Race Discrimination in Employment Compliance Guide

EEO

Employer Knowledge Series

A comprehensive guide to understanding racial discrimination in the workplace, rights and obligations under applicable anti-discrimination laws, and best practices for employers.

personnel concepts
EMPLOYER KNOWLEDGE SERIES

Race Discrimination in Employment Compliance Guide

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An anti-discrimination policy and prevention program as outlined herein can only be effective if taken seriously and followed through. Each company is unique. The needs of your company should be examined and implemented into the program in order to make it successful. It is essential that the employer demonstrate at all times their personal concern for their employees and the priority placed on them in your workplace. The policy must be clear. The employer shows its importance through their own actions.

 Every effort has been made by the author to assure accuracy and completeness of the information contained herein. This guidebook follows the guidelines recommended by the DOL and EEOC and is provided with the understanding that Personnel Concepts or any of its affiliates cannot be held responsible for errors or omissions, changes in law, regulations or interpretations thereof. This guidebook is not intended to be legal interpretation of any law or regulation.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal advice or other expert assistance is required, the service of a competent professional must be sought. – From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.

Implementation Procedures

The following implementation procedures are intended to provide specific instructions for correctly utilizing the various components of our Race Discrimination Compliance Kit. If you have additional questions about this guidebook or other kit components, please contact Personnel Concepts at 800-333-3795.

1. Post the enclosed Race Discrimination Policy Poster conspicuously in the workplace where legal notices (i.e. policy statements and labor law postings) are customarily posted. The purpose of this poster is to acknowledge your coverage under Title VII and to notify affected workers that race discrimination is strictly prohibited in the workplace.

2. Post the enclosed Racial Diversity Awareness Poster in an area frequented by employees (i.e. break rooms, near time clocks, hallways, etc)

3. Review the Introduction to Race Discrimination and Frequently Asked Questions that are included in this section. This overview is intended to ensure that you understand your establishment's obligations under current racial discrimination law.

4. Review Sections II thru IV for a thorough explanation of the various types of racial discrimination (disparate treatment, disparate impact, denial of equal access to jobs, racial bias, and harassment).

5. Distribute the enclosed Race Discrimination Training Handouts to supervisors, managers, and other affected individuals to ensure that your workforce understands what constitutes unlawful racial discrimination.

6. Review Section VI, "Recent Court Decisions and Case Settlements" to determine if recent cases have involved situations, decisions, or issues that are currently present in your workplace.

7. Refer to the Regulatory Text contained in this guidebook on an as-needed basis when processing an employee complaint.

8. Use the enclosed EEO Incident Reports to document any employee allegation of racial discrimination (bias, disparate treatment, harassment, etc.). These complaints should be investigated and resolved immediately by the individuals within your organization who handle employee complaints and grievances.

Contact a Compliance Specialist at 800-333-3795 to inquire about other products pertaining to employment discrimination, including the EEO Compliance Program, the Space Saver-7 All-On-One Workplace Policy Poster, and the Harassment in the Workplace Program.

Introduction to Race Discrimination

The Gallup Organization, with input from the EEOC, recently sampled American workers of varying racial and ethnic backgrounds, ages, genders, and states of disability. The survey asked employees about their perceptions of discrimination at work and the effect those perceptions had on performance and retention.

The resulting data indicated that 15% of all workers perceived that they had been subjected to some sort of discriminatory or unfair treatment. When broken down into sub-groups, 31% of Asians surveyed reported incidents of discrimination, the largest percentage of any ethnic group.

EEOC's charge data shows that employment discrimination continues to be a significant problem in the workplace. According to the EEOC's statistics:

> Race discrimination accounted for about 36% of all charges, following a historical trend.
>
> Within the context of race filings, 82.5% of charges were brought by African Americans, with Asian/Pacific Islanders filing only 3% -- a sharp contrast with the 30% of Asians employees who responding to the Gallup survey that they perceived discrimination on-the-job.
>
> Retaliation accounted for 24% of Title VII charges, and about 29% of all charges.

Commenting on the contrast between the Gallup findings and the number of discrimination charge filings, EEOC Chair Ida Dominguez noted: "When you compare our most recent EEOC charge statistics with the Gallup data, we find that a far greater percentage of Hispanics and Asians perceive themselves to be discriminated against than actually file charges."

Discrimination in any aspect of employment is illegal and employees are protected from such conduct under Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees (state laws may cover employers with as few as one employee), including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Equal employment opportunity cannot be denied any person because of his/her racial group or perceived racial group, his/her race-linked characteristics (e.g., hair texture, color, facial features), or because of his/her marriage to or association with someone of a particular race or color. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups. Title VII's prohibitions apply regardless of whether the discrimination is directed at Whites, Blacks, Asians, Latinos, Arabs, Native Americans, Native Hawaiians and Pacific Islanders, multi-racial individuals, or persons of any other race, color, or ethnicity.

Discrimination is prohibited in all phases of employment including:

> hiring and firing;
> compensation, assignment, or classification of employees;
> transfer, promotion, layoff, or recall;
> job advertisements;
> recruitment;

testing;
use of company facilities;
training and apprenticeship programs;
fringe benefits;
pay, retirement plans, and disability leave; or
other terms and conditions of employment.

Title VII's protections include:

Recruiting, Hiring, and Advancement
Job requirements must be uniformly and consistently applied to persons of all races and colors. Even if a job requirement is applied consistently, if it is not important for job performance or business needs, the requirement may be found unlawful if it excludes persons of a certain racial group or color significantly more than others. Examples of potentially unlawful practices include: (1) soliciting applications only from sources in which all or most potential workers are of the same race or color; (2) requiring applicants to have a certain educational background that is not important for job performance or business needs; (3) testing applicants for knowledge, skills or abilities that are not important for job performance or business needs.

Employers may legitimately need information about their employees or applicants race for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the information about an applicant's race separate from the application. In that way, the employer can capture the information it needs but ensure that it is not used in the selection decision.

Unless the information is for such a legitimate purpose, pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.

Harassment/Hostile Work Environment
Title VII prohibits offensive conduct, such as racial or ethnic slurs, racial "jokes," derogatory comments, or other verbal or physical conduct based on an individual's race/color. The conduct has to be unwelcome and offensive, and has to be severe or pervasive. Employers are required to take appropriate steps to prevent and correct unlawful harassment. Likewise, employees are responsible for reporting harassment at an early stage to prevent its escalation.

Compensation and Other Employment Terms, Conditions, and Privileges
Title VII prohibits discrimination in compensation and other terms, conditions, and privileges of employment. Thus, race or color discrimination may not be the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge, or any other area of employment.

Segregation and Classification of Employees
Title VII is violated where employees who belong to a protected group are segregated by physically isolating them from other employees or from customer contact. In addition, employers may not assign employees according to race or color. For example, Title VII prohibits assigning primarily African-Americans to predominantly African-American

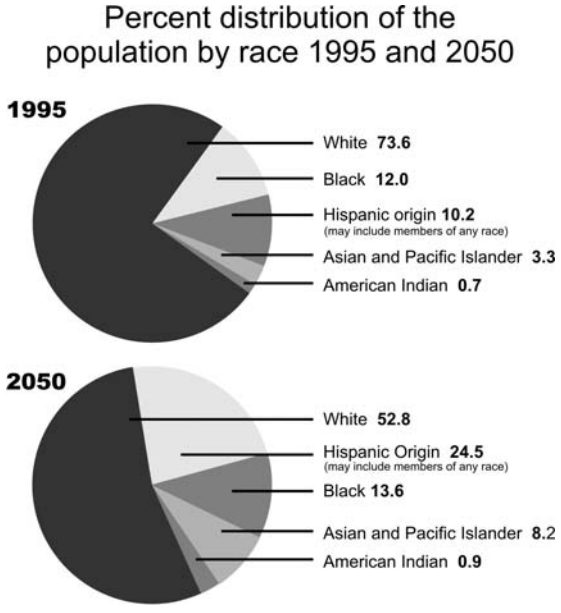
establishments or geographic areas. It is also illegal to exclude members of one group from particular positions or to group or categorize employees or jobs so that certain jobs are generally held by members of a certain protected group. Coding applications/resumes to designate an applicant's race, by either an employer or employment agency, constitutes evidence of discrimination where people of a certain race or color are excluded from employment or from certain positions.

Retaliation
Employees have a right to be free from retaliation for their opposition to discrimination or their participation in an EEOC proceeding by filing a charge, testifying, assisting, or otherwise participating in an agency proceeding.

Title VII prohibits not only intentional discrimination, but also neutral job policies that disproportionately affect persons of a certain race or color and that are not related to the job and the needs of the business.

There are two categories under which most employment discrimination claims fall; disparate treatment and disparate impact. Disparate treatment occurs when an employer commits intentional discrimination such as harassment or refusing to promote or hire an individual because of their color. Disparate impact is generally not intentional but results from an employment practice that on the surface appears to be neutral in treatment but actually treats one group of people more negatively than another. Furthermore, these practices are not justified by a business necessity. Examples of disparate impact include establishing a dress code, educational requirements or height and weight requirements.

The EEOC's charge data for Fiscal Year 2008 shows that employment discrimination continues to be a significant problem in workplace. According to the EEOC's statistics, race discrimination accounted for about 36% of all charges, following a historical trend. And with the growing number of minorities in the United States, these statistics may increase. According to the U.S. Bureau of the Census, Resident Population Projections, by 2050, minorities are projected to rise from one in every four Americans to almost one in every two.



An employer's best defense against discrimination is to develop a strong EEO policy that is clearly communicated and accepted by both managers and employees. Training is an important element and making sure to enforce the rules is pertinent. When business decisions need to be implemented, employers must make sure that the decision is well defended and documented. It's important that employment decisions are always explained to affected individuals as thoroughly as possible.

Frequently Asked Questions

Q: What is Equal Employment Opportunity (EEO)?
A: EEO is the principle of eliminating discriminatory barriers as a means of ensuring fair and equal treatment of all individuals who are employed or seeking employment. Federal and State laws prohibit employment discrimination based on race, color, sex, religion, national origin, age, disability, and prohibit retaliation for opposing job discrimination, filing a charge, or participating in proceedings under these laws.

Q: How is discrimination defined?
A: Black's Law Dictionary defines discrimination as the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored.

In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, marital or veteran status, or handicap whether physical or mental.

Q: What law governs race discrimination and to whom does it apply?
A: Title VII of the Civil Rights Act of 1964 (Title VII) prohibits race, color, religion, sex, and national origin discrimination. Title VII applies to employers with fifteen (15) or more employees.

Q: If a company has less than 15 employees, are they exempt from discrimination laws?
A: No. States generally have their own specific statutes addressing discrimination. Federal law requires at least 15 employees on staff to file a discrimination claim while individual state law may allow a discrimination claim with as few as one employee. Therefore, even if a company has less than 15 employees, a discrimination claim can still be filed with either the state's administrative agency, in court or both.

Q: Who enforces this law?
A: The U.S. Equal Employment Opportunity Commission (EEOC).

Q: What is "Race," as defined under the law?
A: Title VII does not contain a definition of "race." Race discrimination includes discrimination on the basis of ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features. Forms used for collecting federal data on race and ethnicity in the workforce use five racial categories ("Hispanic / Latino" is classified an ethnicity category):

American Indian or Alaska Native;

Asian;

Black or African American;

Native Hawaiian or Other Pacific Islander; and

White;

Q: What is "Color"?
A: Color discrimination occurs when a person is discriminated against based on his/her skin pigmentation (lightness or darkness of the skin), complexion, shade, or tone. Color discrimination can occur between persons of different races or ethnicities, or even between persons of the same race or ethnicity. For example, an African American employer violates Title VII if he refuses to hire other African Americans whose skin is either darker or lighter than his own.

Q: What employment actions are prohibited by Title VII?
A: Title VII prohibits race and color discrimination in every aspect of employment, including recruitment, hiring, promotion, wages, benefits, work assignments, performance evaluations, training, transfer, leave, discipline, layoffs, discharge, and any other term, condition, or privilege of employment. Title VII prohibits not only intentional discrimination, but also practices that appear to be neutral, but that limit employment opportunities for some racial groups and are not based on business need.

Q: What is intentional discrimination?
A: Intentional discrimination occurs when an employment decision is affected by the person's race. It includes not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups.

Q: What if clients, customers, or employees prefer working with people of their own race?
A: Basing employment decisions on the racial preferences of clients, customers, or coworkers constitutes intentional race discrimination. Employment decisions that are based on the discriminatory preferences of customers or coworkers are just as unlawful as decisions based on an employer's own discriminatory preferences.

Q: What is racial harassment?
A: Racial harassment is unwelcome conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Examples of harassing conduct include: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

An isolated incident would not normally create a hostile work environment, unless it is extremely serious (e.g., a racially motivated physical assault or a credible threat of one, or use of a derogatory term, such as the N-word, etc.). On the other hand, an incident of harassment that is not severe standing alone may create a hostile environment when frequently repeated.

Q: How can employers prevent racial harassment?
A: The most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on race will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. Other important steps include adopting effective and clearly communicated policies and procedures for addressing complaints of racial harassment, and training managers on how to identify and respond effectively to harassment. By encouraging employees and managers to report harassing conduct at an early stage, employers generally will be able to prevent the conduct from escalating to the point that it violates Title VII.

An employer is liable for harassment by a supervisor if the employer failed to take reasonable care to prevent and promptly correct the harassment or if the harassment resulted in a tangible job action (termination, demotion, less pay, etc.). An employer is liable for harassment by co-workers or non-employees if it knew or should have known of the harassment and failed to take prompt corrective action.

Q: How will a company know if a charge of discrimination has been filed against them?
A: The EEOC will notify the employer within 10 days of receiving a charge. Notification normally includes a copy of the charge briefly identifying the charging party, the basis (e.g., race,) and issue(s) (e.g., hiring, promotion, discharge, etc.) of the allegation, and the date(s) of the alleged discrimination. Ordinarily, a plain language explanation of the EEOC charge process will be included, as well as explanations of the employer's obligation to retain records pertaining to the charge and of the non-retaliation provisions of the EEOC laws. An invitation to mediate the charge may also be included in the notification package.

Q: What can be expected to happen in an EEOC investigation?
A: After a charge is filed, an employer may be asked to provide a statement of position responding to the allegations in the charge. They may also be asked to provide documents or information related to the subject of the EEOC's investigation. Additionally, the EEOC may ask to visit the worksite or to interview some employees. Cooperation with EEOC requests for information is helpful to the EEOC in investigating charges. When an employer refuses to provide information, or does not do so in a reasonably timely manner, the EEOC may issue a subpoena. Employers may retain an attorney to represent them during the EEOC's handling of the charge but they are not required to do so.

Q: What remedies are available for unlawful discrimination via EEOC enforcement?
A: Under the EEOC-enforced laws, the remedies for unlawful discrimination include:

- an order to eliminate discriminatory practices
- hiring, wage adjustments, promotion or reinstatement, depending upon the nature of the action taken against the individual monetary remedies
- Monetary remedies including lost wages and prejudgment interest, compensatory damages, and punitive damages (Cases in which the employer acts with reckless disregard of the federally protected rights of the individual)

  The sum of punitive damages and future compensatory damages may not exceed the following amounts, per person:

  $50,000 for employers with 15-100 employees
  $100,000 for employers with 101-200 employees
  $200,000 for employers with 201-500 employees
  $300,000 for employers with more than 500 employees

Q: What kinds of notices, posters, policies, and forms should I have implemented in my place of business to help me avoid discrimination lawsuits?
A: To ensure compliance with pertinent labor laws and avoid potential liability in discrimination claims, employers must educate themselves, their supervisors, and managers about the legal issues that affect the workplace, post mandatory notices, and document complaints and

investigations. The following is a list of forms, notices, and documents pertinent to lawsuit prevention and legal compliance.

- Federal “Equal Opportunity is the Law” EEOC poster;
- Your state fair employment / human rights poster;
- Clear policies on harassment and discrimination that describes how to report a complaint and how it will be investigated by the company;
- A policy that describes the employer’s commitment to providing equal opportunity to all applicants and employees;
- Employee complaint forms.

Disparate Treatment and Disparate Impact

Disparate Treatment

The most common violation under Title VII is intentional discrimination, also known as disparate treatment. An employee may feel that they were unfairly fired or passed up for a promotion, but that doesn't mean that they were discriminated against. In order for it to be classified as discrimination, the employee had to be treated differently because of their race, sex, religion, color or national origin.

Disparate treatment is usually proved circumstantially by convincing the court the employer's explanation for their action is unbelievable and it is thereby reasonable to infer the real explanation is discrimination. This is called evidence of pretext because the explanation given by the employer is proven to be a pretext to cover their discriminatory act. Pretext is generally proven through one of the following:

- Employer offers an explanation that they know is false
- Individuals with the same qualifications of a different class were treated differently than the complainant
- Evidence of bias such as knowledge that the employer has an issue with a particular class of people
- Statistical evidence such as the employer failing to have females in management positions despite their availability

Recognizing Racial Motive

Title VII is violated if race was all or part of the motivation for an employment decision. The most obvious violation is a decision driven by racial animosity. For example:

> The employer is a family-owned construction company in need of a construction manager for one of its work crews. Dexter, an African American, is new to the area and applies for the job. He held the same position with another company before relocating. Dexter is rejected. When he finds out that a less-qualified White person was hired instead of him, Dexter alleges discrimination. The company secretary credibly testifies that she overheard an argument between the owner and his son over whether Dexter should be hired. Because Dexter was clearly the most qualified applicant, the son wanted to hire Dexter, but the owner did not. At one point the secretary heard the owner say: "As long as I'm running this company I won't have a Black man doing a White man's job!" The employer has violated Title VII.

Racially biased decision-making and treatment, however, are not always conscious. The statute thus covers not only decisions driven by racial animosity, but also decisions infected by stereotyped thinking or other forms of less conscious bias. For example:

> Charles, an African American, files a charge alleging that the employer, a retailer, used an interview to discriminate against him in favor of a less experienced White applicant. During the EEOC investigator's discussion with the hiring manager, she notices that the hiring manager's statements are peppered with comments such as "we were looking for a clean cut image," and "this is a sophisticated upscale location . . . I have to make sure the people I hire have, you know, the 'soft-skills' we need." Knowing that these statements could be

> reflective of racial stereotyping and bias, the investigator evaluates the employer's decision-making very carefully. The investigator interviews Charles's most recent employer, who tells the investigator that "customers just loved working with Charles . . . he was one of our most effective and motivated employees." The investigator also interviews the person hired and finds no basis for believing her "soft skills," or her "image," were any better than Charles's. In addition, the investigator notices that, like the person hired over Charles, the rest of the staff also is White even though the qualified labor market is significantly more diverse. The investigator concludes that the employer rejected Charles based on racial stereotyping or bias.

Title VII also does not permit racially motivated decisions driven by business concerns, for example, concerns about the effect on employee relations, or the negative reaction of clients or customers. Nor may race or color ever be a bona fide occupational qualification under Title VII. Racial steering or assignment is exemplified in the following:

> An employer admits that it usually assigns Black and Asian American salespersons to sales territories with a high percentage of Blacks and Asian Americans. It is uncontested that the employer does not harbor ill-will toward either group. Instead, the employer believes they will better serve sales territories with high percentages of Blacks and Asian Americans, and thus increase sales to the benefit of the firm's bottom line and their careers. Charges are filed by employees who want the opportunity to work in territories regardless of their racial makeup. The employer has violated Title VII, which prohibits employers from depriving employees of employment opportunities by limiting, segregating, or classifying them on the basis of race.

Likewise, an employer can not yield to a customers' racial preference or what they perceive would make a customer more "comfortable". For example:

> The employer is a home care agency that hires out aides to provide personal, in-home assistance to elderly, disabled, and ill persons. It has a mostly White clientele. Many of its clients have expressed a desire for White home care aides. Gladys, an African American aide at another agency, applies for a job opening with the employer because it pays more than her current job. She is well qualified and has received excellent performance reviews in her current position. The employer wants to hire Gladys but ultimately decides not to because it believes its clientele would not be comfortable with an African American aide. The employer has violated Title VII because customer preference is not a defense to race discrimination.

