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## CRITIQUE: A DEFENDANT'S VIEW

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In ten years, employers have become subject to an imposing body of law regulating employment practices. This law has created two immense problems for the employer. First, enforcement of these laws is frequently capricious, arbitrary and unfair. Second, recent decisions strip the employer of his most reliable methods for selecting skilled, productive workers and threaten the efficiency of American industry.

Adding to the employer's problem is an aggressive and sophisticated plaintiffs' civil rights bar. Its members testify at congressional hearings about the need for additional legislation, increased enforcement and great expenditures to achieve "equal rights under the law." Reported cases show large awards of attorneys' fees to plaintiffs' counsel.<sup>1</sup> Some also receive substantial EEOC grants and referrals.<sup>2</sup>

The plaintiffs' bar also has access to resources and manpower unavailable to all but the largest companies. Through coordination with the NAACP Legal Defense Fund, for example, plaintiffs' bar is able to utilize computers and programs which analyze and structure statistical data obtained from government and company records. This data frequently becomes the basis of a prima facie case of discrimination<sup>3</sup> which most medium or small sized companies

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1. Many plaintiffs' civil rights cases are also funded by the NAACP Legal Defense Fund which is supported by grants from employer-supported foundations and awards from previous cases.

2. One organization active in the Richmond area is the Lawyers' Committee for Civil Rights Under Law. In *Clanton v. Allied Chemical Corp.*, C.A. No. 5-73-R (E.D. Va. 1975), a case in which the EEOC referred the charging parties to the Committee, it requested attorneys' fees of \$50-70 per hour for lawyers with 1-5 years experience, plus a 25% premium. In addition, since June 20, 1971, the Committee has received almost \$1.1 million from the EEOC to "assure legal representation . . . to individuals." L. Perry, EEOC Chairman, Report to Senate Labor Committee on Commission's Current Status and Projected Improvements 26, October 9, 1975.

3. For a discussion of the requirements of a prima facie case and the tremendous significance of this statistical data see Werne, *Guide to the Law of Fair Employment*, 10 U. RICH. L. REV. 209 (1975).

lack the resources to counter or critique.

Management's first contact in the area of fair employment practice will be with one or more of the myriad federal, state or local fair employment practice (FEP) compliance agencies. Dealing with these agencies can be difficult and frequently frustrating. Despite the statutory emphasis on conciliation,<sup>4</sup> the relationship of these agencies to management is adversary rather than conciliatory. Dealing with government attorneys can be equally frustrating. Agreements between counsel may be subsequently rejected by senior staff attorneys or staff turnover. Even when a conciliation agreement is reached, management will find that there is no finality, for it can later be reopened by dissatisfied employees.<sup>5</sup> Even court approved consent decrees may be reopened.<sup>6</sup> None of these factors contribute to a spirit of compromise or cooperation.

The problem is further compounded by overlapping agency jurisdiction in many of the areas governed by the FEP laws. For example, a simple company practice allegedly adversely affecting the employment opportunities of women may be within the jurisdiction of the Equal Employment Opportunity Commission under Title VII,<sup>7</sup> the Labor Department's Wage and Hour Division under The Equal Pay Act,<sup>8</sup> and the Office of Federal Contract Compliance (OFCC) under Executive Order 11246,<sup>9</sup> as well as state and local agencies. Approval by the OFCC of an employer's affirmative action plan is not a defense to a Title VII charge, and the Wage and Hour Division would not consider itself bound by an EEOC determination.

Arthur S. Fleming, Chairman of the United States Commission on Civil Rights, recently testified about the difficulties facing an employer who seeks to comply with overlapping, and at times, con-

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4. 42 U.S.C.A. § 2000e-5(b) (1974).

5. See, e.g., *Reed v. Arlington Hotel Co.*, 476 F.2d 721 (8th Cir. 1974).

6. In *Leisner v. New York Tel. Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973), the district court held that private parties were not bound by a consent decree previously entered into by a defendant with the EEOC since the earlier decree was "inadequate". A second consent decree which allowed the individual plaintiffs in the second action to obtain the benefits of both suits was eventually approved. *Leisner v. New York Tel. Co.*, 6 E.P.D. 8871, at 5691 (S.D.N.Y. 1973). See also *Arnold v. Consolidated Freight Ways*, 11 F.E.P. Cases 569 (S.D. Tex. 1975).

7. 42 U.S.C.A. § 2000e *et seq.* (1974).

8. 29 U.S.C.A. § 206(b)(1) (1974).

