantly improve the present enforcement program. For example, alterations are necessary in the provisions of Title VII which require court action in order to enforce the statute,

which make data from employees confidential, and which limit the authority of the Equal Employment Opportunity Commission to investigate and litigate matters involving patterns and practices of discrimination.

Third, the diffusion of authority for enforcing federal equal employment laws is one of the paramount reasons for the overall failure of the government to mount a coherent attack on employment discrimination.

Moreover, there is inadequate sharing of information, almost no joint setting of investigative or employment priorities, and little cross-fertilization of ideas and strategies at the regional level. This fragmented administrative picture has resulted in duplication of effort, inconsistent findings, and the loss of public faith in the objectivity and the efficiency of the program.

And finally, attempts to coordinate the overall federal effort have been most discouraging. Although the Equal Employment Opportunity Coordinating Council has been in existence since 1972, through mid-1975 it had attempted to handle only one major issue--the development of joint testing guidelines. Even that effort, as of this date, has been unsuccessful. I might add parenthetically that at the second meeting of that Coordinating Council, the Commission on Civil Rights presented eleven major issues that the council should deal with. As I have just indicated, the Coordinating Council has been struggling with just one issue for four years.

In summary, the federal government finds itself in an ironic situation. Employers complain that they are being harassed and forced to comply with conflicting and overlapping regulations; and they're right. Aggrieved women and minorities

charge that their complaints are lost in a snarl of bureaucratic red tape; and they're right.

Therefore, the Commission on Civil Rights has proposed what may seem at first glance a drastic solution. But we believe that only a new approach can provide an effective solution for what is clearly one of the most serious and deeply entrenched problems confronting the people who are concerned about equal opportunity in this nation. We recommended to the President and to the Congress the establishment of a National Employment Rights Board with the authority to enforce a single federal statute prohibiting employment discrimination on the basis of race, religion, color, sex, national origin, age and handicapped status.

Thus the functions of the Equal Employment Opportunity Commission and the equal employment responsibilities of the Civil Service Commission, the Wage and Hour Administration, and the Office of Federal Contract Compliance would be consolidated into one agency with broad administrative and litigative powers. This would require revisions in existing legislation, including Title VII. A number of executive orders would be rescinded and their authority incorporated into a new Title VII. We recommend that not only the Board be given power to bring suit in Federal District Court, as the EEOC currently has, but that it also be cease-and-desist power which the EEOC has never been able to get. This cease-and-desist power should include the authority to order all equitable relief including back pay and affirmative action, with goals and timetables. In addition, the Board should be given final authority to debar a federal contractor or subcontractor, to terminate any federal grant, to revoke the certification of any labor union and to revoke any federal license upon failure to

comply with a Board order. Orders by the Board would be subject to review in federal Courts of Appeal in accordance with the Administrative Procedures Act.

The Board would be invested with broad investigative powers, including subpoena power and the authority to require regular reporting on information needed to evaluate compliance with Title VII. All information collected by the Board in the course of its proceedings, with the exception of trade secrets, would be available to the public. The Board's primary purpose and responsibility would be the elimination of discriminatory employment practices affecting large classes of persons. Therefore, it would allocate more than 50 percent of its resources to matters involving patterns and practices of discrimination.

Although that Board would retain the power to act on individual complaints, most of these charges would be referred to approved state fair employment practices agencies. The findings of these agencies would be given substantial weight by the Board, but complaints would be permitted to file objections to any local agencies which enforce statutes affording at least the same protections as revised Title VII would afford, and in a manner consistent with the Board's policies, which should be set forth in published guidelines. Moreover, such a Board would periodically evaluate each agency to which it defers for adherence with the guidelines. The Board would appropriate funds to compensate those approved agencies according to the number of referrals processed. Complaints against federal installations would be referred to the Civil Service Commission for investigation, pursuant to the Board's guidelines. The Commission's processing of complaints would be reviewed periodically.

The Board would consist of seven persons appointed by the President and confirmed by the Senate for six-year terms. Members would be removed by the President only for cause. No more than four Board members could be affiliated with any one political party. The chairperson of the agency would be appointed by the President for a four-year term. The general counsel of the Board would be independent, appointed by the President, and confirmed by the Senate for a six-year term. The counsel would be subject to removal by the President only for cause. The executive director of the Board would be appointed by a vote of the Board members.

Finally, we believe that such a National Employment Rights Board should be given, at a minimum, resources equivalent to one-and-a-half times those currently allocated to all federal agencies for the enforcement of laws, executive orders, regulations, and rules prohibiting employment discrimination.