Conducting a Thorough Investigation

Because discrimination often is subtle, and there rarely is a "smoking gun," determining whether race played a role in the decision-making requires examination of all of the surrounding facts and circumstances. The presence or absence of any one piece of evidence often will not be determinative. Sources of information can include witness statements, including consideration of their credibility; documents; direct observation; and statistical evidence such as EEO-1 data, among others. A non-exhaustive list of important areas of inquiry and analysis is set out below.

Potential Evidence of Racial Disparate Treatment

Race-related statements (oral or written) made by decision-makers or persons influential to the decision. Race-related statements include not only slurs and patently biased statements, but also "code words" that are purportedly neutral on their face but which, in context, convey a racial meaning. As evidenced in the case of *Ash v. Tyson Foods, Inc.*, (U.S. Feb. 21, 2006) referring to African American men as "boy" could be evidence of discrimination without any explicit racial modifiers: "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. "

The credibility of the witness(es) attesting to discriminatory statements, and the credibility of the witness(es) denying them, are critical to determining whether such statements actually were made. If racially discriminatory statements were made, their importance will depend on their egregiousness and how closely they relate – in time and content – to the decision in question. For example, a statement that there are "too many Asians" in a department, made by a hiring official when discussing applicants, would be strong evidence supporting an Asian American's failure-to-hire claim. Such a statement also would support a claim of hostile work environment by Asian American employees.

Comparative treatment evidence. This is evidence as to whether the claimant was treated the same as, or differently than, similarly situated persons of a different race. Such evidence is not always required, but a difference in the treatment of similarly situated persons of different races is probative of discrimination because it tends to show that the treatment was not based on a nondiscriminatory reason. Conversely, an employer's consistent treatment of similarly situated persons of different races tends to support its contention that no discrimination occurred.

Comparator evidence that supports either party's position must be weighed in light of all the circumstances. For example, if the group of similarly situated persons who were treated better than the claimant included persons of the claimant's race, that would weaken his or her claim, but it would not be conclusive proof of nondiscrimination because the balance of the evidence overall might still more convincingly point to discrimination. Identification of persons who are similarly situated to the claimant should be based on the nature of the allegations, the alleged nondiscriminatory reasons, and other important factors suggested by the context, but should not be based on unduly restrictive standards.

Relevant background facts. Specific employment decisions and issues should not be looked at in isolation. Other information that can shed light on whether the employer's adverse employment decision was motivated by race includes the employer's treatment of other employees (or customers, etc.), race-related attitudes, the work environment generally, and the context of the challenged employment decision. For example, background evidence that an employer has permitted racial jokes and slurs about Asian Americans in the workplace would support an Asian American employee's allegation that her termination was based on her race. Similarly, background evidence that an employer has discriminated against African Americans in hiring, pay, or promotions would support an African American employee's claim that a pattern of mistreatment (e.g., her supervisor undermining her work, ostracizing her, and making snide comments) is actually a pattern of race-based harassment. The point is that background evidence can

help determine the employer's state of mind and otherwise provide important context. Also, as suggested by the above examples, the inquiry into background evidence can reveal other potential violations of the statute.

Relevant personnel policies. An employer's deviation from an applicable personnel policy, or a past practice, can support an inference of a discriminatory motive. Conversely, acting in conformance with a consistently applied nondiscriminatory policy or practice would suggest there is no such motive.

The decision-maker's race. The race of the decision-maker may be relevant, but is not controlling. In other words, it should not be presumed that a person would not discriminate against members of his own race. As the Supreme Court has noted, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."

Statistical evidence. Statistics reflecting the employer's general policy or practice can be helpful in determining whether race was a factor in a particular selection decision. For example, a Black applicant's allegation of hiring discrimination would be bolstered by evidence that the selection rate of qualified Black applicants is significantly below the selection rate of qualified applicants of other races, or that Blacks are significantly under-represented in the employer's workplace given their availability in the qualified labor market. Conversely, while a racially diverse workforce cannot immunize an employer from liability for specific acts of discrimination, the more racially diverse the relevant part of the employer's workforce is, the less credible would be the claim of discrimination. Statistical evidence also is important in determining whether the employer has a systemic pattern or practice of discriminating.

Employer Credibility

The credibility of the employer's explanation is key and must be judged in light of all the evidence obtained during the investigation. If an employer's explanation for the employee's treatment ultimately is not credible, that is powerful evidence that discrimination is the most likely explanation. An employer's credibility will be undermined if its explanation is unsupported by or contrary to the balance of the facts. Similarly, the credibility of the explanation can be called into question if it is unduly vague, appears to be an after-the-fact explanation, or appears otherwise fabricated (e.g., the explanation shifts, or inconsistent reasons are given).

Of course, even if the employer's explanation lacks credibility, discrimination will not be found if the evidence affirmatively demonstrates that the employer's real motivation was not race or another protected EEO trait, but something not covered by the laws enforced by EEOC – for example, an employee's blowing the whistle to the SEC about violations of securities laws. Also, an employer's business decision cannot be found discriminatory simply because it appears that the employer acted unwisely, or that the employer's decision was in error or a misjudgment. At the same time, the reasonableness of the employer's explanation is an important part of the overall picture. The investigator must look at the totality of the evidence to determine if there is reason to believe the employer acted in a racially motivated manner.

An example of a credible employer explanation is as follows:

> Alex, of Hispanic descent, has been progressively promoted and now holds a mid-level management position in a public relations firm in which he is responsible for several important accounts. The clients and the employer are happy with his performance. A senior-level management position that involves more responsibility opens up. The employer desires someone with demonstrated creativity to fill it. Alex applies for the job, but is not selected. Instead, the employer chooses Jennifer, a White female who, while qualified, has slightly less seniority and relevant experience. Alex files a charge alleging race and/or national origin discrimination. The investigation reveals that while Jennifer has somewhat less experience than Alex, she has displayed more creativity than Alex by developing a new way to reach the youth market, consistently suggesting improvements on the design of marketing materials, and implementing a new system for quickly disseminating time-sensitive documents. Alex, on the other hand, is seen as competent, hard working, and professional, but not as someone who displays quite as much creativity as wanted for the new job. There is clear and reasonably specific evidence verifying the perceived difference between Alex's and Jennifer's creativity. There is no evidence of discrimination other than comparative qualifications. The relatively minor differences in the employees' qualifications, alone, do not warrant a conclusion that Alex's non-promotion was motivated by race or national origin.

However, if an investigation revealed the facts differently and instead Alex outshone Jennifer in the other performance categories important for the promotion, such as customer relations, and leadership skills, the employer's stated reason – that it chose the most qualified person – would lack credibility and it would be reasonable to suspect that Alex's race/national origin motivated the employer. Similarly, if there was any evidence supporting Alex's case other than relative qualifications (e.g., derogatory statements about the leadership potential of Hispanics, shifting explanations, a pattern of not promoting Hispanics, or inconsistency suggesting bias against Hispanics in measuring creativity) the totality of the evidence could lead one to conclude that Alex's race/national origin likely motivated the employer.

Recognizing "Pattern or Practice" Race Discrimination

A systemic "pattern or practice" of intentional discrimination involves statistical and/or other evidence that demonstrates that discrimination is "standard operating procedure – the regular rather than the unusual practice." For example, a pattern or practice would be established if, despite the fact that Blacks made up 20 percent of a company's applicants for manufacturing jobs and 22 percent of the available manufacturing workers, not one of the 87 jobs filled during a six year period went to a Black applicant.

As evidenced in the case of *Teamsters v. United States,* (1977). "Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population from which employees are hired," and statistics showing a stark imbalance are often a "telltale sign" of discrimination. At the same time, Title VII does not require an employer's workforce to be racially balanced. *See* 42 U.S.C. § 2000e-2(j) (Title VII does not require race-based hiring simply because there is a racial imbalance between the employer's workforce and the community).

To the extent possible, the statistical analysis must include nondiscriminatory factors that reasonably might be said to account for any disparity. In a hiring case, for example, relevant factors would include the racial makeup and qualifications (e.g., education and experience relevant to the job) of the applicants or of the general labor market if applicant data are unreliable or difficult to obtain. The disparity also should be "statistically significant," meaning unlikely to have occurred by chance. Other instances and evidence of discrimination should be examined in conjunction with the statistics. If the statistical disparity is gross, it alone can establish a pattern or practice claim, such as when there is an "inexorable zero." In all cases, the employer's explanation or rebuttal (which may be statistical, non-statistical, or both) should be fully analyzed and weighed against the evidence supporting the claim. EEOC staff should contact headquarters experts for assistance in statistical cases.

Disparate Impact

Another violation of Title VII occurs when an employer does not intend to exclude a particular group of people but engages in practices that have the effect of doing so. This is known as disparate impact. Typically disparate impact will be determined by comparing the rate at which an employer's actions exclude a protected group to the rate at which others are excluded.

The finding of discrimination in the form of disparate impact does not depend on the existence of an unlawful motive. Disparate impact analysis is aimed at removing barriers to EEO that are not necessarily intended or designed to discriminate – "practices that are fair in form, but discriminatory in operation" in that they operate as "built-in headwinds for [a protected class] and are unrelated to measuring job capability."

The statute exempts certain policies or practices from disparate impact challenges – most notably, seniority systems. Otherwise, however, the disparate impact approach applies to all types of employment criteria, whether objective or subjective, including:

- recruitment practices
- hiring or promotion criteria
- layoff or termination criteria
- appearance or grooming standards
- education requirements
- experience requirements
- employment tests

The EEOC and other federal agencies have adopted guidelines that require employers to keep records to determine whether selection procedures for a position within the company create a disparate impact. These guidelines recommend using a "four-fifths rule" to assess impact. The four-fifths rule states that a selection rate for any race, sex or ethnic group which is less than four-fifths (or 80%) of the rate for the group with the highest rate of selection will generally be regarded as evidence of disparate impact. This rule is only a "rule of thumb". Lesser disparities can also be found to have an adverse impact and greater disparities may not.

Proving Unlawful Disparate Impact

In the case of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court addressed the disparate impact theory and created a model of proof that the plaintiff and defendant must use in presenting their cases. In *Griggs*, the employer required a high school diploma and a passing score on two professionally developed tests. The lower courts found no liability because the plaintiff was not able to prove that the employer had a discriminatory motive for the requirements. However, the Supreme Court reversed the decision. The Court stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." In a famous quote, the Court said that the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capacity."

The model of proof that was defined by the *Griggs* case consisted of three steps:

First, the plaintiff must first prove that a specific employment practice adversely affects employment opportunities of Title VII protected classes.

Second, if the plaintiff can establish a disparate impact, the employer must demonstrate that the challenged practice is justified by "business necessity". If the employer does not meet the burdens of production and persuasion in proving business necessity, the plaintiff prevails.

Third, if the employer does prove that the challenged practice has a “business necessity” then third step requires the plaintiff to demonstrate that alternative practices exist that would meet the business needs of the employer yet would not have a discriminatory effect. For example:

> A pizza delivery restaurant has an inflexible no-beard policy. The restaurant fires Jamal, one of its African American drivers, for failing to remain clean shaven. Jamal has a severe case of pseudofolliculitis barbae (“PFB”), an inflammatory skin condition that occurs primarily in Black men and that is caused by shaving. The severity of the condition varies, but many of those who suffer from PFB effectively cannot shave at all. If Jamal or EEOC were to challenge the no-beard policy as unlawful because it has a significant negative impact on Blacks, the employer would have to prove the policy is job-related and consistent with business necessity.

Soon after the *Griggs* case, the EEOC, in conjunction with the Department of Labor (DOL), the United States Department of Justice, and the United States Office of Personnel Management, released the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607, which outlined employment testing standards that complied with Title VII. Although the guidelines are not regulations, they are basis on which many courts make their ruling.

The Guidelines explain the various permissible ways that employers can utilize selection criteria when hiring employees and how to conduct validation studies to confirm that the methods they implement are in compliance with federal regulations. According to the Guidelines:

> Procedure(s) having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines.

In order to assure compliance, employers should use professionally developed ability tests from a source that can provide validation studies showing that the test does not negatively impact protected classes. An employer should monitor any testing that is done to verify that it is not resulting in fewer hires of protected classes. The Guidelines recommend using the “four-fifths rule” to check for adverse impact.

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Equal Access To Jobs

Recruiting

A study conducted by Marianne Bertrand and Sendhil Mullainathan at the University Of Chicago Graduate School Of Business measured racial discrimination in the labor market and the differences in resume performance based on name. To manipulate the perception of race, resumes were given either a very African American sounding name or a very White sounding name. The resumes with typical sounding White names resulted in 50% more callbacks than the resumes with African American names. The extent of discrimination was remarkable uniform across occupations and industries. Likewise, employers that touted that they were “equal opportunity employers” exhibited the same level of discrimination.

According to the Council of Economic Advisors, African Americans are twice as likely as Whites to be unemployed and when they are employed they earn 25% less than their White counterparts.

Who ultimately receives employment opportunities is highly dependent on how and where the employer looks for candidates. Accordingly, Title VII forbids not only recruitment practices that purposefully discriminate on the basis of race but also practices that disproportionately limit employment opportunities based on race and are not related to job requirements or business needs. For example, recruiting from racially segregated sources, such as certain neighborhoods, schools, religious institutions, and social networks, leads to hiring that simply replicates societal patterns of racial segregation.

Job Advertisements and Employment Agencies

Title VII specifically forbids job advertisements based on race, color, and other protected traits. The statute also prohibits discrimination by employment agencies. If an employer asks an employee-referral agency or search firm not to refer or search for candidates of a particular race, both the employer that made the request and the employment agency that honored it would be liable.

Word-of-Mouth Referrals

While word-of-mouth recruiting in a racially diverse workforce can be an effective way to promote diversity, the same method of recruiting in a non-diverse workforce is a barrier to equal employment opportunity if it does not create applicant pools that reflect the diversity in the qualified labor market. Similarly, unions that are not racially diverse should avoid relying solely on member referrals as the source of new members.

Homogeneous Recruitment Sources

Title VII is violated by recruiting persons only from largely homogeneous sources if the recruitment practice has a racial purpose or if it has a significant racial impact and cannot be justified as job related and consistent with business necessity. For example, Title VII might be violated if a municipal employer with an overwhelmingly White population and workforce abuts a major city with an overwhelmingly Black population, but the municipality only hires its own residents and refuses to advertise its jobs in newspapers that circulate in the abutting major city. As another example, Title VII might be violated if a statistically significant racial disparity results from recruiting persons exclusively from predominantly White schools, or exclusively from predominantly Black schools, when it would be feasible to recruit qualified students from a

range of sources. More investigation would be needed to determine whether a racial motivation exists, or whether the employer's recruitment practices can be justified as job related and consistent with business necessity.

Discriminatory Screening of Recruits

The process of screening or culling recruits presents another opportunity for discrimination. Race obviously cannot be used as a screening criterion. Nor may employers use a screening criterion that has a significantly disparate racial impact unless it is proven to be job related and consistent with business necessity. For example:

> An executive in a large company asks a recruiter in the human resources department to find her a new secretary. The executive tells the recruiter that in addition to excellent secretarial skills, she wants only to interview candidates who will relate well with high level executives inside and outside the company. In response to this, the recruiter searches the company's résumé database. The search produces 50 current résumés. In order to reduce this to a more manageable number, the recruiter refines the search to eliminate résumés from zip codes that are predominantly Black or Latino. This violates Title VII.

Hiring and Promotion

The law generally leaves it to the employer's business judgment to determine who should be hired or promoted. Within that context, however, an applicant's race should not affect his or her chances. This means that employers cannot treat persons of different races differently in the hiring or promotion process. Nor may employers use selection criteria that have a significant discriminatory effect without being able to prove that the criteria are job-related and consistent with business necessity. Thus, a sound way for employers both to achieve business goals and to comply with the law is to hire and promote based on job-related ability, as measured by uniform and consistently applied qualification/selection standards.

Uniform and Consistently Applied Standards

When making hiring and promotion decisions, employers must apply the same selection criteria to persons of different races, and apply them in the same way, giving the same weight to each criterion for each person. The reasons given for selection decisions should be credible and supported by the evidence. The following are examples.

> ***Example of Nondiscriminatory Selection Decision***
>
> Malcolm, an Asian American, applies for an executive position with the employer, a health maintenance organization. Malcolm is well qualified; he has a B.S. in biology from a large state university and an M.D. from a prestigious private university. Malcolm also has seven years' experience practicing internal medicine and recently obtained an Executive M.B.A. from a well-respected business school. The employer interviewed Malcolm and eight other candidates. Malcolm was one of two finalists brought back for a final round of interviews. The employer's selection committee ultimately chose Robert, a White finalist with slightly fewer qualifications but with experience in a similar job for a competitor.

The employer tells EEOC that given Robert's experience, it believed it would gain the most competitive benefit by hiring him. The EEOC investigator confirms Robert's experience working for a competitor, and reads the minutes of the selection committee's final meeting which reflect that this was the reason discussed at the meeting for choosing Robert over Malcolm. Here, the evidence supports the employer's legitimate, nondiscriminatory reason.

Example of Discriminatory Selection Decision

Kai, a Native American, files a charge after he applied for a promotion, was interviewed, and was not selected. The investigation reveals that, based on objective qualifications, Kai was deemed one of the top candidates but the job ended up going to Ted, a similarly qualified White candidate from outside the company. The hiring manager tells the investigator that he thought that Kai was well qualified but he chose Ted because he "seemed to be a better fit; I'm comfortable with him and I can see him in my job one day." When pressed to be more specific, the manager says he liked the fact that Ted worked for a competitor. However, the investigation reveals that although Ted did work for another company in the industry, it was not really a competitor. Employee and management witnesses tell the investigator that Ted's experience working for another company in the industry was no more valuable than Kai's experience working for the company itself. The witnesses also tell the investigator that, until now, the company practice had been to prefer qualified internal candidates over similarly qualified external candidates. There is reasonable cause to believe that Kai was discriminated against based on his race or national origin.

Example of Discriminatory Selection Decision

Rita, an African American, has worked seven years as a Program Analyst for a federal agency. She consistently has received outstanding performance evaluations. Each of the last four years, Rita has applied for openings for jobs in her office in a higher grade. The agency has rejected Rita each time. After the fourth rejection, Rita initiated EEO counseling, and then a formal complaint, because she believed she had been repeatedly discriminated against. She stated that four White employees were promoted over her, each time for a different reason. The investigation reveals that the agency actually did apply the same promotion criteria during each selection. Importantly, however, witness interviews and documentary evidence (e.g., the employer's interview notes) strongly suggest that the agency weighted the criteria differently each time so that Rita was the least qualified applicant. In other words, it appears that when a job-related qualification favored Rita it was deemed less important than when a qualification favored a White candidate. Moreover, statistics reveal that Whites are promoted more often than similarly qualified African Americans. There is reasonable cause to believe Rita was discriminated against based on her race.

Job-Related Standards, Consistent with Business Necessity

In an employer's important effort to hire the best candidate, it might unintentionally engage in race discrimination by using selection standards that measure differences between racial groups that are not related to the job. Title VII provides that, if a selection standard is shown to have a significant impact based on race, the employer must demonstrate that the standard is job-related and consistent with business necessity. Thus, employers should be sure to "measure the person for the job and not the person in the abstract."

