EEO IN THE JUDICIAL BRANCH:

An Outline of Policy and Law

Daniel B. Edelman

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Alan I. Herman *Senior Staff Attorney*

David F. Halbach, *Senior Staff Attorney*

Merril J. Grumer, *Staff Associate*

Randy P. Wolfe, *Staff Associate*

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Author

Daniel B. Edelman is a partner in the Washington, D.C., law firm of Yablonski, Both, and Edelman, engaged in general practice with emphasis on complex litigation, including Title VII cases, securities, and breach of contract claims. Mr. Edelman graduated magna cum laude from Harvard College in 1966 and received his LL.B degree cum laude from Harvard Law School in 1969. He served as a law clerk to the Honorable Harry A. Blackmun both in the United States Court of Appeals, Eighth Circuit, and in the Supreme Court of the United States. Mr. Edelman is a member of the bar of Minnesota, the District of Columbia, and the Supreme Court of the United States. He has argued cases before four United States Courts of Appeal.

Introduction

Courts, in their capacity as employers, administer formal and informal personnel management systems much like those in public sector agencies in the executive and legislative branches. However, the recognition of Equal Employment Opportunity (EEO) principles and their application to judicial system personnel administration have been very slow to develop. A 1978 National Center for State Courts survey[1] reported the following findings:

1. There are few EEO programs currently in operation in state and local courts.
2. Women and minorities continue to be underrepresented in court system work forces.
3. Women and minority group members are underrepresented among the judiciary.

Among the reasons for these phenomena is a basic skepticism by court officials about the applicability of federal and state EEO legislation to the operation of court personnel systems.

Courts, as agencies of justice, must be especially sensitive to the fairness of their own employment practices. They can hardly succeed in their mission of doing justice, particularly in the application of EEO and other civil rights laws, if they are not just in their own employment practices.

Apart from these essential policy considerations, EEO laws clearly do apply to court personnel systems. Courts are liable not only for discriminatory personnel procedures but also for failure to remedy offending acts of supervisors.[2] Monetary liability for violation of these laws will routinely include back pay and attorney's fees, and may include damages above and beyond back pay. Back pay liability, particularly in the context of class suits, may be extremely large; class back pay judgments in six figures are not unknown. Awards of attorney's fees may also be substantial, in some cases greatly exceeding the amount of back pay. Remedies for violations of EEO laws routinely include injunctive relief that may involve court-imposed personnel practices and procedures. Finally, there is growing precedent for the award of damages against officials in their individual capacities; thus the possibility of personal monetary liability for discriminatory practices exists.[3]

Because of the special responsibility of courts to be models of justice in their internal operations and because of the increasing potential for substantial monetary liability, court personnel systems are well advised to make voluntary EEO initiatives a matter of high priority.

This outline begins by summarizing the federal EEO laws presently applicable to state and local governments. It then addresses the specific legal issues regarding the applicability of EEO laws to courts, e.g., the implications of the separation of powers doctrine, the Tenth and Eleventh Amendments to the United States Constitution, judicial immunity, and the exemption created by Title VII of the Civil Rights Act. Finally, once it is clearly established that EEO laws are applicable to the judicial branch, it examines the appropriateness of voluntary affirmative action in state and local courts.

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1. See F. Bremson, M. Culhane, J. Mayson and A. Milton, Jr., "Equal Employment Opportunity in the Courts," *State Court Journal*, vol. 3, no. 3 (1979), 11.

2. *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1979).

3. *Cleary v. Department of Pub. Welfare*, 23 EPD 15, 725 (¶ 30,917) (E.D. Pa. 1979).

EEO STATUTES AND CASE LAW

Applicable Statutes

1. Civil Rights Act of 1964, as Amended in 1972

In 1972, Congress amended Title VII of the Civil Rights Act of 1964,[4] which prohibits discrimination based on race, religion, sex, and national origin, to include state and local governments—and thus courts—within the coverage of the Act. The Report of the House Education and Labor Committee recites that *"[a]ll State and local government employees* would under the bill have access to the remedies available under the Act." (Emphasis added.)[5] Thus, the legislative history of the 1972 amendments indicates Congress' intent to include court employees within the coverage of Title VII. A further indication of this intent is a reference in that report to the 1970 report of the U.S. Commission on Civil Rights, *Mexican-Americans and the Administration of Justice in the Southwest*, which points out the underrepresentation of Mexican-American employees in justice administration agencies, including the courts.

2. Civil Rights Acts of 1870 and 1871

The Civil Rights Acts of 1870[6] and 1871[7] also prohibit employment discrimination in courts. The 1870 Act has been held to prohibit racial discrimination in employment by state and local governments, as well as by other employers,[8] and its prohibition of race discrimination has been held to protect Mexican-Americans.[9] That Act does not, however, address sex discrimination. The 1871 Act provides a civil remedy for discrimination by courts and other state agencies in violation of the Equal Protection Clause of the Fourteenth Amendment.[10] The Report of the House Education and Labor Committee, referred to above, specifically states that "the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§1981 and 1983, is in no way affected."[11]

3. The Equal Pay Act of 1963, as Amended in 1974 (EPA)

The Equal Pay Act of 1963, as amended in 1974, requiring equal pay for equal work without regard to sex, applies to courts as well as other state and local government employers.[12]

4. The Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act, prohibiting age-based discrimination against persons aged 40 to 70, also applies to courts as well as other state and local employers.[13]

5. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination by recipients of federal financial assistance on the grounds of race, color, or national origin.[14]

6. The Vocational Rehabilitation Act of 1973

The Vocational Rehabilitation Act of 1973 prohibits handicap-based discrimination against otherwise qualified individuals in connection with programs and activities receiving federal assistance, and establishes remedies paralleling those under Title VI.[15] Court systems receiving federal assistance directly or indirectly are subject to the Act.

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4. 42 U.S.C. §2000e (1976).

5. H. Rep. No. 92-238 on H.R. 1746, [1972] U.S. Code Cong. and Adm. News 2137, 2152.

6. The 1870 Act, 42 U.S.C. §1981, (1976), provides as follows:
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

7. The 1871 Act, 42 U.S.C §1983, (1976), provides as follows:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

8. *Washington v. Davis*, 426 U.S. 229 (1976); *Williams v. DeKalb County*, 577 F.2d 248 (5th Cir. 1978), *modified*, 582 F.2d 2 (5th Cir. 1978); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 437 U.S. 903, (1978) *vacated as moot and remanded for dismissal*, 440 U.S. 625 (1979).

9. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).

10. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Whitmer v. Davis*, 410 F.2d 24 (9th Cir. 1969).

11. [1972] U.S. Code Cong. and Adm. News, 2154.

12. 29 U.S.C. §206(d) (1976).

13. 29 U.S.C. §621, *et seq.* (1976).

14. Title VI, 42 U.S.C. §2000d (1976), provides as follows:
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

15. 29 U.S.C. §794 (1976).