9. 3 C.F.R. 169 (1974).

flicting anti-discrimination requirements:

There is no one person, agency or institution which can speak for the Federal Government in this important area. Thus, employers, employees, and aggrieved citizens are left to their own devices in trying to understand and react to a complex administrative structure.<sup>10</sup>

The weight accorded the EEOC's regulations,<sup>11</sup> the disparate economic strength of the government as a litigator and the potential for fees and awards create a great potential for abuse of power.<sup>12</sup> A recent decision shows that employer fears of abuse may be partly justified. The Birmingham, Alabama EEOC office has issued findings of discrimination before completing an investigation, instructed conciliators to "abort conciliation" and taken similar steps to assist plaintiffs' counsel.<sup>13</sup>

The employer can expect little information from the EEOC about the exact nature of the charges against it. Despite a 1972 amendment to Title VII that was intended to advise the employer of the nature of the charge and thereby enable it to take immediate remedial steps,<sup>14</sup> employers receive only an EEOC form which lists little useful information. The EEOC's General Counsel has candidly admitted that "the respondents by and large are not helped [by this form] to identify the nature of the grievance and to take immediate steps to remedy it."<sup>15</sup>

This attitude continues into litigation. After hearing a series of cases in which the EEOC objected to discovery, Judge Winner commented that the EEOC apparently considers anyone with information beneficial to its case to be an informer exempt from discovery.<sup>16</sup> He added that the EEOC "thinks it fair to confront the defendant

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10. 187 DAILY LAB. REP. D-1, September 25, 1975.

11. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

12. *Avery v. Providence Hosp.* 55 F.R.D. 62, 68-69 (D.D.C. 1972).

13. *Perry v. Golub*, C.A. No. 75-G1476-S (N.D. Ala. September 11, 1975).

14. 42 U.S.C.A. §§ 2000e-5(b), -5(e) (1974). See, e.g., 117 CONG. REC. 31783-84, 31958-85, 32088-114 (1971).

15. Report of 1972 Proceedings, ABA Section of Labor Regulations Law 123 (1973).

16. *Joslin Dry Goods v. EEOC*, 336 F. Supp. 941 (D. Colo. 1971), *modified on appeal*, 483 F.2d 178 (10th Cir. 1973); *EEOC v. Los Alamos Constr., Inc.*, 8 E.P.D. ¶ 9763, at 6183 (D.N.M. 1974); *EEOC v. Zia*, 8 E.P.D. ¶ 9764, at 6194 (D.N.M. 1974).

with the case it must defend against a few days prior to trial," and its "determination to conceal the facts on which its case at trial is based is equalled only by its determination to pry into a prospective opponent's files in investigative proceedings."<sup>17</sup> Other district courts have begun calling the EEOC to task for ignoring due process protections in its own regulations.<sup>18</sup>

The procedural problems facing an employer are compounded by rapid expansion of case law and the confusing and conflicting regulations. For example, the EEOC successively ruled that pregnancy is *sui generis* and therefore not covered by Title VII,<sup>19</sup> that Title VII requires that pregnancy be treated as a temporary disability<sup>20</sup> and that women are entitled to maternity leave even if there is no comparable leave for temporary disabilities.<sup>21</sup>

The primary function of this nation's business is to produce goods and services for consumption. An important product, of course, is the employment of a workforce which is compensated in accordance with its contribution to output. The courts and enforcement agencies have, however, tended to ignore this and frequently use their control over employment practices to compensate protected groups for past societal actions. Court decisions and agency regulations therefore continue to encroach on management's need to hire the most efficient workers, promote those best qualified for the job and discharge those unable or unwilling to earn their wages.

Almost every method of selecting the best qualified applicants for employment has been disapproved. Companies have been denied the right to require applicants to hold high school degrees,<sup>22</sup> and been forced to abandon professionally developed employment tests because of the cost and time required for individual validation.<sup>23</sup> Other methods of selecting the best applicants have also been challenged on the grounds that they discriminate against blacks. Employers may not, without risk, reject applicants because of dishonor-

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17. EEOC v. Zia, 8 E.P.D. 19764, at 6193 n.1 (D.N.M. 1974).

18. See, e.g., EEOC v. Western Elec. Co., 8 F.E.P. Cases 595, 606 (D. Md. 1975).

19. Letters from Charles T. Duncan, EEOC General Counsel, November 10, 15, 1966, in Record 1001-03, Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975).

20. 29 C.F.R. § 1604.10(b) (1975).