Education Requirements

Educational requirements obviously may be important for certain jobs. For example, graduation from medical school is required to practice medicine. However, employers often impose educational requirements out of their own sense of desirable qualifications. Such requirements may run afoul of Title VII if they have a disparate impact and exceed what is needed to perform the job. As the Supreme Court stated in one of its earliest interpretations of Title VII: "History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." For example:

Chloe, White, is the Head Secretary for a division of XYZ Corp. She took the job right after college and now is departing after three years to go to graduate school. The employer was thrilled with Chloe's work, and when it gets notice that she is leaving, it sets out to find a replacement. Sylvia, an African American, applies for the job. Sylvia is a successful graduate of the local business institute, and has spent the last five years working as a secretary for a regional bank, rising a year ago to become the Executive Secretary in one of its major departments. The employer rejects Sylvia's application because she is not a college graduate, which triggers a charge. Statistical evidence shows that in the local labor market African Americans and Hispanics in the pool of administrative and clerical workers are significantly less likely to have college degrees than Whites. The employer defends its education requirement by attributing Chloe's success to the fact that she was college educated, noting that the Head Secretary position involves not only traditional secretarial work, but also more complex responsibilities such as preparing reports, and training and supervising other clerical staff. The investigation reveals, however, that none of the firm's prior successful Head Secretaries had college degrees, and it is not the industry standard. Most importantly, the employer presents no evidence that a college degree is more predictive of, or correlated with, job performance than a degree from a business institute plus significant relevant experience (i.e., Sylvia's qualifications), or other credentials and experiences that would render a person qualified for the job. The evidence establishes that the employer has violated Title VII because the college-degree requirement screens out African Americans and Hispanics to a significant degree but it has not been demonstrated to be job related and consistent with business necessity.

Employment Testing

Employment testing is another practice to which the disparate impact principle frequently is applied. Title VII provides that it is not an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate on the basis of race" or other protected bases. Under this provision, employment tests that have a

disparate impact based on race or another protected trait must be validated pursuant to the government's Uniform Guidelines on Employee Selection Procedures. For example, if an employer decides to use a personality test to determine which employees are "management material," and the test has a significant disparate impact based on race or another protected trait, the employer first must have the test professionally validated to ensure that the test is predictive of, or significantly correlates with, important elements of a manager's job performance. Even if the employer meets that standard, the test still may violate Title VII if there is another, less discriminatory alternative to the test that serves the employer's needs and the employer fails to use this alternative.

Title VII also explicitly prohibits employers from race-norming employment tests, i.e, adjusting scores, using different cutoff scores, or otherwise altering the results of employment tests on the basis of race or other Title VII-protected bases. For example, it is illegal to use different "passing" scores for different racial groups or to alter scores on employment tests in order to make the mean score the same for each race. This does not mean an employer cannot change the way it grades employment tests. For example, an employer may go from a straight ranking system to a grade banding system (i.e., a system that groups similar grades together) if done for nondiscriminatory purposes.

Conviction and Arrest Records

Of course, it is unlawful to disqualify a person of one race for having a conviction or arrest record while not disqualifying a person of another race with a similar record. For example, an employer cannot reject Black applicants who have conviction records when it does not reject similarly situated White applicants.

In addition to avoiding disparate treatment in rejecting persons based on conviction or arrest records, upon a showing of disparate impact, employers also must be able to justify such criteria as job related and consistent with business necessity. This means that, with respect to conviction records, the employer must show that it considered the following three factors:

(1) The nature and gravity of the offense(s);

(2) The time that has passed since the conviction and/or completion of the sentence; and

(3) The nature of the job held or sought. A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity.

Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.

Arrest records are treated slightly differently. While a conviction record constitutes reliable evidence that a person engaged in the conduct alleged (i.e., convictions require proof "beyond a reasonable doubt"), an arrest without a conviction does not establish that a person actually engaged in misconduct. Thus, when a policy or practice of rejecting applicants based on arrest records has a disparate impact on a protected class, the arrest records must not only be related to the job at issue, but the employer must also evaluate whether the applicant or employee actually engaged in the misconduct. It can do this by giving the person the opportunity to explain and by making follow-up inquiries necessary to evaluate his/her credibility.

Other employment policies that relate to off-the-job employee conduct also are subject to challenge under the disparate impact approach, such as policies related to employees' credit history. People of color have also challenged, under the disparate impact theory, employer policies of discharging persons whose wages have been garnished to satisfy creditors' judgments.

Interviews

When interviewing, employers should keep in mind that they are only allowed to ask applicants questions to obtain the information they need to determine which applicant can best fulfill the job requirements. It's important to always avoid questions which ask about characteristics not pertaining to the job. In the case of an applicant's race, there are no appropriate questions that can be asked in this regard because one's race should never be a qualifying factor. This includes any inquiries concerning race or color of skin, hair, eyes, etc. If it is necessary to ask for this information for affirmative action purposes, these inquiries should be accompanied by a statement indicating that the information is needed for affirmative action reporting purposes and will not be used to discriminate

Racial Bias and Harassment

Racial Bias in Other Employment Terms and Conditions

Even if a company works hard to recruit and hire in a way that provides equal opportunity, and even if it maintains a harassment-free workplace, it still must ensure that race is not otherwise a barrier to employee success. Employers cannot permit race bias to affect work assignments, performance measurements, pay, training, mentoring or networking, discipline, or any other term, condition, or privilege of employment.

Work Assignments

Work assignments are part-and-parcel of employees' everyday terms and conditions of employment and are also important for gaining valuable on-the-job experience. Work assignments must be distributed in a nondiscriminatory manner. This means that race cannot be a factor in determining the amount of work a person receives, or in determining who gets the more, or less, desirable assignments.

Performance Evaluations

Performance evaluations frequently serve as the basis for numerous other employment decisions, such as pay, promotions, and terminations. They should be unaffected by race bias.

Training and Constructive Feedback

Training is important for employees to become proficient in their jobs and to prepare for advancement. This includes both formal training and informal training through feedback from supervisors. As with other aspects of the employment relationship, race cannot be a factor in who receives training and constructive feedback.

Workplace Networks

Informal workplace networks can be just as important to an organization as official job titles and reporting relationships. Thus, an employee's success may depend not only on his or her job duties, but also on his or her integration into important workplace networks. Employers cannot allow racial bias to affect an employee's ability to become part of these networks.

Appearance and Grooming Standards

Appearance standards generally must be neutral, adopted for nondiscriminatory reasons, consistently applied to persons of all racial and ethnic groups, and, if the standard has a disparate impact, it must be job-related and consistent with business necessity. The following are examples of areas in which appearance standards may implicate Title VII's prohibition against race discrimination:

> **Height and Weight:** Standards for height and weight sometimes are challenged as having an unlawful adverse impact. For example, a requirement that employees be at least six feet tall might have an adverse impact on Asian Americans due to average height and weight differences, and thus such a requirement would need to be job-related and consistent with business necessity.

Dress: An employer can impose the same dress code on all workers in similar jobs, regardless of their race or ethnicity, as long as the policy was not adopted for discriminatory reasons and is enforced evenhandedly. However, an employer must treat racial or ethnic attire that complies with the dress code the same as other attire that complies with the dress code. For example, Title VII prohibits employers from banning the wearing of traditional Hawaiian dress that complies with the employer's dress code requirements.

Hair: Employers can impose neutral hairstyle rules – e.g., that hair be neat, clean, and well-groomed – as long as the rules respect racial differences in hair textures and are applied evenhandedly. For example, Title VII prohibits employers from preventing African American women from wearing their hair in a natural, unpermed "afro" style that complies with the neutral hairstyle rule. Title VII also prohibits employers from applying neutral hairstyle rules more restrictively to hairstyles worn by African Americans.

Beards: Employers generally can require employees to be clean-shaven. However, Title VII requires an employer to make exceptions to a no-beard policy for men with pseudofolliculitis barbae, an inflammatory skin condition that occurs primarily in Black men and that is caused by shaving, unless being clean-shaven is job-related and consistent with business necessity (see Example 9 and accompanying footnote).

Compensation

Employees must receive compensation without regard to race. All forms of compensation are covered, such as salary, overtime pay, bonuses, stock options, expense accounts, commissions, life insurance, vacation and holiday pay, and benefits.

Discipline and Discharge

Discipline and discharge decisions are typically based on either employee misconduct or unsatisfactory work performance. Such rules and policies regarding discipline and discharge must be enforced in an evenhanded manner, without regard to race.

Harassment

Under the same laws that govern discrimination, employers are also responsible for preventing harassment in the workplace. The same groups of people that are protected from discrimination are likewise protected from undergoing unwelcome offensive conduct based race or other protected characteristics. These types of behavior create a hostile work environment and constitute discriminatory harassment.

To determine if an action is considered harassment, it must be viewed as such by the people that it affected, not by the ones responsible for it. An employee may not have seen or even meant their words or actions to be harassing in nature, but if the victim felt uncomfortable or insulted, then it would be classified as harassment. If the action is not welcomed by the victim, then an offense has occurred.

Accepting conduct is not the same as welcoming it. A person is not welcoming a conversation or action just because they fail to say anything. They may even participate in the conversation but they feel offended by what someone in the group is saying. Furthermore, just because a person likes something today doesn't mean that they will welcome it tomorrow.

Anyone, regardless of gender or job level can be guilty of harassment. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.

There are two requirements for race-based conduct to trigger potential liability for unlawful harassment:

(1) the conduct must be unwelcome; and

(2) the conduct must be sufficiently severe *or* pervasive to alter the terms and conditions of employment in the mind of the victim and from the perspective of a reasonable person in the victim's position.

At this point, the harassing conduct "offends Title VII's broad rule of workplace equality."

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

The conduct need not be explicitly racial in nature to violate Title VII's prohibition against race discrimination, but race must be a reason that the work environment is hostile. To determine if a

work environment is hostile, all of the circumstances should be considered. Incidents of racial harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment.

Harassment must be analyzed on a case-by-case basis, by looking at all the circumstances and the context. Relevant factors in evaluating whether racial harassment creates a sufficiently hostile work environment may include any of the following (no single factor is determinative):

- The frequency of the discriminatory conduct;
- The severity of the conduct;
- Whether the conduct was physically threatening or humiliating;
- Whether it unreasonably interfered with the employee's work performance; and
- The context in which the harassment occurred, as well as any other relevant factor.

The more severe the harassment, the less pervasive it needs to be, and vice versa. Accordingly, unless the harassment is quite severe, a single incident or isolated incidents of offensive racial conduct or remarks generally do not create an abusive working environment. But a single, extremely serious incident of harassment may be sufficient to constitute a Title VII violation, especially if the harassment is physical. Examples of the types of single incidents that can create a hostile work environment based on race include: an actual or depicted noose or burning cross (or any other manifestation of an actual or threatened racially motivated physical assault), a favorable reference to the Ku Klux Klan, an unambiguous racial epithet such as the "N-word," and a racial comparison to an animal. Racial comments or other acts that are not sufficiently severe standing alone may become actionable when repeated, although there is no threshold magic number of harassing incidents giving rise to liability. Moreover, investigators must be sensitive to the possibility that comments, acts, or symbols that might seem benign to persons of the harasser's race could nevertheless create a hostile work environment for a reasonable person in the victim's position.

Below are examples designed to explain the concept of conduct sufficiently "severe or pervasive" to alter someone's working conditions.

Sufficiently Severe Conduct
Tim, an African American, is an employee at an auto parts manufacturing plant. After a racially charged dispute with a White coworker, the coworker told Tim: "Watch your back, boy!" The next day, a hangman's noose, reminiscent of those historically used for racially motivated lynchings, appeared above Tim's locker. Given the violently threatening racial nature of this symbol and the context, this incident would be enough to alter Tim's working conditions.

Sufficiently Pervasive Conduct
Miyuki, of Japanese descent, gets a job as a clerk in a large general merchandise store. After her first day on the job, a small group of young male coworkers starts making fun of her when they see her by slanting their eyes, or performing Karate chops in the air, or intentionally mispronouncing her name. This occurs many times during her first month on the job. This is pervasive harassment because of race and/or national origin.

Conduct Not Sufficiently Severe or Pervasive
Steven, an African American, is a librarian at a public library. Steven approaches his supervisor, White, with the idea of creating a section in the stacks devoted to books of interest particularly to African Americans, similar to those he has seen in major bookstore chains. Steven's supervisor rejects the idea out of hand, stating that he does not want to create a "ghetto corner" in the library. This statement alone, while racially offensive, does not constitute severe or pervasive racial harassment, absent more frequent or egregious incidents.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Employer Liability

The rules for liability differ depending on whether the harasser is a supervisor. An individual qualifies as an employee's supervisor if the individual has authority to undertake or recommend tangible employment decisions affecting the employee, or the individual has authority to direct the employee's daily work activities. As a general rule, employers are responsible for the behavior of their supervisors because employers act through their supervisors.

Thus, any time discrimination by a supervisor results in the victim suffering a tangible employment action, such as being fired (or quitting in response to intolerable harassment accompanied by an official company act), demoted, not promoted, or docked in pay, the employer is automatically liable, and there are no defenses available to the employer. For example, if a supervisor has a racially motivated grudge against an employee and acts on it by denying the employee a raise otherwise deserved under the employer's pay system, the employer would be automatically liable and no defense would be available.

There is an exception to the general rule that applies when the supervisor's harassment was not tangible – i.e., the case involves a hostile work environment instead of a firing, demotion, pay cut, etc. In this situation, the employer avoids liability if it proves the elements of the following affirmative defense:

> The employer exercised reasonable care to prevent and correct promptly any harassing behavior; *and*
>
> The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

An example of a situation where an employer would not be liable for the unlawful harassment of a supervisor is as follows:

Carla, an Asian American, claims that she was subjected to frequent offensive comments based on race and sex by her first-level supervisor. Carla was aware of the employer's anti-harassment complaint procedures, but did not notify her employer; nor were there extenuating circumstances explaining her failure to follow the employer's procedures. The employer learned of the harassment from Carla's coworker, and immediately conducted an investigation. The employer reprimanded the supervisor and transferred him to another division. The employer is

not liable for the harassment because it took reasonable preventative and corrective measures and Carla unreasonably failed to complain about the harassment.

Conduct of Owner, President, Partners, or Officers

If the harasser is of a sufficiently high rank to fall "within that class . . . who may be treated as the organization's proxy, "the employer cannot raise the affirmative defense even if the harassment did not result in a tangible employment action. Examples of officials who qualify as "proxies" or "alter egos" include a president, an owner, partners, and corporate officers.

Conduct of Co-Workers and Non-Employees

For the unlawful harassing conduct of non-supervisory employees, or non-employees over whom the employer has control (e.g., independent contractors or customers on the premises), the employer will be liable if it knew or should have known about the conduct and failed to take prompt and appropriate corrective action. For example:

Charles is a frequent visitor on XYZ Senior Community's "neighborhood days," when XYZ allows senior citizens in the neighborhood to visit its residents. During his visits, Charles often yells derogatory comments about Blacks and Latinos at Cheryl, a Black employee of Puerto Rican national origin, and has even pushed and tripped her on a few occasions. Cheryl complains about the conduct to a manager, and is told that XYZ cannot take any action against Charles because he is not a resident. On subsequent visits, Charles continues to yell racial and ethnic slurs at Cheryl, and she files an EEOC charge. XYZ is liable for the actions of Charles, a non-employee, because it had the power to control Charles's access to the premises, was aware of Charles's offensive conduct, and did not take corrective action.

This means that an employer should have an anti-harassment policy and complaint procedure and should be vigilant enough to detect harassing conduct that it reasonably should know about even without a complaint. It should also create an environment in which employees feel free to raise concerns, and are confident that those concerns will be addressed. Victims of harassment, in turn, should make sure management knows about the harassing conduct.

Affirmative Action and Workplace Diversity Programs

Affirmative Action

Affirmative action can be traced to a very basic premise: "All men are created equal."

No effort is more basic to who we are as people or as a nation. It touches all aspects of life: how people transact business; what they can learn; where they reside, eat, or play. In any of these settings, there are certain characteristics about a person that should not affect decisions impacting that person's right to life, liberty or pursuit of happiness. The basic underlying objective has been and will always be to treat all people equally.

To achieve this objective, antidiscrimination laws were enacted that specifically tell us certain factors we cannot consider when making decisions that affect others. With time, lawmakers realized that just forbidding wrong behavior wasn't enough. Illegal discrimination continued, and case by case prosecution wasn't getting us closer as a nation to the reality of treating everyone equally. Consequently, affirmative action measures were established as a tool to fight against the present effects of past illegal discrimination. They were intended to provide a widespread, proactive approach to combat illegal discrimination. Their ultimate objective, however, has always been to make equal opportunity a reality.

Affirmative Action: leveling the playing field.

The phrase *affirmative action* was first used officially by the government in 1961 by President Kennedy in Executive Order 10952, which created the Equal Employment Opportunity Commission. He went on to declare that federal contractors shall "take *affirmative action* to ensure that applicants are employed, and employees are treated during their employment, without regard to race, creed, color or national origin."

Also in 1965, President Johnson issued Executive Order 11246, which many point to as the beginning of affirmative action as we know it today. Executive Order 11246 shifted affirmative action enforcement to the Department of Labor, which led to federal regulations. These regulations essentially gave birth to affirmative action plans.

Also in 1965, President Johnson gave the commencement speech at Howard University where he articulated the reasoning behind these new affirmative action measures. He said: a legal right...

"is not enough. You do not wipe away the scars of centuries by saying: 'Now, you are free to go where you want, do as you desire, and choose the leaders you please.' You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying you are free to compete with all the others, and still justly believe you have been completely fair. Thus it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and more profound stage of the battle for civil rights. We seek not just freedom, but opportunity – not just legal equity but human ability – not just equality as a right and a theory, but equality as a fact and as a result."

Affirmative Action: remedial action.

A remedy is a legal means of preventing or correcting a wrong, or enforcing a right. Affirmative action programs try to prevent the wrong of discrimination, or correct the entrenched systems of

racism, sexism and segregation that lead to it, in order to prevent future discrimination. Making equal treatment a reality is the objective.

Racism, rather than being self-correcting, is self-perpetuating. The disadvantages to people of color and the benefits to white people will be passed on to each succeeding generation unless remedial action is taken. The disadvantages to people of color become built into institutional practices which may be race neutral in intent, yet adversely affect people of color. It's necessary to take positive steps to eliminate and compensate for these institutional effects of racism, even when there isn't any discernible discriminatory intent.

Former U. S. Supreme Court Justice Blackman stated that we cannot eradicate caste without the system of preferences that affirmative action entails, and that, ultimately, we cannot get beyond racism without taking race into account. Affirmative action measures are by their very nature remedial.

Does Affirmative Action substitute one discrimination for another?

Affirmative action initiatives, by their nature, create a tension with equal opportunity laws. Equal opportunity laws say don't consider the protected class characteristics of an individual, while affirmative action programs, by their nature, consider them. The resolution of this dichotomy is at the heart of the issues in the developing body of affirmative action law.

The issue was directly addressed in 1979 in the case of United Steelworkers v. Weber. The question before the U.S. Supreme Court was whether Title VII of the Civil Rights Act of 1964 allowed employers to take race-conscious steps to eliminate racial imbalances. The Court declared that race-conscious affirmative action plans were allowed.

There are these issues to consider in determining whether prescribed affirmative action is proper. First, there must be sufficient evidence of a history of discrimination in the particular setting at issue. If so, the proscribed affirmative action must further a compelling governmental interest and must be narrowly tailored to meet that interest.

Today, a narrow majority of the Court seems to be indicating that taking race into account to break down the patterns of segregation can be as bad as segregation itself.

However, the government has not been totally disqualified from considering race in responding to racism. What the Court has done is apply greater scrutiny when deciding whether particular affirmative action initiatives are sufficiently narrowly tailored to meet the compelling governmental interest of equal enjoyment of life and liberty by the citizens of the United States.

Title VII permits diversity efforts designed to open up opportunities to everyone. For example, if an employer notices that African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force, the employer could adopt strategies to expand the applicant pool of qualified African Americans such as recruiting at schools with high African American enrollment. Similarly, an employer that is changing its hiring practices can take steps to ensure that the practice it selects minimizes the disparate impact on any racial group. For example, an employer that previously required new hires to have a college degree could change this requirement to allow applicants to have a college degree or two years of relevant experience in the field. A need for diversity efforts may be prompted by a change in the

population's racial demographics, which could reveal an under representation of certain racial groups in the work force in comparison to the current labor pool.