7. Equal Protection Clause of the Fourteenth Amendment

As public bodies, courts, like other state and local government employers, are subject to the Equal Protection Clause of the Fourteenth Amendment in all of their activities, including employment.[16]

8. Program-Specific Acts

The Justice System Improvement Act of 1979,[17] the Juvenile Justice and Delinquency Prevention Act of 1974, as amended,[18] and the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing Act)[19] prohibit discrimination on the basis of race, color, religion, sex, or national origin,[20] and provide for the suspension and termination of federal funds if discrimination occurs.

16. The constitutional proscription also extends to employees exempt from coverage of Title VII. *Davis v. Passman*, 442 U.S. 228 (1979).

17. 42 U.S.C. §3701, *et seq.* (Supp. III 1979).

18. 42 U.S.C. §5601, *et seq.* (1976).

19. 31 U.S.C. §1221, *et seq.* (1976).

20. The Revenue Sharing Act also prohibits discrimination on the basis of age or handicap.

Constitutionality of Application of Federal Statutory Sanctions to State Agencies, Including Courts

Federal statutory sanctions for employment discrimination by other state and local government employers, and by courts, are quite plainly constitutional. The Supreme Court recognized in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that in extending Title VII to state and local governments, Congress was acting pursuant to its powers to enforce the substantive guarantees of the Fourteenth Amendment. In that case, the Court held that Congress is empowered to authorize the federal courts to grant awards of back pay against state governments despite the Eleventh Amendment provision for sovereign immunity of the states.[21] The constitutionality of the application of federal anti-discrimination laws to state and local governments has been consistently upheld as within Congress' enforcement powers under the Fourteenth Amendment.[22]

Given the clear constitutionality of application of each of these anti-discrimination enactments, the assertion of any state statute or common law doctrine to the contrary would necessarily fail under the Supremacy Clause of the U.S. Constitution.[23]

The suggestion that courts might be immune from the application of federal prohibitions of employment discrimination under the common law doctrines of separation of powers or judicial immunity is not sound. Separation of powers becomes an issue in connection with conflicts between different branches of government at *either* the federal *or* the state level, but the separation of powers doctrine has no application to federal-state relations. *Kwai Chiu Yuen v. Immigration & Naturalization Service*, 406 F.2d 499 (9th Cir. 1969), *cert. denied*, 395 U.S. 908 (1969). Here the question is not separation of co-equal branches at the same level, but of application of a valid federal statute to a branch of state government under the Supremacy Clause of the Constitution. See *Ex parte Virginia*, 100 U.S. 339 (1879). An assertion of the common law doctrine of judicial immunity would also fail, not only under the Supremacy Clause, but also because judicial immunity, by its nature, protects only those judicial acts performed within the court's function as arbiter of a legal dispute; it does not extend to matters of day-to-day court administration such as internal court employment practices. *Sherwood v. Farrar*, 9 EPD 7,905 (¶ 10,202) (W.D. Mich. 1975).

21. See also, *New York Gas Light Club, Inc. v. Carey*, ____ U.S. ____, 100 S.Ct. 2024, 2032, 23 EPD 15,897 (¶30,955) (June 9, 1980); *Hutto v. Finney*, 437 U.S. 678 (1978).

22. *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); *Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Me. 1977); *Nilsen v. Metropolitan Fair & Exposition Authority*, 435 F. Supp. 1159 (N.D. Ill. 1977); *Usery v. Edward J. Meyer Memorial Hospital*, 428 F. Supp. 1368 (W.D. N.Y. 1977); *Brown v. County of Santa Barbara*, 427 F. Supp. 112 (C.D. Cal. 1977); *Usery v. Bettendorf Community School District*, 423 F. Supp. 637 (S.D. Iowa 1976); *Harris v. Pennsylvania*, 419 F. Supp. 10 (M.D. Pa. 1976); *United States v. City of Milwaukee*, 395 F. Supp. 725 (E.D. Wis. 1975).

23. *LeBlanc v. Southern Bell Telephone and Telegraph Co.*, 333 F. Supp. 602 (E.D. La. 1971); *aff'd per curiam*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971). Also 42 U.S.C. §2000e-7 confirms that Title VII supersedes any state law "which purports to require or permit . . . any act" which violates that Act.

Current State of the Law Regarding Inclusions and Exclusions of State Court Employees

1. Inclusions

Title VII of the Civil Rights Act applies to those employers with at least 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year; the ADEA uses similar language but applies to employers with 20 or more employees.[24] The other statutes referred to on pages 3-4 apply without regard to number of persons employed. In addition to the prohibition against discrimination, which applies to all recipients, all recipients of $25,000 or more in OJARS[25] assistance who have 50 or more employees must maintain equal employment opportunity programs.

Some court systems have taken the position that each of the courts within the system—some of which have less than the requisite number of employees—is a separate employer for purposes of application of these requirements; even some courts funded by the state or jointly funded by the state and county have asserted this position, although it appears more logical where funding is at the county or local level. To the extent that these views would place substantial numbers of employees outside the protection of the Act, they are inconsistent with the principle that Title VII is a remedial statute to be accorded a liberal construction.[26] Given state or county funding of court systems, the states and counties will themselves undoubtedly be treated as employers for purposes of Title VII.[27]

2. "Exempt Employees" Under Title VII, Equal Pay Act, and Age Discrimination in Employment Act

Title VII of the Civil Rights Act, the Equal Pay Act (EPA), and the Age Discrimination in Employment Act (ADEA) exempt elected officers and certain appointees of such officers. Under Title VII, the term "employee" is defined as follows:

> 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.[28]

The legislative history of the exemption from Title VII reveals Congress' intention that the exemption be narrowly construed.[29]

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24. 42 U.S.C. §2000e(b) (1976); 29 U.S.C. §630 (1976).

25. The Office of Justice Assistance, Research, and Statistics (OJARS) was created by the Justice System Improvement Act of 1979, 42 U.S.C. §3701, *et seq.* (Supp. III 1979), and includes the Law Enforcement Assistance Administration (LEAA), the National Institute of Justice (NIJ), and the Bureau of Justice Statistics (BJS).

The pertinent provision of the LEAA regulation, 28 C.F.R. §42.302(d) (1980), provides as follows:

> Each recipient of LEAA assistance within the criminal justice system which has 50 or more employees and which has received grants or subgrants of $25,000 or more pursuant to and since the enactment of the Safe Streets Act of 1968, as amended, and which has a service population with a minority representation of 3 percent or more, is required to formulate, implement and maintain an equal employment opportunity program relating to employment practices affecting minority persons and women within 120 days after either the promulgation of these amended guidelines, or the initial application for assistance is approved, whichever is sooner. Where a recipient has 50 or more employees, and has received grants or subgrants of $25,000 or more, and has a service population with a minority representation of less than 3 percent, such recipient is required to formulate, implement, and maintain an equal employment opportunity program relating to employment practices affecting women. For a definition of "employment practices" within the meaning of this paragraph, see §42.202(c).

