AN EEO OVERVIEW FOR PERSONNEL MANAGERS

BY MARVIN J. LEVINE

The Equal Employment Opportunity Commission, established under Title VII of the Civil Rights Act of 1964, is authorized to investigate and remedy discrimination in employment. Title VII prohibits discrimination by employers, labor organizations, and employment agencies on account of race, color, religion, sex, or national origin.

Most of a firm's personnel functions are covered by the law which encompasses (1) failure or refusal to hire, (2) layoff or discharge, (3) restrictions with respect to compensation, terms, conditions or privileges of employment and (4) limitations or classification of employees in any way which would deprive an individual of employment opportunities or otherwise adversely affect his or her status as an employee because of race, color, religion, sex or national origin. The EEOC's efforts are directed at improving the economic position of enumerated minority groups (Blacks, Spanish-Surnamed Americans, Orientals, and American Indians) and female employees by following up employment discrimination complaints with conciliation efforts or court action.

Title VII, as amended in 1972, covers private employers of 15 or more persons, public and private employment agencies, labor unions with 15 or more members, joint labor-management committees for apprenticeship and training, public and private educational institutions and state and local governments. Title VII does not cover discrimination based on age or disability.

The U.S. Civil Service Commission has authority to enforce the provisions of Title VII dealing with discrimination against federal employees. The Department of Justice has authority to file suit on charges of discrimination against state and local agencies. The Department of Labor is authorized to file suit on charges of discrimination against federal contractors, and in age discrimination cases.

Nature of Discrimination

A difference in educational levels sometimes explains the gap in earnings between all persons and persons belonging to minority groups. However, this explanation is not credible when the minority-group individual has completed a number of median school years higher than the national average but still has earned substantially less than the national levels. This argument also cannot be used to explain the large earnings differentials between males and females since the median school years completed for all those 25 years or older was exactly equal (12.1 years) for both males and females in a recent report published by the Bureau of Labor Statistics.

In addition, for blacks of the same age group, females showed a bit more schooling than males (10.6 vs. 10.1 years), though earning substantially less.[1] Also, EEOC surveys have demonstrated similar patterns of inequality. Women and minorities generally experienced uneven participation rates and unbalanced occupational distribution both among industries in the same geographical area and across job categories. Generally speaking, women and members of

minority groups were concentrated, for the most part, in job categories and industries where the earnings potentials were lowest.

Furthermore, labor mobility studies show that few jobs are located from newspaper advertisements, employment offices, and the like. Workers most frequently learn of jobs from friends, by passing the place of work and seeing help-wanted signs, and by other casual associations. Since minorities have few contacts with primarily white areas distant from the inner city and since few of their friends and neighbors are employed there or make frequent trips thre, the chances of their learning of distant job opportunities may be significantly lessened.

Specifically, communication has had to be made with the minority-group members to convince people to apply for employment. This, companies often find, is hard and discouraging work. For example, blacks, the largest minority group, are often reluctant to look for jobs outside the inner city. Once the word does get around, however, that a firm has a fair employment policy, potential employees will apply. Meanwhile, the experience of those already on the payroll, their treatment, and their opportunities for advancement, all have a bearing on the number of future job-seekers.

No less real, however, than the facts of discrimination and limited labor mobility on the part of minorities has been the existence of a large measure of good will or at least of cooperation, in important segments of industry and labor. For many years, the most enlightened and resourceful industries have been pioneering in equal employment opportunity. They have developed the whole package of programs which have come to be known as affirmative action; broadened recruitment sources and aggressive hiring, training and promotion practices. In fact, there is a wealth of experience accumulated by industry which shows what may be done with the uneducated and unqualified when personnel departments depart from traditional policies and practices and make meaningful changes in employment standards.

Remedies for Past Discrimination

The employer who has carried out discriminatory employment practices prior to July 2, 1965, the effective date of the 1964 Civil Rights Act, but has since that time operated in a nondiscriminatory fashion, may still be required by the courts to take remedial action if the consequences of past practices are found to have a present effect.