Affirmative action, in contrast, "means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." Affirmative action under Title VII may be:

(1) court-ordered after a finding of discrimination
(2) negotiated as a remedy in consent decrees and settlement agreements, or
(3) conducted pursuant to government regulation.

Also, employers may implement voluntary affirmative action plans in appropriate circumstances, such as to eliminate a manifest imbalance in a traditionally segregated job category. In examining whether such a voluntary affirmative action plan is legal under Title VII, courts consider whether the affirmative action plan involves a quota or inflexible goal, whether the plan is flexible enough so that each candidate competes against all other qualified candidates, whether the plan unnecessarily trammels the interests of third parties, and whether the action is temporary, e.g., not designed to continue after the plan's goal has been met.

An affirmative action plan implemented by a public sector employer is subject to both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution. Some federal courts have held that public law enforcement agencies may satisfy the Equal Protection Clause if an "operational need" justifies the employer's voluntary affirmative action efforts. In the higher education context, the Supreme Court decided in *Grutter v. Bollinger* that attaining a diverse student body can justify considering race as a factor in specific admissions decisions at colleges and universities without violating the Equal Protection Clause or Title VI of the Civil Rights Act of 1964. The Supreme Court has not yet ruled on whether an "operational need" or diversity rationale could justify voluntary affirmative action efforts under Title VII, but a number of legal scholars and practitioners have debated the issue.

The Commission encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII. Further, the Commission believes that "persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes" of the statute. However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law. EEOC investigators should consult with attorneys from their legal unit on charges of discrimination involving affirmative action and diversity plans.

Although race should seldom be taken into account in the hiring context, the Supreme Court has repeatedly held that Title VII does not prohibit all race-conscious actions taken voluntarily by employers. *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In the Civil Rights Act of 1991, Pub.L. No. 102-166, Congress specified that nothing in the Act "shall be construed to affect….affirmative action, or conciliation agreements, that are in accordance with the law." In short, the Court and Congress have concluded that affirmative action can be a useful tool to combat barriers to equal employment opportunity. The Commission consistently encourages employers to adopt proactive measures, or "best practices," that address such barriers while ensuring fairness to all employees.

Courts typically apply a three-part test to evaluate voluntary affirmative action plans under Title VII. First, there must be a manifest imbalance in the relevant workforce. Second, the plan must be temporary, seeking to eradicate traditional patterns of segregation. Finally, the plan cannot "unnecessarily trammel the rights" of non-beneficiaries. *See, e.g., Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987).

Voluntary affirmative action programs implemented by governmental entities may also be scrutinized under the Equal Protection Clause of the U.S. Constitution. Voluntary affirmative action is constitutional when it serves a compelling government interest and is narrowly tailored to achieve that goal. Two cases, in particular, offer insight on the Supreme Court's views on affirmative action in the context of higher educational institutions. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court held that protecting minorities from faculty layoffs was unconstitutional but noted that "[i]n cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." The Court has also noted the importance of diversity in higher education, at least with respect to students, holding that achieving a diverse student body is a "compelling interest" for higher educational institutions. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003).

Affirmative Action Guidelines for Federal Contractors - Executive Order 11246

Since 1965, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has been committed to ensuring that Government contractors comply with the equal employment opportunity (EEO) and the affirmative action provisions of their contracts.

OFCCP administers and enforces Executive Order 11246, as amended, which prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over $10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin.

The Executive Order also requires Government contractors to take affirmative action to insure that equal opportunity is provided in all aspects of their employment.

Affirmative Action Requirements

Each Government contractor with 50 or more employees and $50,000 or more in government contracts is required to develop a written affirmative action program (AAP) for each of its establishments.

A written affirmative action program helps the contractor identify and analyze potential problems in the participation and utilization of women and minorities in the contractor's workforce.

If there are problems, the contractor will specify in its AAP the specific procedures it will follow and the good faith efforts it will make to provide equal employment opportunity.

Expanded efforts in outreach, recruitment, training and other areas are some of the affirmative steps contractors can take to help members of the protected groups compete for jobs on equal footing with other applicants and employees.

Compliance Reviews

OFCCP conducts compliance reviews to investigate the employment practices of Government contractors. During a compliance review, a compliance officer examines the contractor's affirmative action program; checks personnel, payroll, and other employment records; interviews employees and company officials; and investigates virtually all aspects of employment in the company.

The investigator also checks to see whether the contractor is making special efforts to achieve equal opportunity through affirmative action. If problems are discovered, OFCCP will recommend corrective action and suggest ways to achieve equal employment opportunity.

Complaint Investigations

Individuals may file complaints if they believe they have been discriminated against by federal contractors or subcontractors. Complaints also may be filed by organizations on behalf of the person or persons affected.

Complaints must be filed within 180 days from the date of the alleged discrimination, although filing time can be extended for a good reason.

If a complaint filed under Executive Order 11246 involves discrimination against only one person, OFCCP will normally refer it to the EEOC. Cases involving groups of people or indicating patterns of discrimination are generally investigated and resolved by OFCCP. Complaints may be filed directly with any of OFCCP's regional or district offices throughout the country, or with OFCCP in Washington, D.C.

Enforcing Contract Compliance

When a compliance review discloses problems, OFCCP attempts to work with the contractor, often entering into a conciliation agreement. A conciliation agreement may include back pay, job offers, seniority credit, promotions or other forms of relief for victims of discrimination. It may also involve new training programs, special recruitment efforts, or other affirmative action measures.

When conciliation efforts are unsuccessful, OFCCP refers the case to the Office of the Solicitor for enforcement through administrative enforcement proceedings. A contractor cited for violating EEO and affirmative action requirements may have a formal hearing before an administrative law judge.

If conciliation is not reached before or after the hearing, sanctions may be imposed. For example, a contractor could lose its government contracts or subcontracts or be debarred, i.e., declared ineligible for any future government contracts.

Workplace Diversity Programs

John F. Kennedy said, “If we cannot end now our differences, at least we can help make the world safe for diversity”.

The workplace is a diverse culture and becoming more so every day. According to the U.S. Bureau of the Census, Resident Population Projections, by 2050, minorities are projected to rise from one in every four Americans to almost one in every two. Each of these individuals has a unique set of characteristics, talents, skills, physical abilities, background, appearances, thoughts, feelings, beliefs and viewpoints. It is the array of those differences that make the workplace so diverse.

Workplace diversity programs foster awareness and help employees to appreciate those differences rather than complaining about why someone differs in thought, behavior or ability. Once focus is changed from seeing the differences to appreciating the uniqueness, one can see the benefits that these differences can bring. They allow for variety, innovation and more creative ways to conquer everyday challenges.

Diversity is one of an employers’ greatest assets. Recognizing the value of a diverse workforce is the basis of workplace diversity. It involves valuing the differences in every employee in the workplace and developing a culture where the diverse backgrounds, skills, talents and views of all staff and those seeking employment with the department are recognized, valued and encouraged. Workplace diversity also embraces employment equity where persons seeking employment with the department receive fair and equitable treatment, where employment decisions are based on merit and where all staff can work in an environment that is free from discrimination, harassment and bullying. Workplace diversity programs function to:

- Raise awareness of and promote workplace diversity in the company.
- Integrate the principles of workplace diversity into business and human resource management policies, practices and systems.
- Encourage staff to identify and maximize use of their life skills and experiences in the workplace.
- Encourage supervisors to recognize and draw on the diversity of their staff. Provide for staff to balance their work and personal life-style responsibilities.
- Ensure staff are not subjected to discrimination or unfair treatment in the workplace on grounds such as ethnicity, race, gender, age, physical or mental disability or personal life-style responsibilities.
- Uphold and promote the EEOC’s values and Code of Conduct and continue to work towards eliminating all forms of harassment and bullying in the workplace.
- Ensure staff and those seeking employment with the department receive fair and equitable treatment in accessing employment opportunities, staff selection processes, career development and mobility arrangements.

Training is usually a key step in promoting diversity awareness. There are a variety of courses that can be purchased or created to teach people the value of diversity.

Employers can also provide opportunities for employees to showcase their talents or culture. For example, create a diversity committee in the company and ask them to set a theme each

month to highlight some type of diverse trait of their workplace. Other examples of diversity programs include:

- Schedule visits to various parts of your business so employees can learn more about others who work in different parts of the business.
- Offer training and education programs on "valuing diversity" or “managing a diverse workplace”.
- Enforce a "zero-tolerance" policy against any acts of discrimination in the workplace.
- Create cross-functional teams or project groups where workers from different jobs meet frequently and take responsibility for getting the work done and solving problems.
- Offer mentoring programs or encourage employees to participate in community mentoring programs that may introduce them to a new culture.
- Create hot-spot intervention programs that identify and deal with workplace diversity issues.
- Continue to raise awareness through posters and slogans throughout the workplace.
- Hold focus groups that illicit opinion of a wider range of people.
- Offer more systematic career guidance and planning programs.
- Create performance appraisal systems that are non-discriminatory.
- Establish outreach programs, such as internship programs, scholarships, targeting recruitment in the community, and lectures at schools.
- Have employees demonstrate their creative abilities whether artistic, dramatic, written etc.
- Focus on a specific heritage or culture, including speakers, exhibits, dress, articles, photographs.
- Hold a potluck lunch with an international theme. Ask employees to bring different types of food to share, charge a small amount to sample each type of food and donate the proceeds to a local charity.
- Provide open discussion groups as "brown bag" lunches with a variety of employees who are willing to participate to talk about their particular background, origin or special interest.
- Invite professional or community expert speakers to talk about diversity.

Goals of Diversity Training

The goals of diversity training are to help employees understand:

- The legal and statutory requirements for Equal Employment Opportunity and Affirmative Action which support diversity in the Federal government and in private industry;
- That diversity is the similarities, as well as the differences, among and between individuals at all levels of the organization, and in society at large; and
- How diversity contributes to richness in the organization by having a variety of views, approaches, and actions to use in strategic planning, tactical planning, problem solving, and decision-making.

Diversity training usually focuses on:

- Interpersonal skills employees need to provide services to, work with, and manage persons and groups with similarities and differences;

- Behavior employees are expected to exhibit in all workplace contacts -- behavior that respects each individual, preserves human dignity, honors personal privacy, and values individual differences as well as common characteristics; and
- The work environment and its relationship to effectiveness and efficiencies in organizational performance.

Management's goals for diversity training may include:

- Increasing employee awareness of equal employment opportunity laws;
- Increasing employee understanding of how diverse perspectives can improve organizational performance;
- Preventing illegal discrimination or harassment in the workplace;
- Improving workplace relations;
- Building more effective work teams;
- Improving organizational problem-solving; and
- Improving service to customers.

Staff Roles

In order for a Workplace Diversity Program to be successful, everyone within the company has to commit to fulfilling their role. Employees in leadership roles need to set examples by embracing diversity and using it to foster growth and creativity in their groups. Individual employees need to commit to treating one another with respect and complying with company guidelines that prohibit harassment. The following are some examples of the ways in which people in the workplace can contribute to the success of the program.

The Company should:

- use the performance management process to draw on the diverse backgrounds and skills of staff and to develop these qualities in the workplace;

- comply with anti-discrimination legislation to help prevent and eliminate any employment related disadvantage attributable to race, color, gender, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, or social origin;

- promote workplace diversity and remain proactive in eliminating all forms of harassment and bullying in the workplace;

- consult with staff in developing and maintaining workplace practices that provide flexibility for staff to balance their work and personal life-style commitments;

- ensure selection committees:

    - are aware of and consider the benefits of moving towards a more diverse workforce;
    - consider the interests of applicants who may possibly be subject to employment-related disadvantage because of ethnicity, race, gender or disability;
    - focus on any special facilities that an applicant may require to participate in a selection process (e.g. wheel chair access, provision of interpreters);

- are aware of the concept of reasonable adjustment which provides for physical and organizational changes to workplace design to enable a person with a disability to perform to their full potential;
- base their employment decisions on merit;

All staff in the department has a responsibility for fostering a culture in the workplace where diversity is valued and supported. **Employees are expected to**:

- treat each other with courtesy and respect and foster good working relationships;
- maintain appropriate standards of ethical behavior, conduct and performance in accordance with the EEOC values and Code of Conduct;
- draw on their diverse backgrounds, skills and talents and focus on areas where these attributes may be enhanced and of value to the working environment;
- listen to the views of others without prejudice; and
- commit to eliminating all forms of discrimination, harassment and bullying in the workplace.

Supervisors are especially important in setting an example for the group they oversee by:

- displaying a positive commitment to workplace diversity;
- using the performance management process to maximize the diverse qualities of your staff in the workplace;
- encouraging and supporting staff in managing their work and personal lifestyle commitments;
- dealing with inappropriate behavior in the workplace;
- seeking a diverse range of views and encouraging staff to contribute; and
- ensuring that staff selection processes adhere to the merit principle and that issues of diversity are considered.

In addition to the above, the **Executive will need to**:

- demonstrate a commitment to the principles of equity and diversity and support the aims of the Workplace Diversity Program; and
- lead by example in fostering a culture where the diversity of the workforce is recognized and valued.

Diversity training should adhere to certain principles. It should:

- Have clearly stated goals and learning objectives that relate to the mission and needs of the organization;
- Use appropriate training approaches, methods and materials;
- Provide advance information to employees on course content and instruction methods, attendance policy, and alternatives for learning;
- Be provided in a supportive and non-coercive environment;
- Be conducted only by experienced and fully qualified instructors; and
- Be monitored and regularly evaluated.

Principles for Implementing Workplace Diversity Training Programs

Each workplace is unique and the workplace diversity programs should be customized to fit the environment in which they will be implemented. The following steps should be followed in order to establish a program that works for the individuals in any given organization:

1. Establish Clearly Stated Goals and Learning Objectives that Relate to the Mission and Needs of the Organization.

Clearly stated goals and learning objectives are strongly recommended for all diversity programs.

- Do a thorough needs analysis and link diversity program to needed improvements in organizational and/or individual performance.
- From identified performance improvement needs, identify goals for the program.
- Ensure program design is consistent with top management direction and guidance.
- Specify learning objectives in behavioral terms.
- Obtain employee and management support for the goals and objectives.

2. Use Appropriate Approaches, Methods and Materials.

Program and/or training approaches, methods, and materials, to be effective, should consider the organization's culture, the intended audience for the program, and the nature of the diversity issues that the organization wishes to address. The specific approaches, methods, and materials should be thoroughly planned.

- Use best practices of others as benchmarks for diversity programs.
- Document, or have vendors document, all methodologies employed and how they support desired outcomes.
- Diversity programs may use a variety of methodologies including reading, lecture, discussion, case study, role play, structured experience, or multimedia presentations.
- Make sure planned discussions of individual experiences will be voluntary and limited to work-related issues. If an employee needs to discuss personal issues or conflicts, he or she should seek assistance from the agency Employee Assistance Program.
- Consider having any training course content and exercises reviewed by an experienced training official who is technically knowledgeable and skilled in identifying psychological issues that may arise during the training.
- Address any risk concerns identified by persons in lines of authority and accountability prior to conducting activities or training.
- Pilot the diversity programs or training first to human resource and diversity specialists and use participant feedback to modify the course.
- Consider using "Train the Trainer" programs to facilitate consistency in training program delivery.

3. Provide Employees Advance Information About the Program.

Consistent with a company's authority to assign work, employees may be assigned to groups, sessions or training on a voluntary or mandatory basis. In either case, companies should

provide advance information to employees on content and instructional methods, attendance policy, and alternative opportunities.

Although diversity programs and training are not required by statute or regulation, a company may require employees to attend for the good of the business.

4. Conduct Programs and/or Training in a Supportive, Non-Coercive Environment.

The environment should be such that all attendees, including those who share information about work experiences, are confident that no harm will come to them and that there will be no threat to their careers.

- Provide programs and/or training in a supportive and non-coercive environment where participants may feel safe discussing workplace experiences and practicing appropriate interpersonal skills and expected behaviors.
- Obtain consensus on the "ground rules" for group interaction early in the activity, including agreement on what is permissible to discuss (and what is not).
- Assure that programs and/or training are done with proper regard for participant's privacy and constitutional rights.
- Allow sufficient time for processing each learning exercise and continually monitor participant reaction. Take appropriate measures to address issues if they arise.
- Determine if managers and line supervisors should attend programs/training with the people they supervise. If employees attend programs/training with their supervisors, both should be advised of any company policy regarding disclosure of work-related diversity issues.

5. Monitor the Activity.

Monitor delivery to assure proper group management and desired management results for the diversity program/training.

- Allow for immediate participant feedback in or outside of the group.
- Inform participants where to direct complaints about the program, including anonymous feedback.
- Respond quickly and appropriately to any complaint about the diversity program/training.

6. Measure Success

Companies should evaluate the success of their workplace diversity programs in terms of the extent to which it meets established goals and learning objectives. Specific areas of assessment include, employee satisfaction, increased employee understanding of workforce diversity issues, demonstrated interpersonal skills and appropriate workplace behaviors or improved organizational performance. Success can be measured by:

- Feedback through staff surveys.
- Feedback on specific initiatives.
- Extent of flexible work practices in place to balance work and personal life style responsibilities.

- Number of reported grievances, incidents of harassment or bullying.
- Comparison with service wide diversity data.
- Extent to which diversity issues are raised as a concern in exit interviews.

The program should be ever evolving and incorporate feedback from employees and managers according to what is working. Also, as the workforce changes, their may be an opportunity to learn about a new culture, view point or experience.

Recent Case Settlements And Court Decisions

In the News

RICCI ET AL. *v*. DESTEFANO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07–1428. Argued April 22, 2009—Decided June 29, 2009

New Haven, Conn. (City), uses objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, a rancorous public debate ensued. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City threw out the results based on the statistical racial disparity. Petitioners, white and Hispanic firefighters who passed the exams but were denied a chance at promotions by the City's refusal to certify the test results, sued the City and respondent officials, alleging that discarding the test results discriminated against them based on their race in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964. The defendants responded that had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the defendants, and the Second Circuit affirmed.

Held: The City's action in discarding the tests violated Title VII.

Comment

In an eagerly anticipate decision, the U.S. Supreme Court ruled that the City of New Haven improperly discriminated on the basis of race when it refused to certify the results of a promotional test on which white and Hispanic firefighters outperformed their black colleagues. A 5-4 majority of the Court rejected the City's argument that it disregarded the test results to avoid violating Title VII's disparate-impact provisions.

In its 5-4 reversal, the Supreme Court ruled that an employer, such as the City of New Haven, may take action to avoid racially disparate impact only if there is a "strong basis in evidence" that the employer would be subject to liability. In particular, an employer would have to have a "strong basis in evidence" that its action was (1) not job related and consistent with business necessity or (2) that there exists an equally valid, less discriminatory alternative. Here, Justice Kennedy found that the City of New Haven had no substantial basis in evidence for either (1) or (2). Justice Kennedy wrote the following: "Whatever the City's ultimate aim--however well intentioned or benevolent it might have seemed--the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white."

In his concurrence Justice Antonin Scalia wrote the following: "I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provision of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"

Significant EEOC Cases Addressing Race/Color

General

In August 2008, a tobacco retail chain agreed to pay $425,000 and provide significant remedial relief to settle a race discrimination lawsuit on behalf of qualified black workers who were denied promotion to management positions. The three-year consent decree also requires the company, which has stores in Arkansas, Missouri, and Mississippi, to train all managers and supervisors on preventing race discrimination and retaliation; create job descriptions for manager and assistant manager positions that outline the qualifications for each position; develop a written promotion policy that will include the procedures by which employees will be notified of promotional opportunities; report assistant manager and manager vacancies, the name and race of all applicants for the position, and the name of the successful candidate; report the names of all African Americans who are either hired or promoted to manager or assistant manager positions; and report any complaints of race discrimination and describe its investigation in response to the complaint. **See *EEOC v. Tobacco Superstores, Inc., No. 3:05 CV 00218 (E.D. Ark. settled Aug. 2008).*)**.