21. EEOC Decision No. 75-147, CCH EEOC DECISIONS ¶ 6447 (January 13, 1975).

22. See, e.g. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

23. See, e.g., Albemarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975).

able military records,<sup>24</sup> arrest records, or felony convictions,<sup>25</sup> financial irresponsibility<sup>26</sup> or even unfavorable reports from previous employers.<sup>27</sup>

Having been denied the use of these selection methods once considered objective and preferable, many companies have abandoned objective standards because they cannot be validated to the satisfaction of the EEOC. This in itself may be discriminatory, for "non-objective hiring standards are always suspect because of their capacity for masking racial bias."<sup>28</sup>

Employers have learned that they must play a "numbers game," in which the attention of the enforcement agencies and the courts is focused on the statistical composition of the employer's workforce, and the ratio of protected groups reflected in hiring, termination and promotion decisions. A company faced with a statistical imbalance in its workforce faces possible litigation with the knowledge that it will, from the outset, bear the burden of rebutting a statistical prima facie case. In practice, this burden is extremely difficult, if not virtually impossible, to overcome.<sup>29</sup>

An employer may attempt to overcome statistical problems by undertaking a vigorous self-analysis and affirmative action program. But this is also dangerous. Studies are discoverable, and to the extent that self-criticism is incorporated in an affirmative action program required under Executive Order 11246, it may be available to curious persons pursuant to the Freedom of Information Act.<sup>30</sup> The dilemma faced by the defendant employer is clearly set forth

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24. Cf. *Lewis v. Western Airlines*, 10 F.E.P. Cases 534 (N.D. Cal. 1975).

25. See *Green v. Missouri Pac. R.R.*, 62 F.R.D. 434 (E.D. Mo. 1973); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

26. See *Wallace v. Debron Corp.*, 494 F.2d 674 (8th Cir. 1974).

27. See *East v. Romine, Inc.*, 11 F.E.P. Cases 300 (5th Cir. 1975).

28. *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975).

29. In *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975), the Fourth Circuit reversed a district court's finding that the plaintiffs had failed to prove Grant guilty of discrimination. Although the district court found "no evidence, other than the statistical data, to demonstrate intentional discrimination," the Fourth Circuit held that the district court "erred in requiring proof of actual discrimination in addition to the statistical data implying discrimination. Statistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt-discrimination."

30. See *Sears, Roebuck & Co. v. General Services Admin.*, 8 F.E.P. Cases 1297 (D.C. Cir. 1974).

in *Senter v. General Motors Corp.*<sup>31</sup> In *Senter*, the defendant "made a valiant and determined effort" to reduce a statistical imbalance in its supervisory workforce with affirmative recruiting programs for blacks and a completely revised selection procedure. Acknowledging this fact the court nevertheless found "the most convincing evidence presented to the Court of promotional discrimination" to be the program itself, for the "dramatic increase between the year 1971 and 1972 of black supervisory employees [was] both a testament to the efficacy of the . . . program and the validity of plaintiff's position."<sup>32</sup> On this basis, the court held General Motors liable for back pay measured by the program's success.

Faced with these choices, employers increasingly agree — in affirmative action plans, consent decrees and EEOC conciliation agreements — to pure quota systems for future employment selection. This is merely an expedient, however, it creates new problems. Quotas are expressly disapproved in Title VII,<sup>33</sup> and non-minority employees are beginning to challenge quotas as a denial of their rights to equal opportunity.<sup>34</sup> Moreover, racial or sexual quotas raise the real question whether one can eliminate racial or sexual discrimination by treating employees as members of racial or sexual classes rather than individuals. Nevertheless, under the present state of enforcement, quotas seem inevitable.

Quotas, however, ignore the real issue. The success or failure of a business and its ability to provide goods and services to consumers and jobs for employees depend upon productivity. Productivity, in turn, depends upon the ability of companies to hire, train and promote skilled and motivated employees. But when hiring considerations are guided by racial and sexual ratios, more qualified employees are ousted or rejected because of their race or sex,<sup>35</sup> and thus productivity is sacrificed to statistics. Until courts, enforcement agencies and Congress recognize the importance of successful business and accommodate the legitimate interests of management in efficiency and output, there will be no meaningful equal employment opportunity for anyone.

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31. 9 E.P.D. ¶ 10, 019, at 7223 (S.D. Ohio 1974).

32. *Id.* at 7226.

33. 42 U.S.C.A. § 2000e-2(j) (1974).

34. *See, e.g.,* Hiatt v. City of Berkeley, 10 F.E.P. Cases 251 (Cal. Sup. Ct. 1975).

35. *See, e.g.,* Patterson v. American Tobacco Co., 8 F.E.P. Cases 778 (E.D. Va. 1974).

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