The Commission on Civil Rights gave long, hard thought to this formulation. We realize that it will require a major overhaul of legislation on this issue, a not inconsiderable task in itself. To be sure, the agencies I have been discussing can do a better job with the tools they have, but only to the extent that existing laws permit such an improved enforcement performance. Deeper and broader changes are necessary in order to produce effective solutions. That is the reason for this proposal.

Many may not agree with this solution; however, I hope that everyone here agrees that bold, strong federal efforts to eliminate employment discrimination are imperative and that the time to start is now. For as long as is the history of this nation, inequities have existed in the right of every person, regardless of race, color,

creed, religion, sex or national origin, to obtain work on an equal basis. It took 188 years to get the Congress and the President to approve a measure designed to accomplish that purpose. It is now twelve years since that act was passed, and not only is the final objective still elusive to millions of Americans, but there is still a controversy over the methods used to accomplish the goal. Indeed, there is in some quarters a strong opposition to almost any affirmative action program designed to provide equity in the access to jobs.

Strong legislative and administrative measures are necessary if we are to be able to say in 1976, 200 years after the Declaration of Independence, that we are moving in an ever-quickening pace toward the day when the truths *are* self-evident; that all men are created equal and those inalienable rights to life, liberty and the pursuit of happiness are not illusory, but are real, because they are respected by all citizens and are fully protected, as distinct from being beautifully articulated, as laws of the land.

THE VIEWS OF

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BURNETT S. KELLY*

*At the time of this presentation, Burnett S. Kelly was the Executive Legal Advisor to the EEOC Chairman.

The Equal Employment Opportunity Commission (EEOC), as it is constituted today, is only a few days over four years old. Now many will point to the nearly twelve years the Commission has been in business and will claim that we simply haven't accomplished our job. But as I see it, the Commission is *not* twelve years old. The amendments to the 1964 Civil Rights Law passed by Congress in March of 1972 drastically changed the rules of the game, and in a manner of speaking, made us a new agency. Because we are new, and growing fast, and trying to learn along the way, we've been playing a little catch-up ball for the last four years.

As I understand it, the thrust of what the Civil Rights Commission is proposing as a result of its two-year study is a package of a single law covering job discrimination and a single agency to carry out the mandate of that new law. Now first of all let me say that I do *not* disagree with all of the Commission's findings. I would be quick to agree that the law could be improved, administrative procedures of each agency could be more effective, and that there is much duplication of effort which goes on in the various agencies as we all struggle to combat job discrimination in this country. But I don't feel it is time to throw in the towel and start from scratch, saying that the present structure is a failure.

First of all, I feel strongly that we have not had sufficient time to demonstrate whether this pre-

sent structure, with the problems ironed out, can work. Also, I have problems with the idea of a super-agency. On paper it can sound like a valuable idea; but in reality I'm not convinced that it would be effective. Super-agencies tend to get bogged down in paperwork, they are often unmanageable, and the head frequently has no idea what the foot is doing. We all have our negative remarks about bureaucracies and their bureaucrats. If we created a super-agency for job discrimination, I feel we could work ourselves into the biggest bureaucracy in town. These are human problems we are confronting and we cannot afford to become so big that we lose sight of people and see only paper and red tape.

My other major objection to the super-agency concept is that putting all our civil rights eggs in one basket is pretty risky business. One agency is a lot easier to kill than several agencies. One agency means one appropriation, and it doesn't take too many congressmen or senators to decide that the budget of an agency should be cut drastically. All this leads me to think that I am simply not in favor of creating one agency for job discrimination at the present time. This does not mean that I could not, at a future date, see it as a feasible alternative. Nor does it mean that I see no merit in the Commission on Civil Rights' report. As I said, many of the criticisms are valid; many of the changes suggested sorely need to be made. I simply would like to see some of those changes made under the present structure, rather than revamping the whole works and starting from "Go" again. Part of the reason I am sure that the Civil Rights Commission is calling for the super-agency is that in the past the EEOC has been far less effective than it ought to be as the nation's major civil rights watchdog -- particularly in view of its twelve-year history.

I readily admit that the EEOC's record has fallen short of one hundred percent over the years, but actually we have made great strides in that time. Many of the criticisms of the agency raised by the CRC report have already been acted upon, and others are being dealt with at the present time.

The area of investigations, for example, has come under close scrutiny since Lowell Perry became chairman last May. The Commission [EEOC] has had a high vacancy rate among its investigators all through its first decade. A movement was begun last year to remedy this situation. The effort was thwarted due to budgetary problems in fiscal year 1975. However, our Commission does have sufficient funds now, and we are actively recruiting new investigators. The quality of EEOC investigation should also show a marked improvement in the coming months. Investigative positions are now being filled by generalists who can both investigate charges and participate in conciliations. Their investigations will be more thorough, and if the case should be turned over to the Office of General Counsel for litigation, their attorneys should not have to go back and re-investigate the charge to gather sufficient material to prove the case in court.