In May 2008, the EEOC obtained a settlement of $1.65 million in a racial harassment case filed against a general contractor and its subsidiaries on behalf of a class of African American employees who were subjected to egregious racial harassment at a construction site in Bethlehem, Pennsylvania. The harassment included a life size noose made of heavy rope hung from a beam in a class member's work area for at least 10 days before it was removed; the regular use of the "N-word"; racially offensive comments made to black individuals, including "I think everybody should own one" and "black people are no good and you can't trust them" and "black people can't read or write." Additionally, racist graffiti was written in portable toilets, with terms such as "coon"; "if u not white u not right"; "white power"; "KKK"; and "I love the Ku Klux Klan." Additional remedies were injunctive relief enjoining each defendant from engaging in racial harassment or retaliation; anti-discrimination training; the posting of a notice about the settlement; and reporting complaints of racial harassment to the EEOC for monitoring. **See *EEOC v. Conectiv,et al. Civil Action No. 2:05-cv-00389 (E.D. Pa. settled May 5, 2008)***.

In August 2007, a renowned French chef agreed to pay $80,000 to settle claims that his upscale Manhattan restaurant discriminated against Hispanic workers and Asian employees from Bangladesh in job assignments. The aggrieved employees alleged that they were restricted to "back of the house" positions such as busboys and runners and refused promotions to "front of the house" positions such as captains, which instead went to Caucasian workers with less experience and seniority. They also alleged that they were subjected to racial insults and harassment when they complained. **See *EEOC v. Restaurant Daniel,* No. 07-6845 (S.D.N.Y. August 2, 2007)**.

In June 2007, EEOC obtained $500,000 from a South Lyon, Mich., steel tubing company, which, after purchasing the assets of its predecessor company, allegedly refused to hire a class of African American former employees of the predecessor. Though the company hired 52 of its predecessor's former employees, none of them were Black. EEOC charged that many of the white employees hired had significantly less experience than the black former employees represented by the EEOC, and in

some cases had actually been trained by the same African American employees who were denied hire. The suit also included other black applicants who were denied hire in favor of less qualified white applicants. **See *EEOC v. Michigan Seamless Tube*, No. 05-73719 (E.D. Mich. June 8, 2007)**.

In February 2007, EEOC obtained a $5 million settlement resolving two consolidated class action employment discrimination lawsuits against a global engine systems and parts company, asserting that the company engaged in illegal discrimination against African-Americans, Hispanics and Asians at its Rockford and Rockton, Ill., facilities with respect to pay, promotions and training. **See *EEOC v. Woodward Governor Company,* No. 06-cv-50178 (N.D. Ill. Feb. 2007).**

Youth@ Work

In September 2006, the Korean owners of a fast food chain in Torrance, California agreed to pay $5,000 to resolve a Title VII lawsuit alleging that a 16-year old biracial girl, who looked like a fair-skinned African American, was refused an application for employment because of her perceived race (Black). According to the EEOC lawsuit, after a day at the beach with her Caucasian friends, the teen was asked if she would request an application on her friend's behalf since the friend was a little disheveled in appearance. The owner refused to give the teen an application and told her the store was not hiring anymore despite the presence of a "Help Wanted" sign in the window. After consultation among the friends, another White friend entered the store and was immediately given an application on request. **See *EEOC v. Quiznos*, No. 2:06-cv-00215-DSFJC (C.D. settled Sept. 22, 2006).**

In December 2005, EEOC resolved this Title VII lawsuit alleging that a fast food conglomerate subjected a Black female employee and other non-White restaurant staff members (some of them minors) to a hostile work environment based on race. The racial harassment included a male shift leader's frequent use of "nigger" and his exhortations that Whites were a superior race. Although the assistant manager received a letter signed by eight employees complaining about the shift leader's conduct, the shift leader was exonerated and the Black female employee who complained was fired. The consent decree provided $255,000 in monetary relief: $105,000 to Charging Party and $150,000 for a settlement fund for eligible claimants as determined by EEOC. **See *EEOC v. Carl Karcher Enterprises, Inc., d/b/a Carl's Jr. Restaurant*, No. CV-05-01978 FCD PAW (E.D. Ca. Dec. 13, 2005)**

In October 2005, an elevator manufacturing company agreed to pay $75,000 to an 18-year-old African American welder and $100,000 to 12 other Black employees in an EEOC suit alleging racial harassment of the teen and a pattern of discrimination against African American employees at the Middleton, Tennessee facility. Harassment of the teen included calling him a "Black [S.O.B.]," telling racially offensive jokes, hiding his safety gloves, placing stink bombs under his workstation, and telling him that the vending machines do not take "crack money." **See *EEOC v. Thyssenkrupp Elevator Manufacturing, Inc.,* Civil Action No. 03-1160-T (W.D. Tenn. Oct. 2005).**

EMPLOYMENT PRACTICES

Hiring

In July 2008, EEOC resolved a race discrimination and retaliation suit for $140,000 against a Mississippi U-Haul company. The company was accused of discriminating on the basis of race when it hired the son of a selecting official rather than a veteran African American manager, to serve as the company's marketing company president. The Black manager had worked for U-Haul for ten years as a reservation manager, assistant manager, general manager, area field manager and field relief manager, and held a bachelor's degree in business manage¬ment as well as having received various awards for performance. The company, however, altered the job's requirements and hired the executive's son who lacked a college degree and had scanty experience compared with the Black manager. The manager complained and the company disciplined and fired him. The company has agreed to adopt an online employee handbook and other documents spelling out company policies and practices; to post all vacancies for marketing company president; to provide training on discrimination and retaliation to all board members; and to provide periodic reports to the EEOC. **See *EEOC v. U-Haul Co. of Mississippi,* Civil Action No. 3:06cv516 (S.D. Miss. filed July 2008).**

In June 2008, a beauty supply chain agreed to pay $30,000 to settle a race discrimination lawsuit in which the EEOC charged that it rescinded a job offer after learning the successful applicant was Black. In a deposition, the former acting store manager of the West Orange store gave sworn testimony that she had a telephone conversation with the district manager after the applicant had applied, and the district manager "told [me] she didn't want another black person working in the store." When the selectee arrived at the store on her starting date, she was informed that she could not be hired due to her race because there would have been too many African Americans at the store. **See *EEOC v. Sally Beauty Supply LLC*, Civil Action No. 1:07cv644 (E.D. Tex. settled June 23, 2008).**

In September 2007, EEOC upheld an Administrative Judge's (AJ) default judgment in favor of complainant, a Staff Nurse Supervisor, who had alleged race discrimination when she was not selected for a Nurse Manager position. The AJ sanctioned the agency for failing to timely investigate the complaint. Relief included retroactive promotion, back pay and a tailored order to allow complainant to submit her request for fees incurred solely for the successful prosecution of the appeal. **See *Royal v. Department of Veterans Affairs,* EEOC Appeal No. 0720070045 (Sep. 10, 2007).**

Customer Preference

In January 2007, EEOC charged a Minnesota-based frozen food home delivery service with discriminating against qualified African American job applicants at its Missouri facility. According to the lawsuit, the company refused to hire Black applicants because it was concerned that its customers would be uncomfortable with a Black man coming to their home and would be intimidated by him. Consequently, despite promising the Black applicant he would be hired for a warehouse position, the company hired a less qualified White applicant. **See *EEOC v. Schwan's Sales,* No. 4:07-CV-00221-AGF (E.D. Mo. Jan. 29, 2007).**

In October 2005, the EEOC obtained $650,000 for named claimants and an additional $70,000 for "unknown class members" in a Title VII lawsuit alleging that the owner of assisted living and other senior facilities in 14 states engaged in discriminatory hiring practices based on race and/or color. Specifically, the lawsuit alleged that defendant's former general manager refused to hire Blacks and other non-Caucasian applicants into nursing support, food service, and housekeeping positions at an assisted living facility and coded the applications of minority applicants because she believed residents preferred White employees and did not want minorities to come into their rooms. Additionally, defendant failed to retain employment applications as required by EEOC's regulations implementing section 709(c) of Title VII. Pursuant to a 42-month consent, defendant is prohibited from discriminating or retaliating and is required to advise recruiting sources that it hires without regard to race or color. **See *EEOC v. Merrill Gardens, LLC,* No. 1:05-CV-004 (N.D. Ind. Oct. 6, 2005)**

In September 2005, the nation's largest maker and retailer of wooden play systems agreed to pay six people a total of $275,000 to resolve an EEOC lawsuit, which alleged that the company's owner pursued a policy of limiting the hiring and promotion opportunities of African Americans and Hispanics and fired a white district manager in retaliation for recommending two blacks for district manager openings after telling him that "our customers can't relate to minorities and therefore we must be choosy who we hire." **See *EEOC v. Creative Playthings, Inc.*, No. 04-cv-3243 (E.D. Pa. press release issued Sep. 15, 2005).**

Hispanic Preference

In September 2006, EEOC filed suit against a temporary staffing agency, alleging that it failed to hire African American applicants because of their race and American national origin for warehouse positions and instead hired Hispanic individuals with less experience. **See *EEOC v. Paramount Staffing, Inc.*, No. 2:06-cv-02624 (W.D. Ten. Sept. 2007).**

In August 2006, EEOC filed a lawsuit against a Charlotte, N.C. supermarket chain, alleging that it fired or forced long-term Caucasian and African American employees to resign and replaced them with Hispanic workers after it took over a particular facility. In January 2008, the supermarket chain paid $40,000 to settle the case. In addition, the consent decree required the company to distribute a formal, written anti-discrimination policy; provide periodic training to all its employees on the policy and on Title VII's prohibition against national origin and race discrimination; send periodic reports to the EEOC concerning employees who are fired or resign; and post a "Notice to Employees" concerning this lawsuit. **See *EEOC v. E&T Foods, LLC, d/b/a Compare Foods*, Civil Action No 3:06-cv-318 (W.D.N.C. settled Jan. 28, 2008).**

Job Segregation

In September 2007, EEOC filed race discrimination suit against a Michigan-based freight and trucking company because it refused to hire a Black female applicant for a part-time customer service position, even after she was designated best qualified and had passed the requisite drug test. According to the lawsuit, the company's regional manager vetoed her hire because he was concerned about a Black customer service representative working with customers and drivers in southeast Missouri. **See *EEOC v. Con-way Freight, Inc.,* No. 4:07-cv-01638 (D. Mo. Sept. 20, 2007).**

In July 2007, the EEOC filed suit against a supply company in Arizona, alleging that it assigned an African American employee and his Hispanic team member to less desirable, lower-paying jobs than their Caucasian counterparts because of the Black employee's race. Additionally, the lawsuit alleged that the supervisor responsible for determining job assignments used racial slurs such as "pinche negro," the n-word, and other racially derogatory comments to refer to the Black employee **See *EEOC v. L&W Supply Co.*, (D. Ariz. July 19, 2007).**

In July 2007, EEOC and Walgreens agreed to a proposed settlement of $20 million to resolve allegations that the Illinois-based national drug store chain engaged in systemic race discrimination against African American retail management and pharmacy employees in promotion, compensation and assignment. In addition to the monetary relief for an estimated 10,000 class members, the consent decree prohibits store assignments based on race. **See *EEOC v. Walgreen Co*., No. 07-CV-172-GPM; *Tucker v. Walgreen Co*. No. 05-CV-440-GPM (S.D. Ill. July 12, 2007);**

Terms and Conditions

An Indiana nursing home was ordered to pay $56,000 and furnish other relief to settle a race discrimination lawsuit filed by the EEOC. According to the EEOC's lawsuit, the nursing home discriminated against a class of black employees by subjecting them to disparate terms and conditions of employment due to their race. The EEOC alleged that the home made job assignments based on the race of its employees -- specifically, the employer acceded to the requests of some patients and residents that black employees not be assigned to work in their rooms. The lawsuit also alleged that the employer discharged an African American employee due to her race. The decree also requires the home to provide training to its managers, supervisors, and human resources personnel on the topic of race discrimination, post a notice of non-discrimination at its worksite and submit reports to the EEOC detailing its compliance with the decree. **See *EEOC v. Heartland Employment Services, LLC*, Civil Action No.1:08-cv-1292-WTL-TAB (IN. Apr. 28, 2009).**

In January 2008, the EEOC settled a race and national origin discrimination case against a Nevada U-Haul company for $153,000. The EEOC had charged that the company subjected Hispanic and Asian/Filipino employees to derogatory comments and slurs based on their race and/or national origin. Hispanic employees also were subjected to comments such as "go back to Mexico." In addition, Filipino mechanics were denied promotions while less qualified white employees were promoted. The EEOC also charged that Hispanic and Filipino employees were told they had to be "white to get ahead" at the company. As part of the injunctive relief, U-Haul further agreed to provide training to all employees in its Nevada locations, and provide annual reports to the EEOC regarding its employment practices in its Nevada branches. **See *EEOC v. U-Haul Company of Nevada*, Case No. 2:06-CV-01209-JCM-LRL(D.Nev. settled Jan. 28, 2008).**

In June 2008, the EEOC resolved a race discrimination and retaliation suit against a North Georgia restaurant chain for $135,000. The lawsuit alleged that a white male store manager ordered all the African American employees to be strip-searched in response to a white cashier's drawer turning up $100 short. When advised about the missing money by the store manager, the white cashier asserted she knew nothing about it and was permitted to leave without being searched. When the Black employees complained

about the discriminatory treatment, the manager fired them. The consent decree also includes provisions for equal employment opportunity training, reporting, and posting of anti-discrimination notices. **See *EEOC v. New Capital Dimensions, Inc., dba Krystal Restaurant* (N.D. Ga. Settled June 3, 2008).**

Compensation Disparity

A trucking dealership has agreed to pay $60,000 and furnish other relief to settle a race discrimination lawsuit brought by the EEOC. The EEOC had charged that the company violated federal civil rights laws when it failed to give salary increases to a black diesel technician because of his race. The EEOC charged in its lawsuit that the company failed to give a pay increase to Winston Jones, because he is African American. Jones, a Philadelphia resident with over 20 years of experience as a diesel technician, began working for the trucking company in 2003. The EEOC contended that despite Jones' stellar job performance, the company failed to give him a salary increase or performance evaluation in 2006. However, the company provided salary increases to several white diesel technicians, including an increase to a white technician who had received numerous write-ups for poor performance, poor work quality or customer complaints. The EEOC charged that Jones, who was consistently ranked among the top technicians at the facility, received no salary increase in 2006 because of his race. **See *EEOC v. Stock Transteck, Inc.*d/b/a *Freightliner of Philadelphia,* Civil Action No. 08-2490 (E.D. PA. April 15, 2009).**

In March 2007, EEOC reached a $60,000 settlement in its Title VII lawsuit against Stock Building Supply d/b/a Stuart Lumber alleging that defendant did not give Charging Party a salary increase when he was promoted to a managerial position while White employees who were promoted were given salary increases. **See *EEOC v. Stock Building Supply f/k/a Carolina Holdings, Inc. d/b/a Stuart Lumber Co.,* Civil Action No. 2:05-CV-306-FTM-29 (M.D. Fla. March 26, 2007).**

In September 2006, EEOC charged a northern Arizona hospital that served parts of the Navaho Nation with paying its non-White doctors thousands of dollars less than a White American physician who performed the same work. The non-White physicians represented different races and national origins, including Asian, Native American, Nigerian, Puerto Rican, and Pakistani. When they, as well as former medical director, sought redress of the wage difference and filed discrimination charges with the EEOC, the hospital retaliated against them with threats of termination and threats of adverse changes to the terms and conditions of their employment. **See *EEOC v. Navajo Health Foundation-Sage Memorial Hospital, Inc.,* No. 06-CV-2125-PHX-DGC (D. Ariz. Sept. 7, 2006).**

Hostile Work Environment

The EEOC sued Florida-based construction companies for racial harassment, threatening black worker with noose and unlawfully suspending an African American employee for complaining about severe racial insults, threats and physical abuse. According to the suit, a white employee locked a black coworker in a tool shed and then spray-painted the shed door with the word "Jail." The EEOC said that the same white employee also put a hangman's noose around the black employee's neck, hung the noose in his work area, and threatened to decapitate him. Another African American employee was offended when he saw the noose hanging at the Holly Hill site. The

employer was aware of the harassment but didn't stop it. Instead, the EEOC said, Crom suspended the black worker after he complained about the noose and rewarded the white offender with a higher-paying position. EEOC Miami Regional Attorney Nora E. Curtin, added, "The nightmarish abuse endured in this case is appalling. The hangman's noose is a haunting symbol of racial hatred and must never be tolerated. Employers must take swift and meaningful action to punish those responsible for such outrageous conduct." **See *EEOC v. The Crom Corporation,* Case No. 1:09-cv-00128-SPM-AK (ND.FL. Filed June 3, 2009)**

A Missouri grocery store was ordered to pay $27,000 to settle a race discrimination lawsuit brought by the EEOC on behalf of a female African American worker. The EEOC had alleged in the litigation that co-workers and a supervisor told racist jokes and directed racial slurs at Sandra Ross, a cook and deli clerk. Some of the slurs were written on a wall and in a note taped on a door. Management failed to respond to Ross's complaints about the harassment. Ross, the only African American employee in the Park Hills store, resigned as a result of the racially hostile work environment. In addition to the $27,000 in damages the store agreed to pay Ross, the store also agreed to report any future complaints of race discrimination or harassment to the EEOC for a period of three years and to provide training covering racial harassment and discrimination, at least annually, to all managers during the same period. The supervisory employee, who admitted using a racial epithet in reference to Ross, has since been terminated. **See *EEOC v. Country Mart Grocery*. Case No. 1:08cv149 (ED.MO. May 28, 2009).**

A National chain restaurant will pay $20,000 compensatory damages and provide other relief to settle a race discrimination lawsuit filed by EEOC. The EEOC's suit had charged that the restaurant subjected hostess Frances Griffith to harassment because of her race (white) and failed to take prompt action to end the harassment when she complained about it. Several African American coworkers repeatedly called Griffith by obscene racial epithets. They also allegedly further insulted her when they learned she was pregnant with a mixed-race baby. Besides providing monetary relief, the one-year consent decree enjoins the restaurant from any employment practice which has the purpose or effect of discriminating against any employee on the basis of race. The decree also requires the company to provide employment discrimination awareness training to all of its employees, supervisors, and management at the restaurant where Griffith was employed. Additionally, the restaurant will maintain records of all complaints made of racial harassment at the restaurant where she was employed and submit reports to the Commission regarding these complaints. **See *EEOC v. Jack in the Box* Case No. 3:08-cv-009663 (MD.TN. May 18, 2009).**

In May 2008, the Sixth Circuit ruled that two Black male dockworkers had been subjected to a racially hostile work environment in violation of Title VII. The harassment in this case, in which the EEOC filed an amicus brief in support of the victims, centered on the frequent use of the term "boy" to refer to the Black male employees. The term was spray-painted on walls and doors, written in black marker or spray painted in the locker rooms, equipment, and on a calendar in the break room over Martin Luther King's birthday, etched into bathroom walls in the terminal, and written in dust on dock surfaces, even after the employer held a sensitivity session to explain the term's racial and derogatory implications. **See *Bailey v. USF Holland, Inc.,* 526 F.3d 880 (6th Cir. 2008).**

In August 2005, the EEOC sued a Lockheed Martin facility in Hawaii for racial harassment and retaliation after it allegedly permitted a Latino supervisor and White co-workers to subject an African American electrician to racial jokes, slurs and threats daily for a year. Additionally, the employees told the electrician it would have been better if the South had won the Civil War and talked regularly about lynching and slavery. When the electrician complained about the harassment, he was terminated. In January 2008, the military contractor settled the lawsuit for $2.5 million, the largest amount ever obtained by the EEOC for a single person in a race discrimination case. The company also agreed to terminate the harassers and make significant policy changes to address any future discrimination. **See *EEOC v. Lockheed Martin,* Civil No. 05-00479 SPK (D. Haw. settled Jan. 2, 2008).**

