STATEMENT ON AFFIRMATIVE ACTION FOR EQUAL EMPLOYMENT OPPORTUNITIES

UNITED STATES COMMISSION ON CIVIL RIGHTS

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Since its creation in 1957, the U.S. Commission on Civil Rights has investigated and analyzed the issue of employment discrimination. This pervasive problem continues to attract considerable attention, although great strides have been taken by the Federal Government to remedy it. State and local Fair Employment Practices Commissions, Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission, and Executive Order 11246 are all products of the past 15 years of attention to this situation.

If laws had changed the conditions of employment discrimination, there would be little need for subsequent action today. But the employment picture for our society indicates that the groups victimized by discriminatory employment practices still carry the burden of that wrongdoing.

Unemployment for blacks, Spanish surnamed Americans, and other minorities remains far higher than that of white America. For the past 15 years, the unemployment rate for nonwhites has been twice that for whites. The national rate in 1971 was 5.4 percent for white Americans but 9.9 percent for blacks and other minority individuals. In 1969-70 the unemployment rates in New York City showed the following disparity: Whites in the city recorded a rate of 4.7 percent; blacks, 5.4 percent; and Puerto Ricans, 9.5 percent. Underemployment (part-time workers seeking full employment), another plague on minority job seekers, is also a real problem. A 1966 Government study found an underemployment rate of 29.1 percent in minority (black and Puerto Rican) neighborhoods of New York City.

The underemployment rates for minority Americans are not just a consequence of past discrimination. A look at youth employment rates refutes this argument. For white male adults, the unemployment rate is 4.0 percent; for white teenagers, it is 15.1 percent. However, the statistics for minority male adults show a rate of 7.2

percent; and for minority teenagers, a staggering 31.7 percent.[1]

In whole industries, such as building construction, higher education, and government civil service, racial and ethnic minorities and women are consistently absent or found in disproportionate numbers in low wage, low status jobs.[2]

Income is another measure of the job discrimination suffered by minority Americans. In 1971 the median family income for whites was $10,672, compared with $6,440 for nonwhites and $7,117 (1970 figure) for Spanish surnamed Americans. The discriminatory effect on minorities is obvious when one considers that 32 percent of blacks were below the low income level (poverty line) in 1971. Including Spanish surnamed Americans, Indians, and other minority groups, the figure declines slightly to 31 percent. But the number of white Americans living in poverty is only 8 percent. The receipt of public assistance is another indicator of the economic status of minority citizens. While 4 percent of the white population receives public assistance, 25 percent of the minority population receives aid. In toto, 6.4 million minority group persons rely upon public assistance in order to survive.[3]

The mechanisms created by Title VII alone cannot handle the dimensions of the problem. In FY 1972 the EEOC received 38,840 complaints; it expects 45,000 new complaints during the next fiscal year. The growing backlog of cases is now 53,410, of which 43,101 are pending investigation. Conciliation enforcement and litigation against employment discrimination cannot receive EEOC priority in

[1] U.S. Commission on Civil Rights, Jobs and Civil Rights 5 (1969). U.S. Commission on Civil Rights, Demographic, Social and Economic Characteristics of New York City and the New York Metropolitan Area 10-12 (1972). U.S. Department of Labor, Bureau of Labor Statistics, The Social and Economic Status of the Black Population in the United States, 1971, 52-53.

[2] In the construction trades, new apprentices were 87 percent white and 13 percent black. For the Federal Civil Service, of those employees above the GS-5 level, 88.5 percent are white, 8.3 percent black, and women account for 30.1 percent of all civil servants. Finally, a 1969 survey of college teaching positions showed whites with 96.3 percent of all positions. Blacks had 2.2 percent, and women accounted for 19.1 percent.

[3] U.S. Department of Labor, Bureau of Labor Statistics, The Social and Economic Status of the Black Population in the United States, 1971, 32-46. U.S. Department of Commerce, Bureau of the Census, Selected Characteristics of Persons and Families of Mexican, Puerto Rican and Other Spanish Origin: March, 1971.

such a situation.

The benefits of a Federal contract compliance program to accompany EEOC activities are impressive. Fully one-third of the Nation's labor force is employed by companies which are Government contractors. These companies are among the Nation's largest and most prestigious business firms and institutions. The ending of discriminatory employment barriers in this sphere of the Nation's economic life would go far to redeem the pledge of nondiscrimination contained in the Civil Rights Act of 1964.