In the past there has been some duplication and conflict among our district directors, the Office of Compliance and the Office of General Counsel. However, new procedures have been developed, outlining a new, more cooperative relationship among these offices.

One of the major areas of criticism in the past has been the Commission's backlog. First of all, let me say that we have eliminated the backlog rhetorically. We now call it "charge inventory." But we still take that inventory very

seriously. We are now working on a system designed to cut the time between the filing of a charge and its resolution. We hope to reduce that time from the present high of two and a half years, as Mr. Buggs indicated, to a period of thirteen to fifteen months. To assist us in cutting down our charge inventory, the Commission is developing a closer, more effective relationship with local and state fair employment practices agencies across the country. Our funding of such agencies has increased, as have our demands that they produce visible results. Each agency has been assigned to produce a certain number of charges this year, and its continued funding depends on its success in achieving its goal. These agencies have become more sophisticated and more active every year. Their efforts promise to be of great assistance to the Commission in carrying out its important mandate.

Already these changes are beginning to show positive results. For the first time in the Commission's history, we have begun to resolve as many charges as we receive in a given six-month period. This is leading us past our goal of zero growth rate to actually reducing the number of unresolved charges. We are moving steadily toward accomplishing that goal.

The Commission has undergone reorganization under the watchful direction of Chairman Perry. Administrative procedures have been significantly streamlined. The Office of Executive Director handles most of the administrative work of the agency now, freeing the chairman and the commissioners to give their full attention to policy matters. This, of course, is what was intended all along. But in the past, chairmen often became too involved in the day-to-day operation of the agency. Now this has all been changed.

Much attention has been given, in recent

months, to the operation of the Office of General Counsel. Abner Siebal, the General Counsel, recently presented the Commissioner with a number of procedural matters which needed to be clarified in order for his office to operate more effectively. One of the important questions presented by Mr. Siebal was on the issuing of right-to-sue letters to charging parties. In the past the policy of issuing such letters was unclear and the practice varied among the district directors. Often, charging parties wishing to pursue private civil action, met such delay in receiving right-to-sue letters that their cases were no longer timely. A directive has now been sent out to all Commission offices stating that a right-to-sue letter *must* be sent to charging parties upon request, at the end of the 180 days, as stated in the statute. In some instances a right-to-sue letter may be issued before the expiration of the 180 days, if it appears that the charge will not be processed by the district office in a timely manner.

A number of other procedures for the Office of General Counsel are now being revised at the present time, and these revisions promise to improve the operation of our litigation arm.

Two recent court decisions in the Fourth Circuit also promise to increase the efficiency of the Commission's operation. I'd like to bring these decisions to your attention. In *EEOC v. Raymond Metals* the court upheld the Commission's power to delegate responsibility to its district directors, including the authority to make reasonable cause determination and enter into conciliations.* With such delegations of authority, the Commission will be increasingly able to resolve charges of discrimination in a more timely fashion.

In the future, the Commission may delegate

**EEOC v. Raymond Metal Prods. Co.*, 530 F.2d 590 (4th Cir. 1976).

the district directors the authority to approve the filing of preliminary injunctions, as timeliness is of the greatest importance in seeking injunctive relief. In the past such authority came only from the commissioners, and by the time a petition reached that body, it was no longer timely. Many employers have suffered severe financial loss due to this procedural problem.

In another suit, *EEOC v. General Electric*, the court resolved the question: "Can an EEOC lawsuit address, for example, sex discrimination, if the original charge was filed on the basis of race?"* In this case the court held that a lawsuit can include any basis where reasonable cause is found as a result of EEOC's investigation. Certainly this decision increases the Commission's ability to combat the complex problem of employment discrimination.

Another hopeful sign I see for the success of the agency, and another good reason to leave our structure as it now is, is the significant body of Title VII law which has developed over the last four years. Much of the success or failure of the agency depends on the Office of General Counsel, as so many future problems can be settled by precedent. With the several landmark decisions which have been handed down by the Supreme Court and the important issues now pending there, the Commission has a strong foundation on which to build, and further refine, Title VII law.

When equal employment opportunity laws were first enacted, discrimination was perceived as conscious, overt acts against individuals. Today, employment discrimination is defined as classwide, involving whole employment systems, rather than isolated incidents. Also, the courts have said it is the consequences of employment practices, not their intent, which determines whether discrimina-

*EEOC v. General Electric Co., 532 F.2d. 359 (4th Cir. 1976).

tion exists. Much of the current thinking as to what precisely constitutes employment discrimination resulted from the Supreme Court's landmark decision in the 1971 case of *Griggs v. Duke Power Co.** *Griggs*, of course, is not a new case, but its impact should never be underestimated. In *Griggs*, the Court held that Title VII not only prohibits deliberate discrimination against individuals, it also prohibits any act, intentional or unintentional, which has a disparate impact on groups protected by Title VII.