Retaliation

The EEOC filed a suit against a family medical center who subjected Iris Towers, an African American supervisor to race discrimination and retaliation by failing to promote her and firing her after she complained about ongoing racial harassment. From the start of her employment, the EEOC said, Towers faced an uphill battle because her direct supervisor displayed an immediate and ongoing dislike towards her because of her race. Even though the employer was aware of the discriminatory animus Towers's supervisor harbored against her, it allowed the harassment to continue and let the boss terminate her as punishment for the complaint. The three-year consent decree settling the case requires the medical center to pay $85,280 to Towers and to institute new anti-discrimination policies and procedures. They are also required to conduct annual training for all of its employees on Title VII's requirements; post a notice to employees at the clinics about the decree; provide reports to the EEOC regarding its training; and permit the EEOC to monitor its compliance by allowing the agency to enter and inspect its clinics during normal business hours. **See *EEOC v. Muskegon Family Care,* No. 1:08-CV-618 (W.D. MI. June 2, 2009).**

A construction company headquartered in Illinois, will pay $630,000 and provide significant remedial relief to settle a company terminated Giles Jefferson and a class of 23 other black employees because of their race. In addition, the EEOC alleged that they fired Jefferson as a retaliatory measure after it discovered he had filed a lawsuit against another employer for race discrimination. The company was found to have a practice of laying off black employees after they had worked for the company for short periods of time, but retained white employees for long-term employment. Additionally, the three-year decree enjoins the company from engaging in future discrimination and retaliation; requires that it implement a policy against race discrimination and retaliation, as well as a procedure for handling complaints of race discrimination and retaliation; mandates that the company provide training to employees regarding race discrimination and retaliation; and requires the company to provide periodic reports to the EEOC regarding layoffs and complaints of discrimination and retaliation. **See *EEOC v. Area Erectors, Inc.*, No. 1:07-CV-02339 (IL. May 29, 2009).**

In March 2006, the Commission obtained $2 million for approximately 50 claimants in this Title VII lawsuit alleging that defendant subjected employees in its three Illinois restaurant/gift stores to sex and race discrimination and retaliation, causing the constructive discharge of some employees. Female employees were subjected to offensive sexual comments and touching by managers and coworkers; Black employees

to racially derogatory language, and directives to wait on customers that White employees refused to serve and to work in the smoking section; and a White employee to racially offensive language because of her association with a Black employee. The 2-year consent decree prohibits the company from engaging in sex and race discrimination and retaliation at the three stores. **See *EEOC v. David Maus Toyota*, Civil Action No. 6:05cv-1452-ORL-28-KRS (M.D. Fla. Oct. 30, 2007).**

Discharge

In January 2008, the Commission upheld an AJ's finding of race and color discrimination where a probationary employee was terminated from his position of Part-Time Flexible Letter Carrier. Although complainant was a probationary employee, the record reflected that he worked at the same level or better than other full-time carriers. The Commission found that, as no other probationary employee was available as a comparator, complainant established a prima facie case of discrimination by creating an inference of race and color discrimination. Further, the Commission found that the agency failed to provide a legitimate, nondiscriminatory reason for terminating complainant because the responsible management official failed to specify a standard to which complainant was compared when he determined that complainant was not performing at an acceptable level. Complainant was reinstated to his position with backpay. **See *Artis v. United States Postal Service*, EEOC Appeal No. 0720070032 (February 4, 2008).**

In October 2007, a trial court determined that EEOC is entitled to a trial on its claim that a Toyota car dealership engaged in a wholesale elimination of Blacks in management when it demoted and ultimately terminated all of its African American managers because of their race. **See *EEOC v. David Maus Toyota*, Civil Action No. 6:05cv-1452-ORL-28-KRS (M.D. Fla. Oct. 30, 2007).**

In July 2007, the EEOC received a favorable jury verdict in its Title VII lawsuit against the Great Atlantic & Pacific Tea Company (A&P) alleging that a Black senior manager terminated a White manager because of his race. The jury concluded the White manager was discharged solely because of his race and awarded approximately $85,000 in monetary relief. **See *EEOC v. Great Atlantic & Pacific Tea Co.*, C.A. No. 1:05-cv-01211-JFM (D.Md. verdict filed July 30, 2007).**

TYPES OF RACE/COLOR DISCRIMINATION

Color Discrimination

In December 2007, the EEOC sued a discount retail chain when a light skinned Black female manager subjected darker skinned African American employees to a hostile and abusive work environment because of their color. The lawsuit alleged that the manager told one employee she looked as “black as charcoal” and repeatedly called her “charcoal” until she quit. **See *EEOC v. Family Dollar Stores, Inc.,*(No. 07 C 6996 (N.D. Ill. filed Dec. 13, 2007).**

In March 2007, EEOC filed suit against a national video store because a Bangladeshi employee alleged that after she was assigned to be store manager of a Staten Island location, she was told by her district supervisor that Staten Island was a predominantly white neighborhood and that she should change her dark skin color if she wanted to work in the area. The supervisor also allegedly told her that she really should be working

in Harlem with her dark skin color and threatened to terminate her if she did not accept a demotion and a transfer to the Harlem store. **See Intervenor's Declaration in Support of Motion to Intervene at ¶¶ 13-14. *EEOC v. Blockbuster, Inc.*, C.A. No. 07-2221 (AKH) (S.D.N.Y. filed June 12, 2007).**

In May 2006, the Commission won a Title VII case filed on behalf of Asian Indian legal aliens who were victims of human trafficking, enslavement, and job segregation because of their race, national origin, and dark-skinned color. **See *Chellen & EEOC v. John Pickle Co., Inc.*, 434 F.Supp.2d 1069 (N.D. Okl. 2006).**

Same Race Discrimination

In July 2006, EEOC settled a Title VII action against a Dallas-based HIV service agency, in which four Black employees were allegedly racially harassed by the center's founder and former Executive Director, who is also African American. The persistent same-race harassment – which was reported to management and the Board of Directors – included graphic language, racial slurs and pejorative insults. Although it ceased operations, the agency agreed to pay $200,000 to the aggrieved employees. **See *EEOC v. Renaissance III*, No. 3:05-1063-B (N.D. Tex. July 19, 2006).**

In March 2006, EEOC filed a Title VII suit alleging that a Texas transportation shuttle service discriminated against African American drivers in favor of native African drivers by denying them the more profitable routes, sending them to destinations where no passengers awaited pickup, and misappropriating tips earned by the Black American drivers and instead giving them to the African drivers. In November 2007, the district court ruled in favor of the EEOC. The judgment prohibits Ethio Express's President, Berhane T. Tesfamariam , and his business partner Mohammed Bedru from engaging in other discriminatory practices in the future. The judgment also assesses $37,197.00 in monetary damages against Ethio Express. **See *EEOC v. Ethio Express Shuttle Service, Inc. dba Texans Super Shuttle*, No. H-06-1096 (S.D. Tex. judgment entered Nov. 2007).**

In September 1998, an EEOC AJ properly decided that a Black male hospital director who abused all employees was not insulated from liability for racially harassing an African American female where evidence showed that she was the target of more egregious and public abuse than other employees. Evidence revealed that the director told her he only hired because she is a Black woman, he often used profanity toward her, referred to her by race and gender slurs, singled her out for verbal abuse in front of other employees, told plaintiff to "get your black ass out of here", and told her and other black managers they better not file EEO complaints. **See *Veterans Admin*., EEOC No. 140-97-8374x-RNS (Sept. 21, 1998).**

Intersectional Discrimination/Harassment

Race/Age

- In October 2007, the EEOC resolved a discrimination lawsuit alleging race and age discrimination for $48,000. The EEOC had charged that a South Carolina beauty salon violated federal law by refusing to promote a 51-year-old African American stylist. Between June and September 2006, three employees resigned from the salon manager position and in filling the salon manager position all three times, the salon selected a succession of three white employees from other

salons whose ages ranged from late teens to early 20s even though the Black stylist was more than qualified to fill the position. **See *EEOC v. Regis Corporation d/b/a SmartStyle,* Civil Action No.7:06-cv-02734 (D.S.C. settled October 5, 2007).**

- In June 2007, the Commission affirmed its decision that complainant, a 48-year old Black male Supervisory Deputy with the U.S. Marshals Service, was not selected for the position of Assistant Chief Deputy U.S. Marshal because of race, gender, and age discrimination when the agency's Career Board selected a 34-year old Caucasian female based on her academy achievement, work experience and interview. The Commission found that the record showed that complainant's qualifications were observably superior to those of the selectee, and concluded that the agency's stated reasons for not selecting complainant for the position in question were a pretext for discrimination. The agency was ordered to appoint complainant to the position of Assistant Chief Deputy U.S. Marshal, with back pay and benefits, and pay complainant $50,000.00 and attorney's fees. **See *Washington v. Department of Justice*, EEOC Appeal No. 0720060092 (February 8, 2007), request for reconsideration denied, EEOC Request No. 0520070324 (June 15, 2007).**

- In November 2006, the EEOC affirmed an AJ's findings that a federal employee complainant was not selected for promotion to Team Leader based on race (African American), sex (female) and age (DOB 2/14/54), notwithstanding her qualifications, and that she was subjected to discriminatory harassment by the same management official. The decision awarded complainant a retroactive promotion with back pay, $150,000 in compensatory damages and attorneys fees and costs. **See *Goodridge v. SSA,* EEOC Appeal No. 0720050026 (November15, 2006).**

Race/Disability

- In July 2008, the EEOC filed a lawsuit alleging that a telemarketing company's immediate termination of Black employee following a diabetic episode at work violated Title VII and the ADA. **See *EEOC v. RMG Communications, LLC,* Civil Action No. 1:08-cv-0947-JDT-TAB (S.D. Ind. filed July 14, 2008).**

- In November 2007, the Commission upheld an Administrative Judge's finding of discrimination on the bases of race (African-American), sex (female), and disability (cervical strain/sprain) when complainant was not accommodated with a high back chair. The agency was ordered to provide complainant with back pay for the period she was out of work due to the failure to accommodate, and complainant was awarded $2,250 in compensatory damages. **See *Jones v. United States Postal Service*, EEOC Appeal No. 0720070069 (November 8, 2007).**

- An EEOC Administrative Judge's finding that a blanket policy excluding employees with Type I and II Diabetes adversely impacted African Americans and Native Americans resulted in a settlement and change in policy.

Race/Gender

- According to an EEOC's lawsuit, filed in September 2008, a Kentucky Steak House subjected black and female employees to a sex-based and race-based

hostile work environment, as well as adverse terms and conditions of employment. In some instances, black workers were terminated because of their race. The EEOC charged that white employees were also harassed because of their association with black coworkers and family members. The mistreatment included being referred to as “n----r lovers” and “race traitors” by white managers. The EEOC also asserted that female workers were harassed because of their gender, and all complainants suffered retaliation for reporting the discrimination. The sex-based hostile work environment included male managers physically intimidating women, making sexual advances, and calling them gender-related epithets such as "b-----s." The case settled for one half million dollars and significant remedial relief. The restaurant is enjoined from engaging in harassment on the basis of race and sex and from retaliating against employees who complain about it. The employer also agreed to monitoring by the EEOC, training its managers on anti-discrimination laws, and posting a notice stating its commitment to maintaining an environment free of racial and sexual harassment and retaliation. The consent decree is binding on any successors and assigns in interest. **See *EEOC v.* Fire Mountain Restaurants LLC, doing business as Ryan’s Family Steakhouse (Civil Action No. 5:08-cv-00160-TBR) *(June 15, 2009).***

- In March 2007, EEOC upheld an AJ’s finding that complainant was subjected to a hostile work environment on the bases of her race (African American) and sex (female) when management: yelled at complainant; refused to communicate with her on work matters; failed to assist her; interfered with her work; removed her space leasing duties and responsibilities which fundamentally changed the nature of her position; and engaged in an effort to get her off the leasing team. Remedial relief included back pay, benefits including reimbursement of leave, compensatory damages and attorney’s fees, posting of a notice, training, and recommended disciplinary action against the responsible management officials. **See *Burton v. Department of the Interior*, EEOC Appeal No. 0720050066 (March 6, 2007).**

- In December 2004, the Commission affirmed an AJ’s finding that a Black female complainant was subjected to discrimination on the basis of her race and sex with regard to the processing and approval of her application for telecommuting and her request for advanced sick leave. The Commission noted that, while complainant was asked to provide additional information concerning child care and told that she would have to submit to a home inspection, a White male employee who also had children at home was not asked to do so. The agency was ordered to pay complainant $100,000.00 in compensatory damages, expunge any derogatory materials relating to complainant’s performance, and pay attorney’s fees and costs. **See *Ellis-Balone v. Department of Energy*, EEOC Appeal No. 07A30125 (December 29, 2004).**

Race/National Origin

- In November 2007, a high-end suburban Illinois retirement facility agreed to pay $125,000 to settle a discrimination lawsuit alleging that it terminated its director of nursing, because of her national origin (Filipino) and race (Asian). The federal district court approved a two-year consent decree requiring the facility to provide training regarding anti-discrimination laws to all its employees; post a notice informing its employees of the consent decree; report to the EEOC any

complaints of discrimination made by its employees; and take affirmative steps to recruit Asian nurses. **See *EEOC v. Presbyterian Homes,* Case No. 07 C 5443 (N.D. Ill. Nov. 28, 2007)**.

- In September 2007, the Commission filed a Title VII suit against a popular pizzeria based in Ferndale, Mich., alleging that it violated federal law when it told two qualified Black job seekers for waitress positions, one of whom is African and spoke with an accent, on two separate occasions that it had run out of applications but hired a White applicant as a waitress later the same day without requiring her to fill out an application. **See *EEOC v. Cosmo's,* Case No. 2:07CV14091 (E.D. Mich. Sep. 27, 2007).**

- In March 2007, MBNA-America agreed to pay $147,000 to settle a Title VII lawsuit alleging discrimination and harassment based on race and national origin. According to the lawsuit, an Asian Indian employee was subjected to ethnic taunts, such as being called "dot-head" and "Osama Bin Laden," was physically attacked by a coworker with a learning disability who believed he was Osama's brother, and was denied training and promotional opportunities afforded to his White coworkers. **See *EEOC v. MBNA-America* (E.D. Pa. Mar. 2007).**

Race/Pregnancy

- In July 2008, a Florida laundry services company agreed to pay $80,000 and furnish other remedial relief to settle an EEOC discrimination lawsuit. The EEOC had charged that a black Haitian laundry worker at Sodexho Laundry Services, Inc. lost her job because of her race, national origin and pregnancy. The employee had developed complications early in her pregnancy, obtained a light duty assignment, but was not permitted to continue her light duty assignment after her doctor imposed lifting restrictions even though Hispanic managers routinely assigned pregnant Hispanic women to light duty work at the same time she was being denied the same opportunity. **See *EEOC v. Sodexho Laundry Services, Inc.* (S.D. Fla. settled July 2008).**

- In October 2006, EEOC obtained a $30,600 settlement in Title VII suit, alleging that a California-based office equipment supplier had fired an accounts payable specialist because she was African-American and because she had been pregnant, when it told her that after she returned from maternity leave, her assignment was complete and there were no other positions in the accounting department, permanently placed a non-Black, non-pregnant female who she had trained to fill-in during her maternity leave in her former position, and a week later hired a non-Black male to work in another accounting position in the same department. **See *EEOC v. Taylor Made Digital Systems, Inc.*, No. C-05-3952 JCS (N.D. Cal. Oct. 25, 2006).**

Race/Religion

- In September 2006, EEOC sued an Oregon video company because allegedly two employees, an African American who was converting to Judaism and a Hispanic with some Jewish ancestry, who began working for Video Only in early 2005, were forced to endure repeated racial, religious, and national origin jokes, slurs and derogatory comments made by employees and upper management since the beginning of their employment. EEOC also charged that the company then engaged in a series of acts designed to punish the victims for complaining

and to ridicule those who corroborated the complaints. **See *EEOC v. Video Only* (D. Or. Sep. 25, 2006).**

- In August 2006, EEOC sued a cocktail lounge for race and religious discrimination because it refused to promote an African American employee who wears a headscarf in observance of her Muslim faith to be a cocktail server because the owner said she was looking only for what she termed "hot, white girls." **See *EEOC v. Starlight Lounge,* No. CV-06-3075-AAM (E.D. Wash. Aug. 2006).**

Associational Discrimination

In July 2007, EEOC sued a steakhouse restaurant chain for permitting its customers to harass a White employee because of her association with persons of a different race. The case settled for $75,000 and injunctive relief which included mandatory EEO training for managers, supervisors and employees. **See *EEOC v. Ponderosa Steakhouse,* No. 1:06-cv-142-JDT-TAB (S.D. Ind. settled July 3, 2007).**

In August 2006, EEOC sued a wholesaler book company for verbally harassing a white female employee after the owner learned she had biracial children. The suit also alleged that the owner made sex and race-based insults to a class of other employees based on their race (Black) and/or gender (female) and retaliated against them when the complained or cooperated with the EEOC's investigation. **See *EEOC v. Books for Less*, C.A. No. 06-4577 (E.D.N.Y. filed Aug. 24, 2006).**

In May 2006, EEOC settled a hostile work environment case against a retail furniture store chain for $275,000. The store manager allegedly made racially and sexually offensive remarks to a Black employee, referred to the African Americans as "you people" and interracial couples as "Oreos" or "Zebras," and disparaged the employee for marrying a Caucasian man. **See *EEOC v. R.T.G. Furniture Corp.*, No. 8:04-cv-T24-TBM (M.D. Fla. May 16, 2006).**

Biracial Discrimination

In September 2006, EEOC sued a Virginia steel contractor, charging that it subjected a biracial (Black/White) employee to harassment based on race and color and then retaliated against him when he complained. **See *EEOC v. Bolling Steel Co.,* Civ. Action No. 7:06-000586 (W.D. Va. Filed Sept. 29, 2006).**

In March 2004, the EEOC settled a hostile work environment case in which a Caucasian-looking employee, who had a White mother and Black father, was repeatedly subjected to racially offensive comments about Black people after a White coworker learned she was biracial. When the employee complained, she was told to "pray about it" or "leave" by the owner; the employee resigned. The company agreed to pay $45,000 to the biracial employee, to create a policy on racial harassment, and to train the owner, managers and employees about how to prevent and address race discrimination in the workplace. **See *EEOC v.Jefferson Pain & Rehabilitation Center,* No. 03-cv-1329 (W.D. Pa. settled March 10, 2004).**

Code Words

In September 2007, the EEOC filed a Title VII racial harassment case against a food and beverage distributor, alleging that the company subjected a Black employee to a racially hostile work environment when a co-worker repeatedly called him "Cornelius" in reference to an ape character from the movie, "Planet of the Apes," management officials were aware of the term's racially derogatory reference to the employee and an ape character from the movie, but terminated his employment once he objected to the racial harassment. **See *EEOC v. Dairy Fresh Foods, Inc.,* No. 2:07CV14085 (E.D. Mich. Sept. 27, 2007).**

In August 2007, the Commission settled for $44,000 a lawsuit against a California medical clinic, alleging that a White supervisor used racial code words, such as "reggin" ("nigger" spelled backwards), to debase and intimidate an African American file clerk and then fired her after she complained. The clinic also agreed to incorporate a zero-tolerance policy concerning discriminatory harassment and retaliation into its internal EEO and anti-harassment policies. **See *EEOC v. Robert G. Aptekar, M.D., d/b/a Arthritis & Orthopedic Medical Clinic*, Civ. No. C06-4808 MHP (N.D. Cal. consent decree filed Aug. 20, 2007).**

In March 2006, the Commission obtained $562,470 in a Title VII lawsuit against the eighth largest automobile retailer in the U.S. EEOC alleged that shortly after a new White employee was transferred to serve as the new General Manager (GM), he engaged in disparate treatment of the Black employee and made racial remarks to him, such as using "BP time" (Black people time) and remarking that he'd fired "a bunch of you people already." The new GM also berated the personnel coordinator for assisting the Black employee with his complaint and intensified his harassment of him until the employee resigned. The 4-year consent decree prohibits defendants from engaging in future discrimination based on race, color, or national origin. **See *EEOC v. Lithia Motors, Inc., d/b/a Lithia Dodge of Cherry Creek,* No. 1:05-cv-01901 (D. Colo. March 8, 2006).**

Selected Supreme Court Decisions

In *Griggs v. Duke Power Co.*, the Supreme Court decides that where an employer uses a neutral policy or rule, or utilizes a neutral test, and this policy or test disproportionately affects minorities or women in an adverse manner, then the employer must justify the neutral rule or test by proving it is justified by business necessity. The Court reasons that Congress directed the thrust of Title VII to the consequences of employment practices, not simply the motivation. This decision paves the way for EEOC and charging parties to challenge employment practices that shut out groups if the employer cannot show the policy is justified by business necessity.