In other words, merely abandoning a past discriminatory practice may not be sufficient to guarantee legal compliance with existing laws and regulations.

For example, unless an employer makes known to the community a change in policy, the employer may be considered to be continuing the prohibited past practices. In this regard, while employers are not required to give preferential treatment in hiring to minorities, women or older persons, the correction of past discriminatory practices is not considered to be preferential treatment.

Among all of the various forms of relief ordered by the courts in Title VII cases, the most controversial are the affirmative hiring ratios and minority preferences imposed to remedy the effects of past discrimination.[2] While there is far from a judicial consensus *vis-a-vis* the hiring of minorities according to set ratios or preferences, some judges have supported such measures. Management should recognize that the courts have a statutory duty under Title VII (Sec. 706(g)) to "order such affirmative action as may be appropriate." Given this background, the affirmative relief ordered by the courts may be quite extensive.

On the other hand, because of the controversial nature of preferential relief, several appeals courts have refused to grant such relief where there has been an insubstantial showing of past discrimination. Specifically, while upholding preferential quotas in entry-level positions, two Federal Appeals Courts have reversed such quotas in promotional positions because there was no proof of past discrimination for the particular positions.[3] And one court has specifically declined to order any preferential treatment for minorities.[4]

Probably the best posture for employers to adopt in this area, however, is to expect the U.S. Supreme Court to act affirmatively if a case reaches it where past discriminatory practices have been established. The leading high court ruling at this point in time was handed down in March, 1976, in *Franks vs. Bowman Transportation Co., Inc.* when the court reversed a court of appeals judgment in holding that the above-quoted Sec. 706(g) supported a grant of retroactive seniority to black employees as a class back to the date of their initial job applications since they were denied employment then because of race in violation of Title VII.

Class Actions

The concept of "class discrimination" has been very broadly interpreted by the courts.[5] The result is that an individual claiming employment discrimination may bring an action to remedy the discrimination not only against him or herself, but also against other persons similarly situated. For example, an employee discharged because of race can maintain a class action for relief "across the board" for general employment discrimination because he or she is a member of a class and his or her claim of discrimination is typical of the claims of that class.[6]

In other words, racial discrimination is class discrimination, and while the effect of past discrimination may differ as to individuals, common questions of law or fact affecting all members of a class exist in lawsuits seeking removal of discriminatory policies.[7]

As the saying goes, *"the road to hell is paved with good intentions."* The relevance of this time-honored adage to employer conduct is that the consequences of employment practices, not the intent, determine whether discrimination requiring remedial action exists.[8] The U.S. Supreme Court has ruled that Title VII prohibits not only overt discrimination but also practices that are fair in form but dis-

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criminatory in effect, such as requiring minimum height and weight standards, information on arrest records, certain educational levels or using certain pencil-and-paper tests. Another such practice would be refusing transfers between one, primarily black, classification and another, primarily white, classification. The practice would be discriminatory even if applied equally to blacks and whites in the classifications.

In any event, any employment practice or policy, however neutral in intent, and however fairly and impartially administered, which has a "disparate effect" on members of a "protected class" (minorities or women) or which perpetuates the effect of prior discriminatory practices, constitutes an unlawful discrimination unless it can be proven that such policy is compelled by "business necessity."[9]

The following reasons do not qualify as business necessities and will not justify otherwise discriminatory practices: (1) savings to be gained in the shorter time necessary for training employees on new jobs; (2) preserving or bettering a company's image; (3) customer or coworker preference; (4) superior or inferior ability to perform nonessential aspects of a job; or (5) need to maintain harmony or decorum at a place of business.[10]