The *Griggs* decision also established the concept of job-relatedness and business necessity. In dealing with job-relatedness, the Court said if an employment practice which operates to exclude, cannot be shown to be related to job performance, the practice is prohibited. The Court also said that to justify any practice or policy which has a disparate effect on groups protected by Title VII law, an employer must demonstrate compelling business necessity, and prove as well that no alternative non-discriminatory practice can achieve the required purpose. The courts have interpreted "business necessity" very narrowly, requiring overriding evidence that a discriminatory practice is essential to the safe and efficient operation of a business; or showing an extreme adverse financial impact from a change of practice. The *Griggs* decision, then, established an effective broad-based definition of employment discrimination. Subsequent decisions from the federal courts have followed the guidance offered by *Griggs* and have outlined the necessary remedial steps to compensate employees for the effects of past discrimination.

Another Supreme Court decision whose impact could be as far-reaching as *Griggs* is the case of *Albemarle Paper Co. v. Moody* which deals with the appropriateness of backpay awards.**

*401 U.S. 424 (1971)
**442 U.S. 405 (1975)

In *Moody*, the Court held that victims of discrimination do not have to prove bad faith in order to qualify for compensatory backpay awards, noting that the Congress intended equal employment opportunity laws to eradicate discrimination and make persons whole for injuries caused by past discrimination. The Court said that a worker's injury is no less real simply because his employer did not inflict it in bad faith. This decision is bound to assist the Commission in its efforts to encourage voluntary affirmative action on the part of the nation's employers. As backpay awards become more and more common in discrimination cases, the cost of non-compliance with Title VII will be more prohibitive than ever before. The *Moody* decision has given employers a real incentive to comply with equal employment laws. The message of *Moody* is very clear, and in dollars and cents, the language every employer understands. Voluntary compliance is just good business policy. Thanks to this decision by the Supreme Court, increasing numbers of self-initiated programs of affirmative action may be forthcoming.

The High Court has also assisted in the procedural meshing of various laws governing employment discrimination. In *Alexander v. Gardner-Denver*, a case involving arbitration, the Court held that an employee does not lose Title VII protection merely because he chooses arbitration under the collective bargaining agreement as his first avenue of remedy.* This decision made it clear that overlapping laws are intended to work together, providing various avenues of relief and the most comprehensive protection; not to force an employee to choose one over the other.

In applying the principles of *Alexander*, lower courts have held that filing charges under one anti-discrimination law stops the statute of limitation of another law, under which employee may have filed

*415 U.S.36(1974).

charges at an earlier date.

Just last week, the Supreme Court handed down a decision regarding seniority which had become a number one issue during the economic recession of 1975. In *Franks v. Bowman Transportation Co.*, the Court ruled that in cases of proven job discrimination, the victims ordinarily should be granted seniority over workers hired after the date these individuals were refused employment.* Not granting seniority in such cases, the Court held, would be to perpetuate the effects of the past discrimination.

Another issue which has become very visible over the last few years is that of maternity leave benefits. The Commission guidelines state that pregnancy should be treated as any other temporary disability. The Supreme Court has heard oral arguments in a maternity case, *Gilbert v. General Electric*** No decision has yet been handed down on this important issue.

In view of both the new developments in Title VII law, which offer increased protection to the victims of discrimination, and the administrative changes at the Commission, it is my feeling that the structure of the Commission should remain the same. This is the time to move forward, not a time to start over. Many of the suggestions offered by the Civil Rights Commission can be implemented without the creation of a whole new agency. My suggestion is that we stop haggling about the organizational structure of the anti-discrimination agency. Let us give our undivided attention and commitment to the battle ahead. Let us assure that equal employment opportunity becomes a reality for all Americans.

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* 424 U.S. 747 (1976)

**429 U.S. 125 (1976)

THE VIEWS OF

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR

ANTIONETTE FORD*

*At the time of this presentation Antionette Ford was the Deputy Director, Office of Federal Contract Compliance Programs, Department of Labor.

I am pleased to have this opportunity to examine my own thinking on the question of whether or not our federal efforts to prohibit employment discrimination would be better accomplished by one law--one agency, or by multiple jurisdictions. This is not a simple issue to address, but one that has valid arguments on both sides. I might add that the question is a very timely one, and hopefully, will be discussed in a number of forums across the country.