This provision also applies to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) by incorporation into the JJDP Act, 42 U.S.C. §5672 (Supp. III 1979).

26. The principle of liberal construction of Title VII has been specifically held applicable to the definition of "employer." *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977) and cases cited therein. Those cases were cited in *Owens v. Rush*, 636 F.2d 283, (10th Cir. 1980), in which it was held that an elected sheriff was an agent of the county for purposes of hiring and firing. Thus the plaintiffs were employees of the county, which has more than 15 employees, and not employees of the sheriff, who had fewer, and were covered under Title VII.

27. *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp 670 (D. Md. 1979); *Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Me. 1977).

28. 42 U.S.C. §2000e(f) (1976). The EPA, 29 U.S.C. §203(e)(2)(C) (1976), and the ADEA, 29 U.S.C. §630(f) (1976), are to the same effect. There is no such exemption to the application of 42 U.S.C. §§1981 and 1983 or, obviously, the Fourteenth Amendment.

29. [1972] U.S. Code Cong. & Adm. News, 2180. See also *Owens v. Rush*, *supra* note 26, where an elected sheriff was considered an agent of the county for purposes of hiring and firing, and the county was considered to be the employer.

Current State of the Law Regarding Inclusions and Exclusions of State Court Employees

The Equal Employment Opportunity Commission's (EEOC) instructions to state and local governments carry forward Congress' intent in this respect. The instructions provided with the EEO-4 report form state:

> ELECTED AND APPOINTED OFFICIALS
>
> Section 701(f) of the Equal Employment Opportunity Act of 1972 contains an exemption for elected and certain appointed officials that is set forth in definition of "employee" in Appendix 1. Based on the legislative history of Section 701(f), the General Counsel of the Commission has ruled that this exemption was intended by the Congress to be construed narrowly. This ruling concluded that only the following persons would be included in the exemption:
>
> 1. State and local elected officials.
> 2. Such official's immediate secretary, administrative, legislative, or other immediate or first-line aide.
> 3. Such official's legal advisor.
> 4. Appointed cabinet officials in the case of a Governor, or heads of executive departments in the case of a Mayor or County Council.
>
> All appointed officials must have been personally selected by the elected officials and must receive assignments from and report directly to the elected official in the carrying out of his/her official duties. In order to find that the personal staff exemption applies, all of these factors must be shown.
>
> No other persons appointed by an elected official are exempt under this interpretation. In no case is any person exempt who is appointed by an appointed official, whether or not the latter is exempt. Furthermore, as specified in Section 701(f), the exemption does not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

The employee exemption provision of Title VII has been construed by a number of federal District Courts. The majority of these decisions have recognized Congress' intent that the exemption be narrowly construed. For example, in *Gearhart v. Oregon*, the Court held that a deputy legislative counsel was not an exempt employee, stating as follows:

> The issue boils down to whether or not she was "an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." . . .
>
> . . . .
>
> . . . Congress, in using the term "immediate adviser," was trying to avoid exempting large groups of faceless technicians and researchers without sweeping into the Act the close personal policy making advisers deemed to be vitally necessary for the conduct of executive and legislative business by officials who are necessarily politicians as well.[30]

In view of the legislative history and the EEOC instructions, the exemption can be expected to receive a similarly narrow construction when applied to the courts. Because the roles of various categories of assistants such as bailiffs, court reporters, law clerks and secretaries vary from court to court, one cannot say that a particular category will or will not be held exempt. Where judges or clerks of court are elected, the EEOC instructions and such authorities as *Gearhart* suggest limitation of the exemption to those appointees who are shown genuinely to be personal or policy-making assistants. It is likely that the exemption will continue to be narrowly construed. Furthermore, the availability of alternative civil remedies under the 1870 and 1871 Acts makes invocation of these exemption provisions somewhat of a futile act.

The exemption specifically provides that it does not extend to employees subject to civil service laws. This does not mean, however, that employees exempt from civil service laws are also exempt from coverage of Title VII, EPA, and ADEA. To be exempt, they must also meet the specific exemption conditions of those statutes.

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30. 410 F. Supp. 597, 600 (D. Ore. 1976). *Accord, Morgan v. Sheriff of Tangipahoa Parish*, 23 EPD 16,511 (¶31,063) (E.D. La. 1979) (based on Congress' intent, deputy sheriffs were not exempt; "only high level, policymaking members of an official's personal staff were meant to be exempted."); *Howard v. Ward County*, 418 F. Supp. 494 (D.N.D. 1976) (under North Dakota law deputy sheriffs were employed by the state or county, not the sheriff, could not be characterized as being on the sheriff's personal staff; and were not exempt). *But see Kyles v. Cacasieu Parish Sheriff's Dep't.*, 395 F. Supp. 1307 (W.D. La. 1975) (deputy sheriffs held exempt from Title VII based on public's perception of the offices of sheriff and deputy sheriff as interchangeable and based on authority of deputy sheriff, by delegation, to exercise functions of sheriff); *Wall v. Coleman*, 393 F. Supp. 826 (S.D. Ga. 1975) (deputy district attorneys held exempt from Title VII based on "personal" nature of attorney-deputy relationship and public identification of the District Attorney's performance with that of his deputies).

Title VII, EPA, and ADEA provide that the exemption extends only to specific appointees of those who are *elected*. Therefore, where appointed judges are concerned, all employees are covered by the Act. Thus, where vacancies in elective positions occur incident to retirement, resignation, or death and are filled by appointment, the appointees of such a judge arguably would not be exempt. See B. Schlei and P. Grossman, *Employment Discrimination Law*, at 854 (B.N.A. 1976). The anomalous result is that qualified appointees of elected judges may be exempt while those filling the same positions for appointed judges are not exempt during the term of the appointment. If the appointed judge is subsequently elected to office, his appointees would then become exempt if the conditions for exemption can be demonstrated. Thus, as to any particular claim of discrimination, the application of Title VII depends upon the manner in which the judge was selected at the time of the alleged discrimination.

To summarize, consistent with Congress' intent and the EEOC guidelines, all employees of the courts must be considered covered unless they satisfy all of the following conditions: (1) not covered by civil service; (2) appointed personally by an elected official; (3) serve and report to that official directly, and at his/her pleasure; and (4) may clearly be characterized as personal staff or as serving in an advisory or policymaking capacity.

Separation of Powers Doctrine as Related to Applicability of State EEO Laws to State and Local Courts

If the separation of powers doctrine is asserted against application of state fair employment laws to courts, the assertion would rest on state rather than federal constitutional grounds. It has long been held that the principle of separation of powers is not enforceable against the states as a matter of federal constitutional law.[31]

This outline does not examine the precise contours of the separation of powers doctrine as it exists under the constitution of any particular state. While details of the doctrine undoubtedly differ from state to state, the separation of legislative, executive, and judicial powers at the state level is universal in this country. A general discussion of separation of powers at the state level appears in 16 C.J.S. *Constitutional Law* §104, *et seq*. As usually understood, separation of powers at the state level plainly does not prohibit application of state fair employment laws to the courts.