In recent years the Nation has been witness to this shift in equal employment opportunity policy from the enacting of legislation to the implementation of nondiscrimination laws. In its wake the move has given rise to a debate concerning the parameters of affirmative action and the possible sanctioning of quota systems and reverse discrimination to achieve nondiscriminatory employment.

To offer a Commission view of this issue, the Commissioners have prepared this Position Statement for public discussion and official consideration. Part I is a survey of the present status of the law and the basis for affirmative action. Part II is a review of certain terms relevant to this area—a look at what affirmative action is and what it is not. Part III is an effort to respond to certain questions that inevitably evolve out of such discussions. And Part IV discusses the policy considerations invoked by the affirmative action issue and proposes ultimate objectives for nondiscrimination in employment nationally.

PART I

Federal, State, and local laws prohibit employment discrimination by employers, labor unions, and others. Where discrimination has occurred, the law requires that all continuing discriminatory effects be remedied.[4] However, intentional discrimination, such as job

[4] Thus, for example, a common discriminatory practice has been the assignment of minority workers to certain departments of a particular business. Under Title VII of the Civil Rights Act of 1964, the Federal courts require that such employees be given special remedial rights to transfer into departments from which they previously were excluded. *Papermakers and Paperworkers, Local 189* v. *United States*, 416 F. 2d 980, 988 (5th Cir. 1969), *cert. den.*, 397 U.S. 919 (1970).

assignment by race, is but the tip of an iceberg. Racial and ethnic divisions in society have translated themselves into institutions which systematically deny equal employment opportunity to minority persons. Similarly, traditional and outmoded views of the role of women give rise to widespread patterns of employment discrimination on the basis of sex. Accordingly, one of the most pervasive forms of employment discrimination is "systemic discrimination"; i.e., discriminatory practices—most, but not all, unintentional—built into the systems and institutions which control access to employment opportunity.

While erecting formidable and, at times, insurmountable barriers to minorities and women seeking employment, the effect of this has been to create a substantial preference for white males irrespective of their relative qualifications vis-a-vis members of the excluded groups. Viewed in this context affirmative action programs are designed not to establish preferential treatment for minorities and women. Rather, the purpose of such programs is to eliminate the institutional barriers that minorities and women now encounter in seeking employment and thereby to redress the historic imbalance favoring white males in the job market. The elimination of these disparities in employment opportunity is absolutely essential if the polarization with which the Nation is now afflicted is ever to be eradicated. Effectuation of affirmative action programs is, therefore, truly in the national interest.

Affirmative action programs are aimed at, among other things, eliminating the existing discriminatory barriers to equal employment opportunity.

Some common examples of discriminatory barriers to equal employment opportunity are:

—When an employer or union relies upon word-of-mouth contact for recruitment, minority persons who have less access than other persons to informal networks of employment information, such as through present employees or officials, are denied equal access to available opportunities.

—Recruitment at schools or colleges with a predominantly nonminority or male makeup is discriminatory when comparable

recruitment is not done in predominantly minority or co-ed institutions.

—Rules against employment of married women and rules providing for the automatic termination of employment upon pregnancy amount to unwarranted discrimination against women.

—Job qualifications which are not substantially related to job requirements unfairly penalize minority persons with limited education or job experience.

—A past history of discriminatory practices continues to deter minority applications until the employer has clearly demonstrated that equal employment opportunity is being achieved.

There has been a growing awareness in recent years of these problems, and widespread adoption of remedies to deal with them. Despite these efforts, both intentional discrimination and systemic discrimination remain widespread. Moreover, a point of even greater significance is that the *consequences* of years of such discrimination in the past remain. As long as the consequences of past discrimination—e.g., the employment opportunity preference in favor of white males—persist, the necessity to redress the imbalance continues.

These, then, are the considerations which underlie the need for remedial "affirmative action."

As part of the Civil Rights Act of 1964, Congress enacted Title VII of the act which makes it a violation of Federal law for an employer, labor union, or employment agency to discriminate against an employee or prospective applicant because of race, color, ethnic origin, religion, or sex. To enforce this new law, Title VII established an Equal Employment Opportunity Commission with the power to investigate complaints, conciliate, and recommend the initiation of civil action by the Department of Justice.[5]

In addition to Justice Department instituted proceedings, Title VII permits the complainant to initiate suit in Federal court if EEOC

[5] Under Title VII, as amended by the Equal Employment Opportunity Act of 1972, the EEOC has jurisdiction over those businesses engaged in interstate commerce that employ more than 25 employees. As of March 24, 1973, the jurisdictional number will drop to 15 employees as provided by the 1972 amendments. Coverage was also extended to include employment by State and local governments, and educational institutions ex-

conciliation fails.