Statistical Evidence

Statistical evidence may be used to infer existence of a pattern or practice of discrimination by an employer. Oftentimes it is practically impossible for an employer to effectively counter such evidence. In one EEOC case, a trucking firm employed 80 city drivers, hostlers and warehousemen, only one being black. Of the 22 road drivers, 11 clerical workers and five mechanics employed, all were white. Of the 22 casual workers, only one was black. Here the EEOC ruled that there was a reasonable basis for finding that the employer had failed to hire the complainant and blacks as a class because of their race. Statistical probability inferred the existence of a pattern or practice of discrimination.[11]

However, if the employer can demonstrate a consistent pattern of nondiscriminatory employment, a class action will fail. A case in point here concerned a black applicant for employment whose job application was rejected. She then sued seeking back wages and an injunction on behalf of all present and future black employees and applicants for employment. A North Carolina Federal District Court dismissed her claim as without merit, indicating her rejection was due to an overweight problem and because she presented the prospect of excessive absenteeism by the fact that she had nine children at home. Furthermore, the employer was able to prove a consistent pattern of employment and promotion of blacks, both male and female, and on the same basis as whites.[12]

Employers also would be well-advised that civil rights enforcement agencies at the federal, state and local levels apply less rigorous standards of proof than do courts in employment discrimination cases. Not being courts of law, they may often issue a finding of cause after concluding that the facts as stated represent a violation. These facts need not be proven "beyond a reasonable doubt" as in criminal cases or by a "preponderance of the evidence" as in civil cases.

These agencies also tend to liberally interpret Title VII anti-discrimination provisions and rarely grant exemptions and exceptions under the law; in other words, exemptions and exceptions are hard to come by. Therefore, it behooves managers to familiarize themselves with enforcement agencies' decisions in order to determine whether their present employment practices may expose them to liability.[13]

Valid Employment Standards

What then are the lawful criteria that an employer may utilize in setting up hiring standards which will not be interpreted as denying equal employment opportunities? The following guidelines, if followed, should enable employers to escape liability:

1. If an individual seeking employment is clearly unqualified to perform a job because he or she lacks the required ability or experience, an employer may lawfully refuse to hire him or her. However, the employer should be careful to impose ability or experience requirements that can be justified by requirements of the job. In other words, if ability or experience levels are clearly much higher than would be necessary for an individual to successfully perform job duties, the employer who uses such standards would be risking liability under civil rights law. Similarly, only that educational attainment needed to properly carry out job tasks should be required of job applicants, in order to prevent discrimination charges.

2. An employer may lawfully fail or refuse to hire an individual who does not meet the specific physical requirements of a job. However, the employer must be certain that this decision is based on the applicant's failure to meet the requirements rather than on an assumption that persons of a certain race, color, religion, sex, national origin or age cannot meet the requirements. Applicants should be given an opportunity to prove their physical ability for a job. In order to justify a decision not to hire because of physical unfitness, employers must be able to show that an applicant is physically unable to perform a job.

Certain job situations carry with them difficult physical requirements due to unique job characteristics, such as the particularly

hazardous nature of some occupations which may affect the safety of individual employees or persons in their charge. Refusing to hire an individual for such situations because of physical disability is not unlawful. Physical disability may be established by an applicant's medical record or by a prehire medication examination. However, the same standards for physical disability apply to all applicants, regardless of their race, color, religion, sex, national origin or age.[14]

Another factor for managers to consider is that discrimination against employees or job applicants because of a physical disability may be unlawful under state law even where race, color, sex, religion, national origin or age do not enter the picture.

Occupational Qualification Exceptions

Title VII provides for exceptions from its hiring prohibitions if religion, sex or national origin is a *bona fide occupational qualification.*[16] The exception, however, is interpreted narrowly. Religion is a bona fide occupational qualification in the case of religious organizations or societies which require employees to be members of a particular religion. National origin is an exception in the case of organizations, groups or trade commissions promoting the interests of a particular national group. Sex is an exception for positions requiring specific physical characteristics necessarily possessed by only one sex, such as positions for actors, models and restroom attendants. Sex may also be an exception for risky jobs.[17] It is seldom a bona fide occupational qualification in circumstances other than those. State female protective laws limiting the hours worked by women or the weights lifted by women will not make sex an exception for positions requiring overtime or the lifting of heavy weights. The EEOC has found that such laws operate to discriminate rather than protect and thus are superseded by Title VII provisions.