Through its constitutional power, the legislative body establishes rules of law to govern and regulate the actions of its people and property, and the "legislative function" has been held to involve the exercise of discretion as to the contents and policy of statutes. 16 C.J.S. *Constitutional Law* §106. The enactment of equal employment opportunity laws by state legislatures is plainly within the legislative power and function, as is the application of such laws to all parts of the state government and private employers. While the separation of powers doctrine prohibits encroachment by the legislature upon the judiciary, it is the interference with the exercise of judicial *functions* that is prohibited. The legislature cannot bar or restrict the power of the judiciary to determine questions of law. 16 C.J.S. *Constitutional Law* §108, 496 n. 57.50. The determination, however, of the eligibility and qualifications of judicial and other public officers, the manner in which such offices are to be filled, the fixing of compensation for such offices, the placing of certain employees under civil service rules, etc., have been recognized as within the legislative function and not impermissibly encroaching upon the judicial function. 16 C.J.S. *Constitutional Law* §§106 and 116. By the same token, application of state equal employment laws to court employees plainly does not "encroach."

31. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *May v. Supreme Court of Colorado*, 508 F.2d 136 (10th Cir. 1974).

VOLUNTARY AFFIRMATIVE ACTION AS A MEANS OF AVOIDING COERCION

Courts can avoid the coercive effect of federal legislation or court orders and assure equal employment opportunities by establishing affirmative action plans. The following discussion is concerned with affirmative action plans that are (1) voluntary and (2) minority-status conscious and/or sex conscious. A voluntary plan is one adopted upon the initiative of the particular employer rather than imposed by judicial decree or other legally coercive means. A plan conscious of minority status or sex takes such status into account in selection decisions (hiring, promotion, entry into training programs, etc.), in order to correct the exclusion or underrepresentation, resulting from past discrimination, of minorities and/or women in particular industries or jobs.[32]

While Title VII does not specifically address affirmative action plans, the Supreme Court in its Title VII cases has called upon employers "...to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and *ignominious* page in this country's history."[33] The Court has also emphasized the value of conciliation and voluntary action, rather than litigation, as preferred methods of Title VII enforcement.[34] The EEOC has issued guidelines encouraging the implementation of affirmative action plans where needed to undo the effects of past discrimination, and providing that such plans will be protected by Title VII.[35] Further, the Supreme Court has held that plans that are reasonably constructed to ameliorate past discrimination do not violate Title VII's prohibition of discrimination.[36]

We have seen that as public employers, state and local court systems are subject to prohibitions against employment discrimination under the Equal Protection Clause of the Fourteenth Amendment and the various statutes already described above. These antidiscrimination principles can, of course, be invoked by white as well as by minority employees.[37] At the same time, state courts as public entities are duty-bound under the Constitution to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[38] The Supreme Court held in the *Weber* case (note 36 *supra*) that reasonably constructed affirmative action preferences do not violate Title VII's prohibition of discrimination. While the Court will have its first occasion in *Minnick* (note 36 *supra*) to pass on the constitutionality of affirmative action in public employment, six Justices, in two other cases, have agreed that racial preferences in public programs other than employment are, in appropriate circumstances, constitutional.[39]

The majorities in *Weber*, *Bakke*, and *Fullilove* indicate that the use of reasonable affirmative action plans by public employers is consistent with both the applicable statutes and the Constitution. Affirmative action plans should, however, be carefully constructed to reflect the EEOC guidelines (see note 35 *supra*). Those guidelines provide that an affirmative action plan shall contain three elements: "a reasonable self-analysis; a reasonable basis for concluding action is appropriate; and reasonable action."[40] The employer must initially assess its own employment situation in order to

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32. State court employment is a case in point. According to surveys conducted in connection with the National Center's Equal Employment Opportunity in the Courts project (note 1 *supra*), minorities appear to be underrepresented in the vast majority of state court personnel systems; women and minorities appear similarly underrepresented in professional ranks.

33. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). (Quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

34. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

35. 29 C.F.R. §1608.1 *et. seq.* (copy attached as Appendix A). The EEOC guidelines expanded upon a statement issued August 26, 1976 entitled "Affirmative Action Programs for State and Local Government Agencies" by the Equal Employment Opportunity Coordinating Council, which was composed of chiefs of the several agencies responsible for enforcement of federal laws against discrimination. 42 U.S.C. §2000e-14 (1976). The Council was abolished and its functions transferred to the EEOC pursuant to the 1978 reorganization of federal civil rights enforcement responsibilities. 43 Fed. Reg. 19807 (1978). A copy of the Council's statement encouraging voluntary affirmative action in state and local employment is appended as Appendix B.

36. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Since *Weber* involved affirmative action in private employment, no constitutional issue of equal protection was presented. In a case now pending, *Minnick v. California Department of Corrections*, No. 79-1213, *cert. granted*, ____ U.S. ____, 100 S.Ct. 3055 (July 2, 1980), the U.S. Supreme Court will have its first opportunity to pass on affirmative action in public employment. The lower court opinion in that case, and modification thereof, are reported at 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (Ct. App. 1979) and 96 Cal. App. 3d 626, (1979).

37. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

38. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

39. *University of California Regents v. Bakke*, 438 U.S. 265 (1978) (racial preferences in medical school admissions); *Fullilove v. Klutznick*, ____ U.S. ____, 100 S.Ct. 2758 (1980) (racial preference in local public works contracting). *Bakke* indicates the view of five Justices that racial preferences are constitutional in appropriate circumstances. The opinion of Justices Brennan, Marshall, White, and Blackmun summarized the central meaning of their opinion and that of Justice Powell as follows:

> Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area. 438 U.S. at 325.

That Justice Powell did not disagree with this characterization is apparent from his opinion in *Fullilove*, 100 S.Ct. at 2783. Additionally, the Opinion of Chief Justice Burger in *Fullilove* indicates that he also supports the use of racial preferences as constitutional, in appropriate circumstances, to undo the effects of past discrimination. 100 S.Ct. at 2760.