Constructive criticism has properly been aimed at our national equal employment and affirmative action efforts by hosts of organizations. There are few, if any, governmental programs as vital to the strength of our nation as our effort to assure equality of opportunities in employment for all citizens. The many forms of job discrimination, subtle and overt, are an obvious and unnecessary waste of human resources. One of the latest and most comprehensive reports in the area of Equal Employment Opportunity (EEO), specifically Volume V, *To Eliminate Employment Discrimination*, is published by the U.S. Commission on Civil Rights.

As one of the principal affected agencies, we in the Labor Department have had serious thoughts and long conversations concerning the ramifications of the one law--one agency approach to equal employment enforcement efforts. The Department of Labor enforces not only Executive Order No. 11246 as amended November 3, 1975, but a multiplicity of statutes which deal with different forms of discrimina-

tion in employment. These include the Equal Pay Act of 1963, the Age in Discrimination Act of 1967, Vocational Rehabilitation Act of 1973, and most recently the Vietnam-era Veterans Readjustment Assistance Act of 1974. The Labor Department has responsibility for approximately 134 more acts, not all having to do with equal employment opportunity.

The Commission on Civil Rights identifies many areas of real and obvious confusion in the federal government's effort to accomplish equal employment opportunity and affirmative action. Their report states that the federal civil rights effort has not been equal to the task before it. It states that this effort has been hampered by deficiencies in existing laws, and that the assignment of authority to a number of agencies has made for inconsistent policies as well as the development of independent and uncoordinated compliance programs. On the basis of these findings, the Civil Rights Commission has recommended the establishment of a National Employment Relations Board (NERB) as an independent agency, having the responsibility for the enforcement of the Equal Pay Act, Section 503 of the Rehabilitation Act, the Age Discrimination Act of 1967, the Executive Order 11246 (for which my agency is responsible), the amended Executive Order 11375 which included sex discrimination, and Executive Order 11478 which, I believe, refers to the Civil Service Commission [CSC]. The same board would also rescind several sections of Title VII: those that establish the EEOC and grant the EEOC, the CSC, and the Attorney General enforcement authority; the Veterans Preference Act; and also that section which established the Equal Employment Opportunity Council. This would leave a host of responsibilities for one large agency.

The authority invested in the proposed National Employment Relations Board would be far-reaching. It would include Title VII enforcement emphasis on eliminating patterns and practices of discrimination, rather than resolving individual complaints. NERB would have broad investigative powers and a series of additional authorities. A super-agency, so structured and with such powers and responsibilities, is indeed impressive. Affected classes would have one identifiable place in the federal government to address concerns regarding their civil rights. Indeed, such an agency would be more comprehensive to consumers and to the regulatees. Additional advantages would also include consistent standards and a reduction of conflicts between statutes and agency standards. There would be less confusion concerning where and what to file. Additionally there would be a concentration of resources, both money and manpower for maximum coverage.

On the other side of the coin, however, and just as legitimately, a single agency such as the proposed NERB would significantly limit the avenues of recourse available to the complainant. Under the current system, beneficiaries are protected by statutes administered by various agencies. A complainant may choose the route most appropriate to his or her problem.

Secondly, while one agency might be more efficient and powerful, it would also be a vulnerable target for those who wish to limit civil rights progress by reducing resources. Currently, civil rights are institutionalized in a number of agencies.

Thirdly, a single agency would suffer from a loss of perspective and experience that the

current agencies bring to civil rights enforcement. For example, let us consider the Justice Department's comprehensive and long experience in litigation, and the experience of both our own solicitor's office and Wage and Hours in the area of investigation in equal pay areas. I think that these agencies' experience cannot automatically be put aside. One large agency without such experience is not prepared to handle all of those areas simultaneously.

A single law, such as proposed by this Commission on Civil Rights report, would of necessity create a new bureaucracy. This would mean that delays in establishing the rules, regulations and standards which would run that bureaucracy could appreciably delay initiative in the current program. Under the proposed method of establishing one large agency, the handling of individual complaints would be relegated to state and local agencies. By so doing, it is possible that industrywide patterns that span several states *might* be overlooked.

If the NERB emphasis were to be on enforcement rather than conciliation, the same problems that currently exist would possibly continue to exist. Enforcement is a strong and useful tool and should be used. But as a hypothetical example, how do you debar a utility? I pose that as a question.

As I stated at the outset, the Commission on Civil Rights report identified several areas of real confusion in the federal government's efforts concerning equal employment. However, I am not convinced that the practical solution to the problem is the creation of another bureaucracy. It is not clear to me how dismissing the efforts of a number of agencies and creating a new one will solve the current problems just because all the

related concerns would be under one roof. I recognize that this may be a simplistic way of looking at it, but to assume that one large agency would reduce the concerns and problems might also be somewhat simplistic.