In *McDonnell Douglas Corp. v Green*, the Supreme Court holds that a charging party can prove unlawful discrimination indirectly by showing, for example, in a hiring case that: (1) the charging party is a member of a Title VII protected group; (2) he or she applied and was qualified for the position sought; (3) the job was not offered to him or her; and (4) the employer continued to seek applicants with similar qualifications. If the plaintiff can prove these four elements, the employer must show a legitimate lawful reason why the individual was not hired. The employee still may prevail if he or she discredits the employer's asserted reason for not hiring him or her.

In *Alexander v. Gardner-Denver Co.*, the Supreme Court rules that an employee who submits a discrimination claim to arbitration under a collective bargaining agreement is not precluded from suing his or her employer under Title VII. The court reasons that the right to be free of unlawful employment discrimination is a statutory right and cannot be bargained away by the union and employer.

In *Albermarle Paper Co. v. Moody*, the Supreme Court decides that after a court has found an employer guilty of discrimination, the "wronged" employee is presumed to be entitled to back pay.

In *Franks v. Bowman Transportation Co.*, the Supreme Court holds that Title VII requires an employer to hire a victim of unlawful discrimination with seniority starting from the date the individual was unlawfully denied the position.

In *McDonald v. Santa Fe Transportation Co.*, the Supreme Court holds that Title VII prohibits racial discrimination against whites as well as blacks.

In *International Brotherhood of Teamsters v. United States*, the Supreme Court rules that in a pattern or practice discrimination case, once the plaintiff proves that the defendant systematically discriminated, all the affected class members are presumed to be entitled to relief (such as back pay, jobs) unless the defendant proves that the individuals were not the victims of the defendant's pattern or practice of discrimination.

In *Hazelwood School District v. U.S.*, the Supreme Court rules that a plaintiff can establish a *prima facie* case of class hiring discrimination through the presentation of statistical evidence by comparing the racial composition of an employer's workforce with the racial composition of the relevant labor market. The court explains that absent discrimination, an employer's workforce should reflect the composition of the employer's applicant pool.

In *Occidental Life Insurance Co. v. EEOC*, the Supreme Court addresses many of the procedural arguments advanced by employers which have prevented EEOC's lawsuits from going forward. The Court holds that EEOC lawsuits do not have to be filed in court within 180 days after the filing of a charge and that EEOC lawsuits are not subject to state statutes of limitation.

In *United Steel Workers of America v. Weber*, the Supreme Court holds that private sector employers and unions may lawfully implement voluntary affirmative action plans to remedy past discrimination. The Court holds that an employer and union do not violate a collectively bargained plan by reserving 50 percent of the slots in a training program in a traditionally segregated industry for black employees. The program is lawful because it does not "unnecessarily trammel the interests of white employees," does not "create an absolute bar to the advancement of white employees," and is "a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."

In *General Telephone Company of the Northwest v. EEOC*, the Supreme Court upholds EEOC's authority to seek class wide relief for victims of discrimination, without being restricted by the class action rules applicable to private litigants. The Court emphasizes that when EEOC files suit, it acts to vindicate the "overriding public interest in equal employment opportunity."

In *Connecticut v. Teal*, the Supreme Court holds that an employer is liable for racial discrimination when any part of its selection process, such as an unvalidated examination or test, has a disparate impact even if the final result of the hiring process is racially balanced. In effect, the Court rejects the "bottom line defense" and makes clear that the fair employment laws protect the individual. The *Teal* decision means that fair treatment of a group is not a defense to an individual claim of discrimination.

The Supreme Court in *Zipes v. Trans World Airlines*, clarifies the requirements for filing a private lawsuit under Title VII. The Court explains that the timely filing of a charge is not a jurisdictional requirement but like a statute of limitations and therefore is subject to equitable tolling and waivers.

In *EEOC v. Shell Oil Co.*, the Supreme Court affirms the authority of EEOC's Commissioners to initiate charges of discrimination through "Commissioners Charges."

In *Johnson v. Transportation Agency, Santa Clara County*, the Supreme Court explains the requirements for a lawful voluntary affirmative action plan. The Court explains that in order for an affirmative action plan to be valid, an employer must show a conspicuous under representation of minorities or women in traditionally segregated job categories and that the plan does not unnecessarily restrict the rights of male or non-minority employees, or create an absolute barrier to their advancement.

The Supreme Court in *EEOC v. Commercial Office Products*, clarifies the relationship between EEOC and state and local Fair Employment Practice Agencies (FEPAs). The Court holds that a FEPA's decision to waive Title VII's 60-day deferral period pursuant to a worksharing agreement "terminates" state proceedings and permits EEOC immediately to deem the charge filed and begin processing. The Court also rules that a charging party who files a charge that is untimely under state law is nonetheless entitled to Title VII's longer 300 day federal filing period rather than the180 day period.

The Supreme Court in *Watson v. Fort Worth Bank & Trust,* in a unanimous opinion, declares that the disparate impact analysis can be applied to subjective or discretionary selection practices. In the past, the Court had applied disparate impact only to tests and other presumptively objective practices.

The Supreme Court in *Price Waterhouse v. Hopkins* establishes how to analyze an employer's actions when the employer has mixed motivations for the employment decision, *i.e.*, the employer was motivated by a legitimate reason *and* also by an unlawful reason such as unlawful race or sex bias. The Court holds that if a plaintiff shows that discrimination played a motivating part in an employment decision, the employer can attempt to prove, as a complete affirmative defense, that it would have made the same employment decision even if discrimination were not a factor.

In *Wards Cove Packing Co. v. Antonio*, the Supreme Court rules that when a plaintiff makes a showing of a disparate impact violation of Title VII, he must do so by demonstrating that specific practices (and not the cumulative effect of the employer's selection practices) adversely affected a protected group. Further, the Court holds that when a showing of disparate impact is made, the employer only has to produce evidence of a business justification for the practice, and that the burden of proof always remains with the employee.

The Supreme Court in *Lorance v. AT&T Technologies* decides when a charging party must file a discrimination charge if the charging party is challenging a seniority system neutral (and non-discriminatory) on its face. The Court holds that the time in which a facially neutral seniority system can be challenged runs from the adoption of the alleged discriminatory system. The Court rejects EEOC's position that the limitations period begins to run only when the employee is adversely affected by the seniority system. *Lorrance* is the first EEOC case in which the agency's General Counsel, Charles Shanor, is permitted to argue in the United States Supreme Court.

In *St. Mary's Honor Center v. Hicks*, the Supreme Court rules that the plaintiff in an employment discrimination case is not entitled to automatically win even if he establishes a *prima facie* case of discrimination and demonstrates that all of the reasons advanced by the employer for the "challenged action" are false. The Supreme Court's decision means that even if the plaintiff can prove the employer's asserted defense is pretextual, than a finding of unlawful discrimination is not mandatory. A fact finder may still conclude that the employer's action is not discriminatory. The Commission had filed a brief as *amicus curiae* arguing, unsuccessfully, that prior Supreme Court cases established that once the plaintiff had shown that all of the employer's reasons for the adverse employment actions are pretextual, then the plaintiff should automatically win.

A unanimous Supreme Court in *McKennon v. Nashville Banner Publishing Co.*, rejects the so called "after acquired evidence" doctrine applied by lower courts to bar a plaintiff from proving unlawful discrimination. Under the doctrine, employers after firing an employee or taking other adverse action, justify their actions by relying on evidence uncovered after the employee's termination which would have justified the termination. The Supreme Court rules that in such cases, the employer is still liable for having violated an anti-discrimination law but that the employee is not entitled to reinstatement or to back pay for the period after the employer learns of the misconduct.

A unanimous Supreme Court in *Robinson v. Shell Oil*, adopts EEOC's position (advanced as *amicus curiae*) that the Title VII prohibition against retaliation protects former as well as current employees.

In *Wright v. Universal Maritime Service Corp.*, the Supreme Court revisits the issue of whether a collective bargaining agreement providing for the mandatory arbitration of discrimination claims can bar individual charging parties from pursuing their EEO claims in federal court. The Supreme Court decides that the collective bargaining agreement at issue did not contain a clear and unmistakable waiver and therefore the charging party could pursue his employment discrimination claim in court.

In *Gibson v. West*, the Supreme Court endorses EEOC's position that it has the legal authority to require that federal agencies pay compensatory damages when EEOC has ruled during the administrative process that the federal agency has unlawfully discriminated in violation of Title VII.

Best Practices for Employers

The following are examples of best practices for employers – proactive measures designed to reduce the likelihood of Title VII violations and to address impediments to equal employment opportunity.

General

- Develop a strong EEO policy that is embraced by the CEO and top executives, train managers and employees on its contents, enforce it, and hold company managers accountable.

- Make sure decisions are transparent (to the extent feasible) and documented. The reasons for employment decisions should be well explained to affected persons. Make sure managers maintain records for at least the statutorily-required periods.

Recruitment, Hiring, and Promotion

- Recruit, hire, and promote with EEO in mind, by implementing practices designed to widen and diversify the pool of candidates considered for employment openings, including openings in upper-level management.

- Monitor for EEO by conducting self-analyses to determine whether current employment practices disadvantage people of color, treat them differently, or leave uncorrected the effects of historical discrimination in the company.

- Analyze the duties, functions, and competencies relevant to jobs. Then create objective, job-related qualification standards related to those duties, functions, and competencies. Make sure they are consistently applied when choosing among candidates. Identify and remove barriers to EEO – such as word-of-mouth recruiting in a workforce that does not reflect the diversity of the qualified labor market, or employment tests – if they cannot demonstrably be tied to job performance and business necessity.

- Develop the potential of employees, supervisors, and executives with EEO in mind, by providing training and mentoring to give workers of all backgrounds the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs.

- Make sure promotion criteria are made known, and that job openings are communicated to all eligible employees.

Harassment

To protect employees from unlawful racial (and other) harassment, employers should adopt a strong anti-harassment policy, periodically train each employee on its contents and procedures, and vigorously follow and enforce it. The policy should contain:

- A clear explanation of prohibited conduct, including examples;

- Clear assurance that employees who make complaints or provide information related to complaints will be protected against retaliation;

- A clearly described complaint process that provides multiple, accessible avenues of complaint;

- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

- A complaint process that provides a prompt, thorough, and impartial investigation; and

- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Terms, Conditions, and Privileges of Employment

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination. Make sure performance appraisals are based on employees' actual job performance. Ensure consistency, i.e., that comparable job performances receive comparable ratings regardless of the evaluator, and that appraisals are neither artificially low nor artificially high. Allow employees, without negative consequences, to have their appraisals reviewed and corrected when appropriate.

- Develop the potential of employees, supervisors, and executives with EEO in mind, by providing training and mentoring that provides workers of all backgrounds the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs.

- Promote an inclusive culture in the workplace by inculcating an environment of professionalism and respect for personal differences. In addition, employees of all backgrounds should have equal access to workplace networks.

- Foster open communication and early dispute resolution. This will minimize the chance of misunderstandings escalating into legally actionable EEO problems. In addition, an alternative dispute-resolution (ADR) program can resolve EEO problems without the acrimony associated with an adversarial process. Importantly, however, even if there is such a program, an employee still is free to file a charge of discrimination with EEOC, and utilizing a company grievance procedure or other ADR mechanism does not suspend the running of the time period for filing an EEOC charge. As a best practice, however, employers should consider expressly waiving in advance any defense related to an employee's failure to adhere to the charge-filing time period if the employee properly utilizes the employer's ADR program.

- Protect against retaliation. Provide clear and credible assurances that if employees make complaints or provide information related to complaints the employer will protect employees from retaliation, and consistently follow through on this guarantee.

Regulatory Text

Title VII of the Civil Rights Act of 1964

EDITOR'S NOTE: The following is the text of Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) amend several sections of Title VII. In addition, section 102 of the CRA (which is printed elsewhere in this publication) amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973. Cross references to Title VII as enacted appear in italics following each section heading. Editor's notes also appear in italics.

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Civil Rights Act of 1964”.

* * *

DEFINITIONS

SEC. 2000e. *[Section 701]*

For the purposes of this subchapter-

(a) The term “person” includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 *[originally, bankruptcy],* or receivers.

(b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 *[United States Code]*), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 *[the Internal Revenue Code of 1986]*, except that during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term “employment agency” means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term “labor organization” means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose,

in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended *[29 U.S.C. 151 et seq.]*, or the Railway Labor Act, as amended *[45 U.S.C. 151 et seq.]*;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term “commerce” means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term “industry affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 *[29 U.S.C. 401 et seq.]*, and further includes any governmental industry, business, or activity.

(i) The term “State” includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act *[43 U.S.C. 1331 et seq.]*.

(j) The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.

(k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section

2000e-2(h) of this title *[section 703(h)]* shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term “complaining party” means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term “demonstrates” means meets the burdens of production and persuasion.

(n) The term “respondent” means an employer, employment agency, labor organization, joint labor management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

APPLICABILITY TO FOREIGN AND RELIGIOUS EMPLOYMENT

SEC. 2000e-1. *[Section 702]*

(a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with statute as violative of foreign law

It shall not be unlawful under section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) Control of corporation incorporated in foreign country

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title *[sections 703 and 704]* shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

(A) the interrelation of operations;
(B) the common management;
(C) the centralized control of labor relations; and
(D) the common ownership or financial control, of the employer and the corporation.

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. *[Section 703]*

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase “unlawful employment practice” shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 *[50 U.S.C. 781 et seq.]*.

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 *[section 6(d) of the Labor Standards Act of 1938, as amended]*.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act *[21 U.S.C. 801 et seq.]* or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28 [*United States Code]*.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. *[Section 704]*

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor--management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 2000e-4. *[Section 705]*

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of Title 5 *[United States Code]* governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges *[originally, hearing examiners]*, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5 *[United States Code]*, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of administrative law judges *[originally, hearing examiners]* shall be in accordance with sections 3105, 3344, 5372, and 7521 of Title 5 *[United States Code]*.

(b) General Counsel; appointment; term; duties; representation by attorneys and Attorney General

(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title *[sections 706 and 707]*. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) Exercise of powers during vacancy; quorum

A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) Seal; judicial notice

The Commission shall have an official seal which shall be judicially noticed.

(e) Reports to Congress and the President

The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken *[originally, the names, salaries, and duties of all individuals in its employ]* and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) Principal and other offices

The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) Powers of Commission

The Commission shall have power-

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued there under;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title *[section 706]* by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) Cooperation with other departments and agencies in performance of educational or promotional activities; outreach activities

(1) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(2) In exercising its powers under this subchapter, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to-

(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this subchapter or such law, as the case may be.

(i) Personnel subject to political activity restrictions

All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of Title 5 *[originally, section 9 of the Act of August 2, 1939, as amended (the Hatch Act)]*, notwithstanding any exemption contained in such section.

(j) Technical Assistance Training Institute

(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this subchapter shall not be excused from compliance with the requirements of this subchapter because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

(k) EEOC Education, Technical Assistance, and Training Revolving Fund

(1) There is hereby established in the Treasury of the United States a revolving fund to be known as the “EEOC Education, Technical Assistance, and Training Revolving Fund” (hereinafter in this subsection referred to as the “Fund”) and to pay the cost (including administrative and personnel expenses) of providing education, technical assistance, and training relating to laws administered by the Commission. Monies in the Fund shall be available without fiscal year limitation to the Commission for such purposes.

(2)(A) The Commission shall charge fees in accordance with the provisions of this paragraph to offset the costs of education, technical assistance, and training provided with monies in the Fund. Such fees for any education, technical assistance, or training--

(i) shall be imposed on a uniform basis on persons and entities receiving such education, assistance, or training,

(ii) shall not exceed the cost of providing such education, assistance, and training, and

(iii) with respect to each person or entity receiving such education, assistance, or training, shall bear a reasonable relationship to the cost of providing such education, assistance, or training to such person or entity.

(B) Fees received under subparagraph (A) shall be deposited in the Fund by the Commission.

(C) The Commission shall include in each report made under subsection (e) of this section information with respect to the operation of the Fund, including information, presented in the aggregate, relating to--

(i) the number of persons and entities to which the Commission provided education, technical assistance, or training with monies in the Fund, in the fiscal year for which such report is prepared,

(ii) the cost to the Commission to provide such education, technical assistance, or training to such persons and entities, and

(iii) the amount of any fees received by the Commission from such persons and entities for such education, technical assistance, or training.

(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Commission, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.

(4) There is hereby transferred to the Fund $1,000,000 from the Salaries and Expenses appropriation of the Commission.

ENFORCEMENT PROVISIONS

SEC. 2000e-5. *[Section 706]*

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title *[section 703 or 704]*.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor management committee controlling

apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty- day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State

or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this

section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28 *[United States Code]*, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this Title *[section 704(a)]*.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title *[section 703(m)]* and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title *[section 703(m)]*; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 *[the Act entitled" An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 105-115)]* shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28 *[United States Code]*.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CIVIL ACTIONS BY THE ATTORNEY GENERAL

SEC. 2000e-6. *[Section 707]*

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5 *[United States Code]*, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5of this title *[section 706]*.

EFFECT ON STATE LAWS

SEC. 2000e-7. *[Section 708]*

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

INVESTIGATIONS

SEC. 2000e-8. *[Section 709]*

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title *[section 706]*, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports there from as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders there under. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

CONDUCT OF HEARINGS AND INVESTIGATIONS PURSUANT TO SECTION 161 OF Title 29

SEC. 2000e-9. *[Section 710]*

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 *[section 11 of the National Labor Relations Act]* shall apply.

POSTING OF NOTICES; PENALTIES

SEC. 2000e-10. *[Section 711]*

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. *[Section 712]*

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

REGULATIONS; CONFORMITY OF REGULATIONS WITH ADMINISTRATIVE PROCEDURE PROVISIONS; RELIANCE ON INTERPRETATIONS AND INSTRUCTIONS OF COMMISSION

SEC. 2000e-12. *[Section 713]*

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5 *[originally, the Administrative Procedure Act]*.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

APPLICATION TO PERSONNEL OF COMMISSION OF SECTIONS 111 AND 1114 OF TITLE 18; PUNISHMENT FOR VIOLATION OF SECTION 1114 OF TITLE 18

SEC. 2000e-13. *[Section 714]*

The provisions of sections 111 and 1114, Title 18 *[United States Code]*, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of Title 18 *[United States Code]*, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

TRANSFER OF AUTHORITY

[Administration of the duties of the Equal Employment Opportunity Coordinating Council was transferred to the Equal Employment Opportunity Commission effective July 1, 1978, under the President's Reorganization Plan of 1978.]

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL; ESTABLISHMENT; COMPOSITION; DUTIES; REPORT TO PRESIDENT AND CONGRESS

SEC. 2000e-14. *[Section 715]*

[Original introductory text: There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.]