40. 29 C.F.R. §1608.4 (1980).

determine whether a need for remedial action exists.[41] Then, through the self-analysis, a reasonable basis must be identified for the affirmative action plan that is to be implemented.[42] Finally, the guidelines seek to assure that the action taken is reasonable: that it be precisely tailored to correct the problems revealed through the self-analysis without unnecessarily restricting opportunities for the work force as a whole.[43]

Plans adopted in compliance with the guidelines will be protected, in the EEOC's view, under the provision of Title VII that immunizes actions taken in good faith reliance upon written interpretations or opinions of the Commission.[44]

In order to maximize protection, a plan should be in writing, dated, and recite reliance upon the EEOC's affirmative action guidelines. Employers who initiated affirmative action programs in advance of the EEOC guidelines would be well advised to review their programs and, where appropriate, to reinstitute them in specific reliance upon the guidelines.[45]

The EEOC guidelines are to be viewed with deference,[46] as they are the views of the agency charged with enforcement and administration of Title VII, and also with coordinating the enforcement of other federal anti-discrimination provisions. The guidelines were not specifically cited by the Supreme Court in *Weber*; they are nevertheless supported by the Court's decision both in purpose and in approach.[47] The Court in *Weber* stressed the necessity of voluntary initiatives to undo the effects of past discrimination and achieve genuine equal opportunity, and declared that an interpretation of Title VII "that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' . . . ."[48] The Court's emphasis on the necessity of voluntary action echoes the statement of purpose that introduces the guidelines.[49] While *Weber* did not indicate that Kaiser and the union had formally made a "self-analysis" and identified a "reasonable basis" for action as contemplated by the guidelines (the Kaiser plan predated the guidelines by several years), the Court's decision was grounded on its recognition that past exclusion of black persons from craft jobs plainly provided a reasonable basis for corrective action.[50] In this respect, the guidelines provide a specific procedure for verifying that a proper basis for affirmative action exists. The Court in *Weber* specifically addressed the reasonableness of the action taken in the Kaiser plan in terms that echo the guidelines' articulation of what constitutes "reasonable action."[51] Thus, *Weber* also supports the position that plans constructed in reliance on the guidelines will be upheld. Notably, the guidelines have been cited with

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41. The purpose of reasonable 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." The EEOC declares that the employer "should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions" as well as itself. 29 C.F.R. §1608.4 (1980).

42. The guidelines recognize a reasonable basis for affirmative action where the self-analysis reveals 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, . . .

A reasonable basis "exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action." 29 C.F.R. §1608.4 (1980).

43. 29 C.F.R. §1608.4(c)(2) (1980).

44. Section 713(b), 42 U.S.C. §2000e-12(b) 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, . . .

See *EEOC v. AT&T*, 419 F. Supp. 1022, 1055, n. 34 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); 29 C.F.R. §1608.1(d), .2, .4(d), .10(a) and (b) (1980).

45. 29 C.F.R. §1608.1(e) (1980).

46. *Griggs v. Duke Power Co.*, *note 33 supra*, at 433; *Albemarle Paper Co. v. Moody*, *note 33 supra*, at 431.

47. *Weber* involved a race-conscious affirmative action plan, negotiated by Kaiser Aluminum & Chemical Corp. and the United Steelworkers, to remedy the exclusion of black persons from craft jobs. The plan established a new craft training program and provided that at least 50 percent of new trainees were to be black until the percentage of black skilled craft workers in the employee's plant approximated the percentage of blacks in the local work force.

48. 433 U.S. at 202.

49. "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 . . . 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)." 29 C.F.R. §1608.1(c) (1980).

50. 433 U.S. at 198, n. 1.

51. The Court stated:

> (T)he plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. *Cf. McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.

443 U.S. at 208. Compare 29 C.F.R. §1608.4(c)(2) (1980).

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approval and followed in at least one lower court decision since *Weber*.[52] While *Weber* arose in the context of private employment where no constitutional issue was posed, the EEOC guidelines address affirmative action in public employment. Application of a single standard to affirmative action plans, whether arising in private or public employment, seems sensible and preferable to creation of a distinct standard for public plans.[53] Given the views of six Justices of the Supreme Court in *Fullilove* and *Bakke* (see discussion in note 39 *supra*), such a result, though not certain, appears highly likely.

State and local courts can minimize the possibility of litigation and coercive enforcement action by promulgation of an affirmative action plan. This plan will also establish the public confidence that courts as an institution are seriously pursuing the equal employment opportunity required by the U.S. Constitution, the laws, and the judicial pronouncements of the nation.

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52. *Baker v. City of Detroit*, 483 F. Supp. 930, 990, n. 113 (E.D. Mich. 1979) (upholding the Detroit police plan for preferential promotion of blacks to lieutenant positions).

Challenges to minority-status-conscious affirmative action plans have been addressed in a number of lower court decisions subsequent to *Bakke* and *Weber*. These decisions have agreed that in appropriate circumstances such plans are permissible under applicable statutes and the Constitution. In addition to *Minnick*, (note 36 *supra*) and *Baker*, see *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), rehearing granted *en banc* (remedial preferences in consent decree for police hiring); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 670 (6th Cir. 1979), *cert.* filed Jan. 10, 1980, No. 79-1080, (remedial preference given to blacks in promotions to sergeant in Detroit police department), *Doores v. McNamara*, 476 F. Supp. 987 (W.D. Mo. 1979) (remedial preferences in hiring for Kansas City police department); *Price v. Sacramento County Civil Service Commission*, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980), *cert. denied as moot*, ____ U.S. ____, 4 Empl. Prac. Guide (CCH) ____¶31,256, No. 79-1996 (Oct. 6, 1980); *Maehren v. City of Seattle*, 92 Wn.2d 480, 599 P.2d 1255 (1979), *cert. filed* Jan. 5, 1980, No. 79-1061.

53. See *Baker v. City of Detroit*, *note 52 supra*.

Appendix A

Following is the Equal Employment Opportunity Commission's "Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended." These guidelines are reprinted from the Federal Register, vol. 44, no. 14 (January 19, 1979).

Adoption of Interpretative Guidelines

The Equal Employment Opportunity Commission ("EEOC", "the Commission") enforces Title VII of the Civil Rights Act of 1964, as amended, ("Title VII," "the Act"), which makes it illegal to discriminate in employment on the basis of race, color, religion, sex, or national origin. The Act requires the Commission to investigate complaints and attempt to correct violations it discovers, informally and through conciliation, or, if necessary, through court action. The Act also authorizes private individuals to bring lawsuits if their complaints are not resolved to their satisfaction or within the statutory time period.

Since the enactment of Title VII of the Civil Rights Act of 1964, many employers, labor organizations, and other persons subject to the Act have altered employment systems to implement the purposes of Title VII by improving employment opportunities for previously excluded groups. Because of what Congress has called the "complex and pervasive" nature of systemic discrimination against minorities and women (see H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. 8 (1972)), these voluntary efforts often involve significant changes in employment relationships. Some of these actions have been challenged under Title VII, as conflicting with statutory language requiring that employment decisions not be based on race, color, religion, sex, or national origin considerations. Accordingly, the Commission believes it is important to announce the legal principles which govern voluntary affirmative action under Title VII and other employment discrimination laws, so that persons subject to the Act have appropriate guidance. These Guidelines constitute the Commission's interpretation of Title VII, harmonizing the need to eliminate and prevent discrimination and to correct the effects of prior discrimination with the need to protect all individuals from discrimination on the basis of race, color, religion, sex, or national origin.