As a deputy director of the Office of Federal Contract Compliance Programs (OFCCP), I am aware that my agency is often cited as the principal offender among government agencies whose equal employment opportunity programs are less than coherent and less than effective. But I also add that even prior to the publication of the Commission report, and certainly since that time, a number of the legitimate criticisms aimed at OFCCP are no longer valid. For example, at the time the report was published, it was a legitimate criticism that the position of deputy director of OFCCP had been vacant in excess of a year. The director, Larry Lorber, an attorney, and I were sworn in as director and deputy director on March 18th of this year (1976). The agency now has its top positions filled for the first time in quite a while. We currently are in the process of rewriting and restructuring our regulations, with the focus on clarification and making certain that these policies and procedures are fully comprehended by all parties administering our regulations. A training program for OFCCP staff and staff of the compliance agencies is now being conducted.

Two of the first tasks that I have involved myself in directly are consideration of an effective strategy for feasible consolidation of enforcement activities, as well as the design and development of a management information system with a hands-on audit system of the compliance agencies' activities at the field level. I view management concerns as one of the primary focuses and concerns of OFCCP. Not to say that other

problems that have been identified are any less important; but regardless of how well we have our goals and policies outlined, without the management mechanisms to back them up, the process isn't going to work effectively. I indicate these forward movements of the OFCCP not to suggest that we have remedies available for all of the deficiencies noted in the Commission report, but rather to demonstrate that many of the deficiencies can be remedied without throwing the baby out with the bathwater.

By identifying some of my own agency's key concerns, it becomes apparent that the major obstacle to effective EEO enforcement is the management problem with which agencies must grapple. Just as we at the Department of Labor are attempting to rectify our deficiencies, I am certain that other agencies are trying to deal with their difficulties. Nothing in my experience, however, suggests that greater managerial efficiency would result by amalgamating now separate institutions, each with several administrative and managerial problems. Nor does the elimination of certain functions from these agencies automatically assure that a newly created body would exist free of similar managerial difficulties. Bigger is not always better.

Finally, we must necessarily anticipate a slowdown in any momentum of the EEO effort during the initial start-up time of transition to a new organization.

In closing, I would like to say that the overall equal employment opportunity effort has been furthered by the ability and interest of agencies to press their own interest and competitive advantage in the development of new policy thrust. An example of that is OFCCP pushing for the state of the art in refining definitions for underutilization of affected classes and fashioning affirmative action approaches. It is legitimate to say that

there are many areas in which we have not, over the history of the program, been as effective as we might well have been. But there are some areas in which we have been very substantially involved and effective. We--enforcement or EEO-type organizations--may not always agree with one another. But there is an advantage to having some agencies take a leadership position forcing the development of new law, while other agencies consolidate past gains.

I trust that it is clear that my purpose has not been to dismiss totally the notion that it may be desirable, at an appropriate time, to reduce the current variety of laws and administering institutions in the EEO area. The Civil Rights Commission has performed a valuable service in chronicling many of the problems of the individual parts of the current EEO effort, as well as their net overall defects. I am suggesting, however, that it does not appear timely to make the giant step suggested by the Commission. It won't be timely until we, as agencies, make certain that we have our own respective houses in order.

Moreover, through the Equal Employment Opportunity Coordinating Council, and other informational means at our disposal, more emphasis can and should be placed on reducing current areas of unnecessary and counterproductive overlay, whether in policy or operating procedure. We in the Department of Labor are certainly prepared to pledge ourselves to that end.

THE VIEWS OF
THE U.S. CIVIL SERVICE COMMISSION

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We have a complex problem that has been with us for hundreds of years. Its resolution is a difficult one and needs forthright action. There are tugs and pulls in different directions. I am neither a lawyer nor a psychometrician who deals with the intricacies of how to design and construct testing devices. I can only speak for those people who are involved in the program as managers. We need to have this kind of open discussion and consider, as objectively as we can, one another's perspectives.

Today, the U.S. Civil Service Commission has an Executive Task Force that reviews equal employment opportunity as it interfaces with the merit system of the federal personnel system. Our executive director has given that task force short term and long term deadlines for coming to grips with both the issues articulated in the Commission on Civil Rights' report and those issues that have been raised by our own staff, federal agencies, civil rights organizations, labor unions, and community groups.

First, I would like to discuss briefly what we are and what we stand for. I do believe there is a basis in law that mandates us to follow those precepts of law articulated by the Congress and interpreted by the courts.