The Equal Employment Opportunity Commission *[originally, Council]* shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 *[originally, July 1]* of each year, the Equal Employment Opportunity Commission *[originally, Council]* shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

PRESIDENTIAL CONFERENCES; ACQUAINTANCE OF LEADERSHIP WITH PROVISIONS FOR EMPLOYMENT RIGHTS AND OBLIGATIONS; PLANS FOR FAIR ADMINISTRATION; MEMBERSHIP

SEC. 2000e-15. *[Section 716]*

[Original text: (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c)] The President shall, as soon as feasible after July 2, 1964 *[the date of enactment of this title]*, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

TRANSFER OF AUTHORITY

[Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.]

EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. *[Section 717]*

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 *[United States Code]*, in executive agencies *[originally, other than the General Accounting Office]* as defined in section 105 of Title 5 *[United States Code]* (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal

employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall-

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him there under. The plan submitted by each department, agency, and unit shall include, but not be limited to-

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title *[section 706]*, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title *[section 706(f) through (k)]*, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) *[Section 706(e)(3)]* shall apply to complaints of discrimination in compensation under this section.

PROCEDURE FOR DENIAL, WITHHOLDING, TERMINATION, OR SUSPENSION OF GOVERNMENT CONTRACT SUBSEQUENT TO ACCEPTANCE BY GOVERNMENT OF AFFIRMATIVE ACTION PLAN OF EMPLOYER; TIME OF ACCEPTANCE OF PLAN

SEC. 2000e-17. *[Section 718]*

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5 *[United States Code]*, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Code of Federal Regulations]
[Title 29, Volume 4]
[Revised as of July 1, 2008]
From the U.S. Government Printing Office via GPO Access
[CITE: 29CFR1608.1]

TITLE 29--LABOR

CHAPTER XIV--EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1608_AFFIRMATIVE ACTION APPROPRIATE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

Sec. 1608.1 Statement of purpose.

(a) Need for Guidelines. Since the passage of title VII in 1964, many employers, labor organizations and other persons subject to title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to title VII, or as a result of conciliation efforts under title VII, action under Executive Order 11246, as amended, or under other Federal, State, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with title VII, because they took into account race, sex, or national origin. This is the so-called “reverse discrimination'' claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of title VII. Any uncertainty as to the meaning and application of title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many, who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of title VII.

(b) Purposes of title VII. Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life. \2\ The Legislative Histories of title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women. \3\ The purpose of Executive Order No. 11246, as amended, is similar to the purpose of title VII. In response to these economic and social conditions, Congress, by passage of title VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, Congress strongly encouraged employers, labor organizations, and other persons subject to title VII (hereinafter referred to as “persons,'' see section 701(a) of the Act) to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed. See section 706 of title VII.

\2\ Congress has also addressed these conditions in other laws, including the Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (1963), as amended; the other titles of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), as amended; the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965), as amended; the Fair Housing Act of 1968, Pub. L. 90-284, title VII, 82 Stat. 73, 81 (1968), as amended; the Educational Opportunity Act (title IX), Pub. L. 92-318, 86 Stat. 373 (1972), as amended; and the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), as amended.

\3\ Equal Pay Act of 1963: S. Rep. No. 176, 88th Cong., 1st Sess., 1-2 (1963). Civil Rights Act of 1964: H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. (1971). Equal Employment Opportunity Act of 1972: H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971). See also, Equal Employment Opportunity Commission, Equal Employment Opportunity Report--1975, Job Patterns for Women in Private Industry (1977); Equal Employment Opportunity Commission, Minorities and Women in State and Local Government--1975 (1977); United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women (1978).

(c) Interpretation in furtherance of legislative purpose. The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII. \4\ Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII. Correspondingly, title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against title VII liability which the Commission is authorized to provide under section 713(b)(1).

\4\ Affirmative action often improves opportunities for all members of the workforce, as where affirmative action includes the posting of notices of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted. See, e.g., EEOC v. AT&T, 419 F. Supp. 1022 (E.D.Pa. 1976), aff'd, 556 F. 2d 167 (3rd Cir. 1977), cert. denied, 98 S.Ct. 3145 (1978).

(d) Guidelines interpret title VII and authorize use of section 713(b)(1). These Guidelines describe the circumstances in which persons subject to title VII may take or agree upon action to improve employment opportunities of minorities and women, and describe the kinds of actions they may take which are consistent with title VII. These Guidelines constitute the Commission's interpretation of title VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs. In addition, these Guidelines state the circumstances under which the Commission will recognize that a person subject to title VII is entitled to assert that actions were taken “in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission,'' including reliance upon the interpretation and opinion contained in these Guidelines, and thereby invoke the protection of section 713(b)(1) of title VII.

(e) Review of existing plans recommended. Only affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines can receive the full protection of these Guidelines, including the section 713(b)(1) defense. See Sec. 1608.10. Therefore, persons subject to title VII who have existing affirmative action plans, programs, or agreements are encouraged to review them in light of these Guidelines, to modify them to the extent necessary to comply with these Guidelines, and to readopt or reaffirm them.

Sec. 1608.2 Written interpretation and opinion.

These Guidelines constitute “a written interpretation and opinion'' of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and Sec. 1601.33 of the Procedural Regulations of the Equal Employment Opportunity Commission (29 CFR 1601.30; 42 FR 55,394 (October 14, 1977)). Section 713(b)(1) provides:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that * * * after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect * * *.

The applicability of these Guidelines is subject to the limitations on use set forth in Sec. 1608.11.

Sec. 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) Adverse effect. Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, title VII proscribes practices which “tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) Effects of prior discriminatory practices. Employers, labor organizations, or other persons subject to title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) Limited labor pool. Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;
(2) Extensive and focused recruiting activity;
(3) Elimination of the adverse impact caused by invalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30290; 38297; 38299 (August 25, 1978));
(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

Sec. 1608.4 Establishing affirmative action plans.

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) Reasonable self analysis. The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive Order 11246, as amended, and its implementing regulations, including 41 CFR part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, State, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to Title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

(b) Reasonable basis. If the self analysis shows that one or more employment practices:

(1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited,
(2) Leave uncorrected the effects of prior discrimination, or
(3) Result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate.

It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated title VII, and without regard to whether there exists arguable defenses to a title VII action.

(c) Reasonable action. The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment,

or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) Illustrations of appropriate affirmative action. Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council “Policy Statement on Affirmative Action Programs for State and Local Government Agencies,'' 41 FR 38814 (September 13, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38290; 38300 (Aug. 25, 1978). That statement reads, in relevant part:

When an employer has reason to believe that its selection procedures have * * * exclusionary effect * * *, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic ‘conscious,' include, but are not limited to, the following:

The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

A recruitment program designed to attract qualified members of the group in question;

A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking `journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) Standards of reasonable action. In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(i) The plan should be tailored to solve the problems which were identified in the self analysis, see Sec. 1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

(d) Written or unwritten plans or programs--(1) Written plans required for 713(b)(1) protection. The protection of section 713(b) of Title VII will be accorded by the Commission to a person subject to Title VII only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of section 713(b)(1). The Commission will not require that there be any written statement concluding that a title VII violation exists.

(2) Reasonable cause determinations. Where an affirmative action plan or program is alleged to violate Title VII, or is asserted as a defense to a charge of discrimination, the Commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these Guidelines, whether or not the analysis and plan are in writing. However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

Sec. 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.

Under title VII, affirmative action compliance programs adopted pursuant to Executive Order 11246, as amended, and its implementing regulations, including 41 CFR part 60-2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of Title VII and the Executive Order, and the Commission's responsibility under Executive Order 12067 to avoid potential conflict among Federal equal employment opportunity programs.

Accordingly, the Commission will process Title VII complaints involving such affirmative action compliance programs under this section.

(a) Procedures for review of Affirmative Action Compliance Programs. If adherence to an affirmative action compliance program adopted pursuant to Executive Order 11246, as amended, and its implementing regulations, is the basis of a complaint filed under title VII, or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and whether adherence to the program was the basis of the complaint or the justification.

(1) Programs previously approved. If the Commission makes the determination described in paragraph (a) of this section and also finds that the affirmative action program has been approved by an appropriate official of the Department of Labor or its authorized agencies, or is part of a conciliation or settlement agreement or an order of an administrative agency, whether entered by consent or after contested proceedings brought to enforce Executive Order 11246, as amended, the Commission will issue a determination of no reasonable cause.

(2) Program not previously approved. If the Commission makes the determination described in paragraph (a), of this section but the program has not been approved by an appropriate official of the Department of Labor or its authorized agencies, the Commission will: (i) Follow the procedure in Sec. 1608.10(a) and review the program, or (ii) refer the plan to the Department of Labor for a determination of whether it is to be approved under Executive Order 11246, as amended, and its implementing regulations. If, the Commission finds that the program does conform to these Guidelines, or the Department of Labor approves the affirmative action compliance program, the Commission will issue a determination of no reasonable cause under Sec. 1608.10(a).

(b) Reliance on these guidelines. In addition, if the affirmative action compliance program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of Sec. 1608.10(b), of this part, may be asserted by the contractor.

Sec. 1608.6 Affirmative action plans which are part of Commission conciliation or settlement agreements.

(a) Procedures for review of plans. If adherence to a conciliation or settlement agreement executed under Title VII and approved by a responsible official of the EEOC is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action challenged under Title VII, the Commission will investigate to determine:

(1) Whether the conciliation agreement or settlement agreement was approved by a responsible official of the EEOC, and
(2) Whether adherence to the agreement was the basis for the complaint or justification.

If the Commission so finds, it will make a determination of no reasonable cause under Sec. 1608.10(a) and will advise the respondent of its right under section 713(b)(1) of title VII to rely on the conciliation agreement.

(b) Reliance on these guidelines. In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of title VII and of Sec. 1608.10(b), of this part, may be asserted by the respondent.

Sec. 1608.7 Affirmative action plans or programs under State or local law.

Affirmative action plans or programs executed by agreement with State or local government agencies, or by order of State or local government agencies, whether entered by consent or after contested proceedings, under statutes or ordinances described in Title VII, will be reviewed by the Commission in light of the similar purposes of Title VII and such statutes and ordinances. Accordingly, the Commission will process Title VII complaints involving such affirmative action plans or programs under this section.

(a) Procedures for review of plans or programs. If adherence to an affirmative action plan or program executed pursuant to a State statute or local ordinance described in Title VII is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine:

(1) Whether the affirmative action plan or program was executed by an employer, labor organization, or person subject to the statute or ordinance,
(2) Whether the agreement was approved by an appropriate official of the State or local government, and
(3) Whether adherence to the plan or program was the basis of the complaint or justification.

(1) Previously approved plans or programs. If the Commission finds the facts described in paragraph (a) of this section, the Commission will, in accordance with the “substantial weight'' provisions of section 706 of the Act, find no reasonable cause where appropriate.
(2) Plans or programs not previously approved. If the plan or program has not been approved by an appropriate official of the State or local government, the Commission will follow the procedure of Sec. 1608.10 of these Guidelines. If the Commission finds that the plan or program does conform to these Guidelines, the Commission will make a determination of no reasonable cause as set forth in Sec. 1608.10(a).

(b) Reliance on these guidelines. In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) and Sec. 1608.10(b), of this part, may be asserted by the respondent.

Sec. 1608.8 Adherence to court order.

Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a Federal, State, or local equal employment opportunity law or regulation, is the basis of a complaint filed under title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine:

(a) Whether such an Order exists and
(b) Whether adherence to the affirmative action plan which is part of the Order was the basis of the complaint or justification.

If the Commission so finds, it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII.

Sec. 1608.9 Reliance on directions of other government agencies.

When a charge challenges an affirmative action plan or program, or when such a plan or program is raised as justification for an employment decision, and when the plan or program was developed pursuant to the requirements of a Federal or State law or regulation which in part seeks to ensure equal employment opportunity, the Commission will process the charge in accordance with Sec. 1608.10(a). Other agencies with equal employment opportunity responsibilities may apply the principles of these Guidelines in the exercise of their authority.

Sec. 1608.10 Standard of review.

(a) Affirmative action plans or programs not specifically relying on these guidelines. If, during the investigation of a charge of discrimination filed with the Commission, a respondent asserts that the action complained of was taken pursuant to an in accordance with a plan or program of the type described in these Guidelines, the Commission will determine whether the assertion is true, and if so, whether such a plan or program conforms to the requirements of these guidelines. If the Commission so finds, it will issue a determination of no reasonable cause and, where appropriate, will state that the determination constitutes a written interpretation or opinion of the Commission under section 713(b)(1). This interpretation may be relied upon by the respondent and asserted as a defense in the event that new charges involving similar facts and circumstances are thereafter filed against the respondent, which are based on actions taken pursuant to the affirmative action plan or program. If the Commission does not so find, it will proceed with the investigation in the usual manner.

(b) Reliance on these guidelines. If a respondent asserts that the action taken was pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon these Guidelines, and the self analysis and plan are in writing, the Commission will determine whether such assertion is true. If the Commission so finds, it will so state in the determination of no reasonable cause and will advise the respondent that:

(1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of Title VII; and
(2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to section 713(b)(1).

Sec. 1608.11 Limitations on the application of these guidelines.

(a) No determination of adequacy of plan or program. These Guidelines are applicable only with respect to the circumstances described in Sec. 1608.1(d), of this part. They do not apply to, and the section 713(b)(1) defense is not available for the purpose of, determining the adequacy of an affirmative action plan or program to eliminate discrimination. Whether an employer who takes such affirmative action has done enough to remedy such discrimination will remain a question of fact in each case.

(b) Guidelines inapplicable in absence of affirmative action. Where an affirmative action plan or program does not exist, or where the plan or program is not the basis of the action complained of, these Guidelines are inapplicable.

(c) Currency of plan or program. Under section 713(b)(1), persons may rely on the plan or program only during the time when it is current. Currency is related to such factors as progress in correcting the conditions disclosed by the self analysis. The currency of the plan or program is a question of fact to be determined on a case by case basis. Programs developed under Executive Order 11246, as amended, will be deemed current in accordance with Department of Labor regulations at 41 CFR chapter 60, or successor orders or regulations.

Sec. 1608.12 Equal employment opportunity plans adopted pursuant to section 717 of title VII.

If adherence to an Equal Employment Opportunity Plan, adopted pursuant to section 717 of title VII, and approved by an appropriate official of the U.S. Civil Service Commission, is the basis of a complaint filed under title VII, or is alleged to be the justification for an action under title VII, these Guidelines will apply in a manner similar to that set forth in Sec. 1608.5. The Commission will issue regulations setting forth the procedure for processing such complaints.

State Specific Discrimination Laws

States generally have their own specific statutes addressing discrimination. Federal law requires at least 15 employees on staff to file a discrimination claim while individual state law may allow a discrimination claim with fewer employees. The chart on the next page shows the state statute, minimum number of employees needed to file a claim and website for each state.

State Specific Discrimination Laws			
State	**Law**	**# of Emp.**	**Website**
Alabama	Ala. Code §25-1-20	15	eeoc.gov
Alaska	Alaska Stat. §18.80.220 Alaska Stat. §47.30.865	2	gov.state.ak.us/aschr
Arizona	Ariz. Rev. Stat. Ann. §41-1461	1	ag.state.az.us/civil_rights
Arkansas	No State	15	state.ar.us
California	Cal. Gov't. Code §12900	5	dfeh.ca.gov
Colorado	Colo. Rev. Stat. §27-34-401	1	dora.state.co.us/civil_rights
Connecticut	Conn.Gen.Stat. §46a-51	3	state.ct.us/chro
Delaware	Del. Code Ann. tit. 19, §710	4	delawareworks.com
Florida	Fla. Stat. Ann. §760.50	15	fchr.state.fl.us
Georgia	Georgia Fair Emp Practices	15	eeoc.gov
Hawaii	Haw.Rev.Stat.§378-1	1	hawaii.gov/hcrc
Idaho	Idaho Code §67-5909	5	www2.state.id.us
Illinois	775 ILCS 5/1-101	1	state.il.us/dhr
Indiana	Ind. Code Ann. §§22-9-1-2 and §22-9-2	6	state.in.us/icrc
Iowa	Iowa Code Ann §216.1	4	state.ia.us/government
Kansas	Kan. Stat. Ann. §§44-1101	6	khrc.net
Kentucky	Kentucky Rev.Stat §344.040 Kentucky Rev.Stat §207.135 Kentucky Rev.Stat §342.197	8	state.ky.us/agencies2/kchr
Louisiana	La.Rev.Stat.Ann §23:311-352	20	gov.state.la.us
Maine	Me. Rev. Stat. Ann. tit. 5, §§4551-4663	1	state.me.us/mhrc
Maryland	Md. Code Ann. Â§49B	Varies by County	mchr.state.md.us
Massachusetts	Mass.Gen.Laws Ann.ch 151B	6	state.ma.us/mcad
Michigan	Mich.Comp.Laws §37-2202 Mich.Comp.Laws §37.1202	1	michigan.gov/mdcr
Minnesota	Minn.Stat.Ann §363.01	1	humanrights.state.mn.us
Mississippi	No state	15	eeoc.gov
Missouri	Mo.Ann.Stat §213.010	6	dolir.state.mo.us/hr
Montana	Mont.Code Ann §49-2-303	1	erd.dli.state.mt.us

State Specific Discrimination Laws (continued)			
State	**Law**	**# of Emp.**	**Website**
Nebraska	Neb.Rev.Stat.Ann §48-1101	15	nol.org.home/NEOC
Nevada	Nev. Rev. Stat. Ann. §613.330 & 335	15	detr.state.nv.us/nerc
New Hampshire	N.H.Rev.Stat.Ann §354-A	6	webster.state.nh.us/hrc
New Jersey	N.J.Stat.Ann.10:5-12	1	state.nj.us/lps/dcr
New Mexico	N.M. Stat. Ann. §28-1-7	4	dol.state.nm.us/dol_hrd
New York	N.Y.Exec.Law §§292, 296	4	nysdhr.com nyc.gov/html/cchr/home *
North Carolina	N.C.Gen.Stat §143-422.2 N.C.Gen.Stat §95-28.1-28.1A N.C.Gen.Stat §130A-148 N.C.Gen.Stat §168a	15	eeoc.gov
North Dakota	NDCC Chapter 14-02.4	1	state.nd.us/labor
Ohio	Ohio Rev. Code §4112.04 & .14	4	state.oh.us/crc
Oklahoma	25 Okla. Stat. Ann. §§1301, 1302 & 1901	15	hrc.state.ok.us
Oregon	Or.Rev.Stat §659A.030 covers criminal proceedings rights for misleading advertising	1 (6 for disability)	boli.state.or.us
Pennsylvania	Pa.Stat.Ann.tit.43, §§953, 954	4	phrc.state.pa.us
Rhode Island		15	state.ri.gov
South Carolina	S.C. Code §1-13-30 & 80	15	state.sc.us/schac
South Dakota	No state	15	state.sd.us
Tennessee	Tenn.Code Ann. §4-21-401 Tenn.Code Ann. §8-50-103	8	state.tn.us/humanrights
Texas	Texas Lab. Code §§21.051, 21.101	15	twc.state.tx.us
Utah	Utah Code Ann., Title 34A Ch 5	15 for age	laborcommission.utah.gov
Vermont	Vt. Stat. Ann. tit. 21, §§495-495d	1	state.vt.us
Virginia	Va. Code Ann. 2.1-714	6	chr.state.va.us
Washington	Wash. Rev. Code Ann. §49.60.180	8 (1 for wage)	wa.gov/hrc
West Virginia	W. Va. Code §5-11-1	15	state.wv.us/wvhrc
Wisconsin	Wisc. Stat. Ann. §111.321-11.36	1	dwd.state.wi.us/er
Wyoming	Wyo. Stat. §27-9-105	2	wydoe.state.wy.us

*New York City has its own laws