Requests for guidance have been received by the Commission from persons subject to Title VII concerning the relationship between affirmative action and so-called "reverse discrimination." There is no separate concept under Title VII of "reverse discrimination." Discrimination against all individuals because of race, color, religion, sex, or national origin is illegal under Title VII. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

To clarify the relationship between affirmative action and a countervailing claim of discrimination, a new section 1608.1 of these Guidelines sets forth the historical and legislative foundation for the Commission's interpretation of Title VII. Section 1608.1(b) explains that Congress enacted Title VII in order to overcome the effects of past and present employment practices which are part of a larger pattern of restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life. Congress sought to accomplish this objective by establishing a national policy against discrimination in employment and encouraging voluntary affirmative action to eliminate barriers to equal employment opportunity. It is the Commission's interpretation that appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of the Act.

It is essential to the effective implementation of Title VII that those who take appropriate voluntary affirmative action receive adequate protection against claims that their efforts constitute discrimination. The term affirmative action means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Section 1608.3 of these Guidelines identifies circumstances in which voluntary affirmative action is permissible under Title VII. When such circumstances exist, and a plan or program otherwise complies with these Guidelines, the Commission will find that there is no reasonable cause to believe that the affirmative action plan or program violates Title VII. See § 1608.10(a). In addition, §1608.10(b) provides that where the plan or program is in writing and was adopted in good faith, in conformity with, and in reliance upon these Guidelines, the Commision will provide the protection authorized under section 713(b)(1) of Title VII to the employer, labor organization, or other person taking the action. See *EEOC* v. *AT&T*, 419 F. Supp. 1022, 1055, n. 34 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

On December 28, 1977, at 42 FR 64826 the Commission published proposed "Guidelines on Remedial and/or Affirmative Action" in the FEDERAL REGISTER and invited comments from the public. Comments were received from almost 500 individuals and organizations. The paragraphs below summarize the major issues raised by the comments and indicate the way in which the final Guidelines address the concerns raised by the comments.

On December 11, 1978, the Commission voted to approve the Guidelines in final form. Pursuant to Executive Order 12067, the Guidelines were then distributed to all Federal agencies for their review. Comments received in this process are also reflected in the discussion below.

I. Change of Guidelines' Title

The proposed Guidelines were titled "Proposed Guidelines on Affirmative and/or Remedial Action" and the phrase "remedial and/or affirmative action" was utilized throughout the document. A number of comments questioned the difference, if any, between remedial action and affirmative action. The term "remedial" has been dropped because of the possible erroneous implication that a violation of the law was required before affirmative action could be taken.

II. The Commission Will Process Complaints Alleging Discrimination Against Any Aggrieved Person

Many of the comments interpreted the Guidelines as indicating a Commission position that whites or males are entitled to less protection against discrimination than minorities or females, and that the Commission would either ignore complaints filed by whites or males, or process them in a different manner from those filed by females and minorities. The Commission maintains its position, articulated prior to *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that discrimination on the basis of race, color, religion, sex, or national origin, is prohibited under Title VII, regardless of the individual or class against whom such discrimination is directed. See, e.g., Commission Decision No. 74-31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions, §6404, (1973). The Commission will follow the same procedures in processing complaints filed by all individuals, regardless of their race, color, religion, sex, or national origin.

To avoid any ambiguity on these issues, language in the proposed Guidelines suggesting that complaints filed by whites and males would be "dismissed" under certain circumstances has been amended. Proposed paragraph V

stated that the Commission would "issue a notice of dismissal of the charge" when an affirmative action program conformed to the Guidelines' requirements. The word "dismissal" is a term of art used by the Commission in its procedural regulations to refer to all determinations other than "reasonable cause." Because its use was miscontrued in many comments, final sections have been amended by substituting the phrase "a determination of no reasonable cause" where such a finding is justified by the facts of the case.

III. Consideration of Race, Color, Religion, Sex, and National Origin in Employment Decisions

Some commentators objected to the draft Guidelines because of their belief that Title VII requires that all employment decisions be made without consideration of race, color, religion, sex, or national origin, regardless of the circumstances. This conclusion does not comport with United States Supreme Court decisions interpreting Title VII, nor with the recent decision in *Regents of the University of California* v. *Bakke*, 98 S. Ct. 2733 (1978) (discussed infra). In the Title VII cases, the Supreme Court has called upon employers " '*** to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). See also, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Thus, the Supreme Court recognizes that persons subject to Title VII will consider race, sex and national origin in their analyses and evaluations. In addition, the Court has emphasized the concept of conciliation and voluntary action rather than litigation as the primary method of enforcing Title VII. See *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355 (1977). Voluntary action necessarily implies latitude to make a reasonable judgement as to whether action should be taken and the nature of such action.

At the same time, the Commission recognizes that considerations of race, color, religion, sex, and national origin are not permissible in other contexts. For example, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court held that the anti-discrimination principle of Title VII could be invoked by white employees as well as minority employees. No question of affirmative action was involved. The Court held that disparate treatment violated Title VII, but specifically stated that its decision did not address any issues relating to affirmative action programs. *McDonald, supra*, at 280, n. 8. For the reasons set forth in § 1608.1, the Commission considers that these Guidelines are consistent with the statute, the Congressional intent behind it, and the decisions of the Supreme Court.

IV. Two Different Justifications of Voluntary Action: The Relationship Between Title VII and Executive Order No. 11246, as Amended

A number of comments indicated uncertainty as to the relationship in the proposed Guidelines between the references to Title VII and the references to the Executive Order. These commentators apparently understood the Guidelines to mean that affirmative action required by Executive Order No. 11246, as amended, and its implementing regulations would be lawful under Title VII *only* where the contractor has a reasonable basis for concluding that such action is necessary under Title VII. The structure of the Guidelines has been changed to clarify the Commission's original interpretation that action taken pursuant to, and in conformity with the Executive Order, as amended, and its implementing regulations, does not violate Title VII.

The legislative history of the Equal Employment Opportunity Act of 1972 shows that Congress repeatedly rejected limitations on affirmative action under the Executive Order, including the goals and timetables approach that had become by that time a central feature of the implementation of the Order. See, e.g., 118 Cong. Rec. 1385-1386 (1972) (remarks of Sen. Saxbe); 118 Cong. Rec. 1664-1665 (1972) (remarks of Sen. Javits); 118 Cong. Rec. 1676 (1972) (rejecting amendment offered by Sens. Allen and Ervin that would have prohibited requirements for certain types of affirmative action, including the goals approach, under the Executive Order); 118 Cong. Rec. 4918 (1972) (rejecting amendment offered by Sen. Ervin that would have applied section 703 (j) of Title VII to the Executive Order).

The Commission concludes that Congress intended to permit the continuation of the Executive Order program which required affirmative action by government contractors. The Congress which acted to allow the Executive Order program to continue would not, in the same measure, invalidate it under Title VII. The statute should be construed to avoid such a contradictory conclusion, especially where such a conclusion would undermine the expressed Congressional purpose of opening employment opportunities to minorities and women who had in the past been denied such opportunities.