Our goal is equal employment opportunity as articulated in executive orders for many years, and made law in 1972. We do believe in carrying

out our enforcement role, but to discuss enforcement in the abstract is difficult. I shall talk about enforcement in terms of results.

Second, neither I nor my agency take issue with the concept of a representative workforce. But we do take issue with the idea of a mandated representative workforce based on underutilization in a workforce. We do believe in using statistical data to get a picture of what exists in a federal agency and the government as a whole, and to devise programs to deal with it. But we do not believe that using race, ethnicity and sex as criteria of selection for eliminating underutilization is within our province under the law.

Third, we do believe that our testing devices and instruments, the system by which we recruit into the federal government, have to be scrutinized. We believe there is more than one way to devise, construct and utilize testing vehicles and selection instruments.

Last, we believe that the principal thrust of the federal program is through the affirmative action plan of approach, and that's where we put our money. A compliance role, focusing on individual complaints, has not been the principal focus of the Civil Service Commission.

I would like to discuss enforcement in the concrete, i.e., about results. Our principal base is integrating equal employment opportunity into the fabric of the federal personnel management system, which by another term could be called the federal merit system. These two principles are integrated into overall management within the federal agencies; and by extension to state and local government, as we interface with them. As an example, federal agencies have between eighty and eighty-five percent of their resources devoted to

personnel--the employment of people. In my own agency, it approximates ninety percent. So, you may see that the role of personnel management in equal employment opportunity is essential.

I'd like to share a few statistics with you. I think they are rather exciting. In November, 1974, minority employment constituted 21 percent of the total federal workforce of 2.4 million full-time employees. In 1974, 17 percent of the employees in the middle level (GS-5 to GS-11), earning annual salaries from $8,000 to $21,000 a year, were minority employees. Seven years earlier, in 1967, there were a little over 11 percent minority employees in that grade level. Employment of minorities in what we call the senior level, salaries that go above $21,000 to a maximum of a little over $37,000 a year, rose to 6 percent of that workforce in 1974 as compared to just a little over 3 percent in 1967. Women in 1974, comprised 31 percent of the mid-level group and about 6 percent of the senior level group.

I'd like to switch to state and local government and talk about those state and local governments that are under the purview of merit system standards, which by law go back to the late thirties. They were brought under the Intergovernmental Personnel Act in 1971. Grant-aided agencies that receive money from federal agencies at the state and local levels are required to have merit system standards. In 1974, in the three major groups of agencies that are grant-aided and where EEOC data are available--employment security, public health, and public welfare--women constituted 54 percent to 71 percent of the workforce. Black and Spanish-surname employment in those same agencies was 17 percent to 23 percent. These data put some flesh and bones on the concept of employment. What difference has my

agency, the Federal Civil Service Commission, made in terms of enforcement? Enforcement is linked with results. There are still problems and we are far from reaching resolution of some of them.

I'd like to talk briefly about the means to the end; the end being equal employment opportunity. Although I just cited some statistics, they are not the sole criteria by which we ought to measure what has happened. They are indicators, and frequently very fine indicators, as to where we ought to look further and how we ought to examine the employment pattern in a particular locale, a particular agency, or a particular part of a federal agency. We in the federal government don't operate in a vacuum. Education, housing and mobility of the workforce are factors that we really need to look at. We must determine our role in doing something about these factors because they are tied in to the whole issue of equal opportunity employment.

We in the U.S. Civil Service Commission, along with the other federal agencies, have been trying for some time to get better employment data. Those of us who have worked with the data know what some of the problems are, especially when we try to break it down by occupation or general class areas. The farther down we go to local government or local areas, the more difficult it becomes to obtain and validate the data. What we have now is general population information, information that is collected by EEOC, and information that is collected by the Department of Labor. Trying to manipulate these data causes the agencies that I work with, and myself as a manager, problems in determining the composition of the workforce and the efforts that should be used to reach our goals.

Concerning the concept of representativeness, let me share with you what the Commission on Civil Rights said in their recommendations for the U.S. Civil Service Commission:

> The Civil Service Commission should adopt rules permitting agencies to make race, ethnicity, or sex a criterion of selection when hiring or promoting individuals in accordance with an affirmative action plan designed to eliminate underutilization of minorities and women. Underutilization shall be considered to be resolved at the point at which there is representation equivalent to the numbers in the available work force.