The sum and substance of the changes required in personnel policies and practices governing equal employment opportunity was aptly summarized by the Supreme Court in the 1971 *Griggs v. Duke Power Co.* case:

"What is required . . . is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The "artificial, arbitrary and unnecessary barriers" mentioned above may include policies and practices involving recruitment, selection, placement, testing, systems of transfer, promotion, seniority, lines of progression, and many other basic terms and conditions of employment.

REFERENCES

1. U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings* (Washington, D.C.: United States Government Printing Office), May, 1973, p. 21.
2. *U.S.* vs. *Local 38, IBEW,* 428 F.2d 144 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970); Local 189, *United Papermakes & Paperworkers* vs. *U.S.,* 416 F.2d 980 (5th Cir. 1969) *cert. denied,* 397 U.S. 919 (1970).
3. *Bridgeport Guardians, Inc.* vs. *Bridgeport Civil Service Commission,* 6 E.P.D. Sec. 8755 (2nd Cir. 1972); *Commonwealth of Pennsylvania* vs. *O'Neill,* 473 F.2d 1029 (3rd Cir. 1973).
4. *Allen* vs. *City of Mobile,* 331 F.Supp. 1134 (S.D. Ala. 1971), aff'd, 466 F.2d 122 (5th Cir. 1972).
5. *Bowe* vs. *Colgate Palmolive,* 416 F.2d 711 (7th Cir. 1969); *Jenkins* vs. *United Gas Co.,* 400 F.2d 28 (5th Cir. 1968); *Blue Bell Boots* vs. *EEOC,* 418 F.2d 355 (6th Cir. 1969); *Franks* vs. *Bowman Transportation Co., Inc.* No. 74-728, U.S. Sup. Ct. March 23, 1976.
6. *Johnson* vs. *Georgia Highway Express, Inc.,* 2 E.P.D. Sec. 10, 119, 417 F.2d 1122 (5th Cir. 1969).
7. *Hall* vs. *Worthan Bag Corp.,* 1 E.P.D. Sec. 9732, 251 F.Supp. 184, (D.C. Tenn. 1966).
8. *Griggs* vs. *Duke Power Co.,* 401 U.S. 424 (1971).
9. *Griggs* vs. *Duke Power Co.,* supra; *U.S.* vs. *Hayes International Corp.,* 456 F.2d 112, 118 (5th Cir. 1972).
10. *Robinson* vs. *Lorillard Corp.,* 444 F.2d 791 (4th Cir. 1971); *Jones* vs. *Lee Way Motor Freight, Inc.,* 431 F.2d 245 (10th Cir. 1970); *U.S.* vs. *Bethlehem Steel Corp.,* 445 F.2d 652 (2nd Cir. 1971); *Papermakers and Paperworkers Local 189* vs. *U.S.,* 416 F.2d 980 (5th Cir. 1969).
11. EEOC Decision No. 72-1105, Feb. 3, 1972.
12. *Logan* vs. *General Fireproofing Co.,* (D.C.N.C.) 1970, 2 E.P.D. Sec. 10, 316.
13. Roger W. Sayers, "Equal Employment Compliance — The Concept of Probable or Reasonable Cause," *Personnel Journal,* May, 1974, p. 346.
14. Sec. 1295, Employment Practices Guide (Commerce Clearing House, Inc.: Chicago, Ill.).
15. Sec. 20,000, Employment Practices Guide (Commerce Clearing House, Inc.: Chicago, Ill.).
16. Sec. 1260 Employment Practices Guide (Commerce Clearing House, Inc.: Chicago, Ill.).
17. Sec. 1264.17, Employment Practices Guide (Commerce Clearing House, Inc.: Chicago, Ill.).

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