In the Equal Employment Opportunity Act of 1972, Congress recognized the contractor's right to rely on affirmative action plans that had been approved under the Executive Order. See section 718 of Title VII. Furthermore, Congress in section 715 established the Equal Employment Opportunity Coordinating Council (composed of the Secretary of Labor, the Chair of the EEOC, the Attorney General, the Chair of the U.S. Civil Service Commission, the Chair of the U.S. Commission on Civil Rights, or their respective delegates) "to minimize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among *** branches of the Federal Government responsible for the implementation and enforcement of equal opportunity legislation, orders, and policies." 42 U.S.C. 2000e-14. This coordination responsibility now rests in the Commission by virtue of 5 U.S.C. 901 et seq., as applied by Reorganization Plan No. 1 (1978), which was implemented by Executive Order 12067 (43 FR 28,967, July 30, 1978). In order to achieve the objectives of section 715 and Executive Order No. 12067, the Commission concludes that it must recognize compliance with the requirements of Executive Order No. 11246, as amended, and its implementing regulations, as a defense to a charge that the affirmative action compliance program is discriminatory. The Commission concludes that adherence to an affirmative action compliance program approved by an appropriate official of the Department of Labor or its authorized agencies is lawful under Title VII. This interpretation thus insures that government contractors will not be subject to inconsistent standards by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs.

Thus, the Commission recognizes that affirmative action by government contractors may be lawful under Title VII for either of two distinct reasons: (a) Such efforts constitute reasonable action to implement the legislative purposes of Title VII, or (b) the action was taken pursuant to, and in conformity with Executive Order No. 11246, as amended, and its implementing regulations. The Guidelines have been

revised to reflect these two independent justifications for affirmative action under Title VII. A separate § 1608.5 governs affirmative action under Executive Order No. 11246, as amended.

The three step analytical process required under § 1608.4, when action is being justified under Title VII, is not necessary under § 1608.5, when action is being justified as undertaken pursuant to an approved program under Executive Order No. 11246, as amended. The circumstances in which such affirmative action is required under the Executive Order and the nature of such affirmative action are established by the Department of Labor.

V. Appropriate Steps for Taking Voluntary Action

A number of comments suggested that the Guidelines did not clearly define the steps the Commission believes are appropriate in taking voluntary affirmative action. A new § 1608.4 has been added to explain the three step process applicable to action justified under Title VII: reasonable self analysis, reasonable basis for concluding that action is appropriate, and reasonable action to correct that situation. The process set forth in § 1608.4 should be utilized to determine whether the circumstances set forth in § 1608.3 are present. Section 1608.5 covers action pursuant to Executive Order No. 11246, as amended.

VI. Reasonable Self Analysis

Some commentators requested further elaboration on the meaning of the term "self analysis." Section 1608.4(a) has been amended to make it clear that there is no single mandatory method of conducting the self analysis, and to refer to the methodology used by government contractors under Revised Order 4 as a model which employers and others may use in conducting a self analysis. Whatever method is used, the primary objective must be to determine whether the employment practices operate as barriers to equal employment opportunity.

Some commentators suggested that the Guidelines may be subject to abuse unless the self analysis is required to be in writing. The Commission believes that the protection from Title VII liability which may be available under section 713(b)(1) should only be recognized where the affirmative action plan or program has been carefully and consciously developed. Accordingly, the section 713(b)(1) defense will be recognized by the Commission only where the analysis and the affirmative action plan or program are in writing and are adopted in good faith, in conformity with, and in reliance upon these Guidelines. See §§ 1608.4(d) and 1608.10.

However, a respondent who has undertaken the analysis, self-evaluation, and development of an affirmative action plan of the type described in the Guidelines, but has not reduced the analysis and plan to writing, may assert these facts as a defense to a charge of discrimination. The analysis and plan need not be in writing because the Commission does not generally require that employer defenses be based on written documents. However, employers are encouraged to have written documentation since such written evidence would make it easier to establish that an analysis was conducted and that a plan or program exists. See § 1608.4(d)(2).

In response to comments which expressed concern that adoption of a plan or program might constitute an admission of discrimination, § 1608.4(d)(1) makes it clear that it is not necessary to state in writing the conclusion that a Title VII violation exists.

VII. The Guidelines Do Not Approve Inadequate Remedies

A number of commentators were concerned that violators of the Act could use the Guidelines and the section 713(b)(1) defense to shield themselves from liability for the underlying discrimination inadequately addressed by an affirmative action plan or program. The Guidelines do not lend themselves to this interpretation.

The proposed Guidelines stated in paragraph VII that the Guidelines were not intended to provide standards for determining whether voluntary action had fully remedied discrimination. The analysis and plan contemplated by these Guidelines will not establish whether discrimination existed before the plan was adopted. Furthermore, the plan cannot determine whether discrimination might take place subsequent to its adoption. In addition, the judgment as to whether affirmative action is sufficient to eliminate discrimination is a complex one which may take into account circumstances that may not have been included in the analysis which underlies the affirmative action plan. For these reasons the existence of the plan cannot provide the basis for determining whether discrimination existed, or whether the plan itself provided an adequate remedy for such discrimination. Therefore, the Guidelines state that they do not apply to a determination of the adequacy of an affirmative action plan to eliminate discrimination against previously excluded groups. Furthermore, the section 713(b)(1) defense is not involved in a determination of the adequacy of such a plan or program. Section 1608.11(a) is intended to make it clear that employers, labor organizations, or other persons who take affirmative action may still be liable under Title VII if the plan or program does not adequately remedy illegal discrimination.

VIII. No Admission of Discrimination Required

Another group of comments stated that, because the Guidelines do not require an admission or finding of discrimination, the Commission may thereby approve affirmative action which might constitute unlawful discrimination prohibited by Title VII. This interpretation is incorrect.

The proposed Guidelines stated in paragraph II that the lawfulness of affirmative action was not "dependent upon an admission, or a finding, or evidence sufficient to prove" that the person taking such action had actually violated Title VII. After careful analysis and consideration, the Commission is of the opinion that the statement, as amended, appearing in § 1608.4(b), represents an appropriate interpretation of Federal law and policy for the reasons set forth in § 1608.1(c).

These Guidelines provide a sufficient basis to determine whether affirmative action is appropriate. Persons subject to the Act should not, by taking reasonable affirmative action, be exposed to liability under the very Act they are seeking to implement. Similarly, the law should not force the employer or other person to speculate whether an arguable defense to a Title VII charge would be recognized by a court before taking affirmative action. Section 1608.4(b) makes it clear that this reasonable basis exists without regard to arguable defenses to a Title VII action.

IX. The Scope of Appropriate Voluntary Action

Several comments raised questions concerning the appropriate scope of voluntary affirmative action intended by the Guidelines. Some perceive the Commission's use of the words "ratios and other numerical remedies" in proposed Paragraph IV, in addition to the words "goals and timetables",

as indicating that the Commission was endorsing "absolute quotas" or "fixed quotas" without regard to qualifications or the circumstances in which they were used. The words "ratios and other numerical remedies" have been omitted from these Guidelines in order to avoid ambiguity and to make it clear that any numerical objective is subject to the availability of sufficient applicants who are qualified by proper, validated standards.