And as I mentioned earlier, I have no problem with the concept of representativeness anywhere in the federal government workforce. I think the nature of our pluralistic society demands that we have the kind of system that brings people into it. But we do take issue with using, very specifically, race, national origin or sex as selection criteria for bringing someone into the federal service. We believe that is not in accordance with the law: the Civil Rights Act, some of the Constitutional protections, or some of the decisions of the highest court of the land. And what is interesting is that many of us can use the same decision, the same piece of legislation, to further our own particular argument. I and my agency may very well be doing the same thing. But when we look at *Griggs*, and we look at the subsequent decision of the Supreme Court, *McDonnell Douglas v. Green*, we come out with a decision that says: The Act does not command that any person be hired simply because he is a member of a minority group. Discriminatory preference, of any group, minority or majority, is precisely and only what Congress has proscribed. Title VII was cited as proscribing racial discrimination.

There is a difference of opinion, and I believe that the difference is an honest one in terms of my own agency, the Commission on Civil Rights, and others. We believe there is a big difference between a lack of representativeness in the federal workforce, (the extent to which it exists principally in these middle and upper levels as I mentioned earlier) and discriminatory employment practices which adversely impact on a particular racial or ethnic group or women. We believe that selection based on individual fitness and ability through the merit system is what is mandated by law. We believe that such a process linked to affirmative action has brought about significant results; that it is within the constitutional and statutory guides; and that it falls within the purview of the merit principle.

I don't think everything we do in terms of process or system is the way it ought to be done. I believe we in the federal government have to find a better way to go out and bring people in and to cut down the time period that it takes to bring these people in. We have to tie in recruitment and selection so that the cause and effect relationship is seen, especially by the minority communities. I think that we have to examine closely our system. And I reiterate: personnel administration, equal employment opportunity and overall management are interrelated to such a degree that my agency as the central personnel agency of the federal government is the most effective way to bring about the goal of equal employment opportunity in the federal sector.

I'd like to talk for a few moments about methodology. We believe that an affirmative action plan is the principal way to achieve the goal of equal employment opportunity in the federal sector. We've had a system of affirmative action planning since the U.S. Civil Service Commission was given

a leadership role under executive order. The President's Committee on Equal Employment Opportunity, which preceded that executive order, also used an affirmative action plan of approach. What I've seen happen through the executive order process is a movement from what I would describe as passive non-discrimination, to an anti-discrimination approach, to one of affirmative and positive action in the federal sector.

I think that there is a difference in the federal government that has occurred in the last ten years. There has been accelerated employment of minorities and women. The affirmative action plan that we have is, as a matter of fact, very close to the guidelines of Order No. 4. Our regulations in the Federal Personnel Manual call for goals and time-tables, and call for an assessment of the work force to pinpoint employment profiles by organization, by class, by grade level, by sex, and by minority designation. On an annual basis, we do get from a number of federal agencies affirmative action plans, designated as regional plans. I have seen improvement in those regional plans, but we have not reached the optimum. What I see is a focus of attention on the movement of people in middle and upper levels. I see a focus of attention on what we call "upward mobility." We are looking at the way we are organized in order to restructure jobs so that we can fill them at lower grade levels. We have planned programs to identify, train and move people into those identified jobs. Agencies have set aside jobs within their organization to be filled by this upward mobility movement. Progress, as you might expect, varies from agency to agency.

Right now we are, as many of you are, in a money crunch. So I think the focus of the federal government in equal employment opportunity has to be on what we can do to develop people within our

own organization so that we can provide a growth pattern for people who are in what we have designated as plateau jobs. Secondly, we must capitalize on the potential of people who have not had the formal education or experience that others in our society have had.

Now let's move on to just one other part of methodology, the selection guidelines. I am not going to talk very much about them because even the terminology, such as "criterion-related" and "construct validity", has to be looked at through the eye of a psychometrician. Our psychometricians say that the American Psychological Association has not identified one selection validation approach as the only acceptable one. There are a number of approaches and you select the one that is suited to the job at hand. Job-relatedness and job analysis are critical in assuring that equal employment opportunity is predicated in the selection process by using valid selection instruments.

In terms of the complete process, we do have a class action regulation that has been published in the *Federal Register*. It came about through a court case and the Commission on Civil Rights' efforts. The issue of a *de novo* trial is before the Supreme Court. If the Court decides that *de novo* trial as opposed to administrative process is mandated, then that is exactly what the Civil Service Commission will do.

There are some very live issues that we are looking at right now concerning who ought to investigate complaints of discrimination. What should be the role of the U.S. Civil Service Commission in the employing agency decision-making? Many things are on the drawing board in terms of making changes.

To wrap up, I believe that at some point in time there may well be a need for a single agency of the kind and type described by the Commission on Civil Rights. I don't believe that such an agency now could follow up on the progress that I believe the federal government has made and will make. I do appreciate the opportunity to be with you, to share with you some of the perspectives that my agency has, and to be able to exchange ideas as we will this afternoon, so that we get a better understanding of each other's positions.

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