Affirmative Action under these Guidelines must be reasonable and must be related to the problems disclosed by the self-analysis. A new § 1608.4(c) has been added to make this clear. Affirmative action under these Guidelines may include interim goals or targets. Such interim goals or targets for previously excluded groups may be higher than the percentage of their availability in the workforce so that the long term goal may be met in a reasonable period of time. In order to achieve such interim goals or targets, an employer may consider race, sex, and/or national origin in making selections from among qualified or qualifiable applicants. Courts have ordered actions of this kind in litigated cases and in consent decrees. *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), *en banc, cert. denied* (98 S. Ct. 3145 (1978); *U.S.* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

X. Relevance of Certain Court Cases

A number of comments indicated that there were court decisions rendering inappropriate the approach taken by the Commission in these Guidelines. Because the proposed Guidelines were issued for comment prior to the decision of the United States Supreme Court in the case of *Regents of University of California* v. *Bakke*, 98 S. Ct. 2733 (1978), a number of commentators suggested that either the Guidelines were inappropriate in light of the decision of the California Supreme Court in that case, or that the Commission should wait until the U.S. Supreme Court had issued its opinion. As recommended, the Commission awaited the action of the Supreme Court in that case before promulgating these Guidelines. The Commission has reviewed these Guidelines in light of the opinions of the Justices of the Supreme Court in *Bakke*. The Commission concludes that these Guidelines are consistent with the action of the Supreme Court in that case.

In the *Bakke* case the university did not assert reliance on any detailed guidance and procedures for crafting an affirmative action plan. These Guidelines seek to provide such guidance and thereby to establish an appropriate legal foundation for voluntary action under Title VII.

Perhaps the case most frequently cited by the commentators as conflicting with the principles articulated in the proposed Guidelines was a split decision in *Weber* v. *Kaiser Aluminum Corp.*, 563 F.2d 216 (5th Cir. 1977), *cert. granted*, — U.S. —. *Weber*, however, was decided prior to *Bakke*, and therefore did not take into account the opinions in that case. In addition, it is fundamentally unfair to expose those subject to Executive Order No. 11246 to risks of liability under Title VII when they act in compliance with government requirements or when they act voluntarily and appropriately to achieve statutory objectives. Furthermore, the clarification provided by these Guidelines is necessary because the *Weber* decision may be interpreted to unduly interfere with the range of affirmative action which Congress intended to permit under Title VII.[1]

The Commission has examined all the decisions brought to its attention in the comments and other recent decisions of the United States Supreme Court and concludes that none of these decisions affect its interpretation of the circumstances in which affirmative action is lawful under Title VII.

By virtue of the authority vested in it by section 713 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265, and after due consideration of all comments received, the Equal Employment Opportunity Commission hereby issues as new Part 1608 of Title 29 of the Code of Federal Regulations its "Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended" as set forth below.

Signed at Washington, D.C., this 16th day of January 1979.

For the Commission.

ELEANOR HOLMES NORTON,
Chair

Sec.

AUTHORITY: Sec. 713 of title VII of the Civil Rights Act of 1964,as amended, 42 U.S.C. 2000e-12, 78 Stat. 265.

§ 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 No. 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

1. The Commission has taken the position that the decision of the Court of Appeals is incorrect and that the affirmative action program there was lawful. The Solicitor General has taken the same position, and the Supreme Court has now granted petitions for a writ of certiorari.

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 § 706 of Title VII.

(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).

(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 § 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.

§ 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

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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 972, 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).

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).

Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and section 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 § 1608.11.

§ 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 unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employees Selection Procedures (1978), 43 FR 30,290; 38,297; 38,299 (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.

§ 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 No. 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 38,814 (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 38,290; 38,300 (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 § 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.

§ 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 No. 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 No. 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 No. 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:

(1) Whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and (2) 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 No. 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 § 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 No. 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 § 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 § 1608.10(b), below, may be asserted by the contractor.

§ 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 § 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 § 1608.10(b), below, may be asserted by the respondent.

§ 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 § 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 § 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 § 1608.10(b), below, may be asserted by the respondent.

§ 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.

§ 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 § 1608.10(a). Other agencies with equal employment opportunity responsibilities may apply the principles of these Guidelines in the exercise of their authority.

§ 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 and 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).

§ 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 § 1608.1(d), above. 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 No. 11246, as amended, will be deemed current in accordance with Department of Labor

regulations at 41 CFR Chapter 60, or successor orders or regulations.

§ 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 § 1608.5. The Commission will issue regulations setting forth the procedure for processing such complaints.

[FR Doc. 79-2025 Filed 1-18-79; 8:45 am]

Issuance of Interpretation and Opinion

The Commission's new Guidelines on Affirmative Action contemplate that in instances where a charge of discrimination has been filed and the Commission finds that the treatment complained of occurred as a result of affirmative action procedures consistent with its Guidelines on Affirmative Action, the Commission will issue a determination of no reasonable cause. This determination may contain language stating that it is "a written interpretation or opinion of the Commission" within the meaning of Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended. The respondent in such a case may rely upon this determination as a defense to any subsequent complaints of discrimination which involve similar facts and circumstances, if the subsequent actions complained of were also taken by the respondent under its affirmative action procedures.

Such language will also appear in no-cause determinations whenever the Commission finds that the action complained of occurred pursuant to an affirmative action plan adopted in good faith compliance with, and reliance upon, the Commission's Guidelines on Affirmative Action.

The Commission's procedural regulations are accordingly revised to include this specific type of no-cause finding as a type of "written interpretation or opinion of the Commission."

Signed at Washington, D.C. this 16th day of January 1979.

For the Commission.

ELEANOR HOLMES NORTON,
Chair

Therefore, 29 CFR 1601.33 is amended to read as follows:

§ 1601.33 Issuance of interpretation or opinion.

Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of Section 713 of Title VII:

(a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or

(b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or

(c) A Commission determination of no reasonable cause, issued under the circumstances described in § 1608.10(a) or (b) of the Commission's Guidelines on Affirmative Action 29 CFR Part 1608, when such determination contains a statement that it is a "written interpretation or opinion of the Commission."

Appendix B

The original policy statement, "Affirmative Action Programs for State and Local Government Agencies," which was issued August 26, 1976, by the Equal Employment Opportunity Coordinating Council, was expanded upon for the guidelines later issued by the Equal Employment Opportunity Commission, which replaced the Coordinating Council in 1978. This statement is reprinted from the Federal Register, document 76-26675.

The Equal Employment Opportunity Coordinating Council was established by Act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

1. Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important, are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order No. 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

2. Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the work force in the relevant job market who possess the basic job related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking, certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

3. When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, 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.

4. The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Respectfully submitted,

HAROLD R. TYLER, JR.,
Deputy Attorney General and
Chairman of the
Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman,
Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman,
Civil Service Commission.

ARTHUR E. FLEMMING,
Chairman,
Commission on Civil Rights.

RICHARD ALBRECHT,
General Counsel,
Department of the Treasury.

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