In cases arising under Title VII, the Federal courts have established that where the proportion of minorities employed by the defendant employer is less than that which reasonably would be expected on the basis of the availability of qualified minority group members, a presumption of discrimination arises. *United States* v. *Ironworkers Local 86,* 443 F. 2d 544, 550-551 (9th Cir. 1971), cert. den., 404 U.S. 984 (1971): *United States* v. *Hayes International Corp.,* 456 F. 2d 112, 120 (5th Cir. 1972); *United States* v. *United Brotherhood of Carpenters and Joiners, Local 169,* 457 F. 2d 210, 214 (7th Cir. 1972). The burden is shifted to the defendant to demonstrate that such underutilization is not the product of discrimination. *Id.*

If the Federal court reaches a finding of employment discrimination under Title VII, it may "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay." Section 706 (g), Title VII. Because of the significance of the *consequences* of years of past systematic discrimination, the legal wrong ends only when all the consequences of past discrimination have been eliminated by the employer.

The number of cases which can be tried by Federal courts or administrative tribunals is small compared to the pervasive nature of employment discrimination. Responding to this void, the Federal Government over the last decade has promulgated a series of Executive orders that provide for nondiscriminatory employment by Federal contractors, and construction contractors on federally assisted projects. The current order is E.O. 11246.

The use of affirmative action remedies is basic both to Title VII and to Executive Order 11246. Thus, for example, when the court in an action under Title VII determines that the defendant has discriminated in violation of the Title, the court will order the employer to undertake affirmative action which will remedy the

empt under the 1964 legislation. This extension was effective as of March 24, 1972.

The EEOC was also empowered to initiate legal actions in Federal court against violators of EEOC orders, and the courts were authorized to issue cease and desist orders enjoining unlawful employment practices when a violation of the law has been proven. This EEOC court enforcement power applies to discrimination by private employers only. The Department of Justice is responsible for enforcement of Title VII against public employers and educational institutions. Public Law 92-261 (March 24, 1972).

discriminatory consequences of past discrimination and prevent the recurrence of such discrimination in the future.

A principal difference between Title VII and Executive Order 11246 is that the Executive order imposes upon Federal contractors the duty to make a *self-determination* as to the need for affirmative action, without resort to a judicial determination. Thus, the keystone of the "affirmative action plans" which Federal contractors are required to adopt is the self-analysis performed by the contractor.

Like other affirmative action requirements applicable to Federal contractors, this "self-analysis" requirement appears in regulations promulgated by the Office of Federal Contract Compliance (OFCC) of the United States Department of Labor (41 CFR 60). The regulations require:

> An analysis of all major job classifications at the facility, with explanation if minorities or women are currently being underutilized in any one or more job classifications . . . 41 CFR 60-2.11(a).

The regulations define "underutilization" to mean

> having fewer minorities or women in a particular job classification than would reasonably be expected by their availability. *Id.*

While the regulations afford guidance in making the determination of "underutilization" (see 41 CFR 60-2.11(a)(1)), the determination is of necessity an approximate one. The determination will depend upon the industry of the contractor and the location of the facility or institution. While it is probable that minority underutilization will include blacks, women, and Spanish surnamed individuals, it is quite possible that, in some locations, Jews, Asian Americans, ethnic Europeans, and Indians will be underutilized minorities for some Federal contractors.[6] Nonetheless, the crucial point to bear in mind is that patterns of systemic discrimination

[6] The Federal Regulations for the implementation of E.O. 11246, known additionally as "Revised Order No. 4," do not provide a comprehensive definition of the terms "minority" or "minority group." The Regulations do provide some limitation on the terms by referring to the affirmative action program's beneficiaries as "members of an

have been so pervasive that gross and unmistakable underutilization is a common occurrence.[7] As the OFCC regulations point out, this is most likely to be the case in such categories as officials and managers, professionals, technicians, sales workers, office and clerical staffs, and skilled craftsmen. (See 41 CFR 60-2.11.)

Once a pattern of underutilization is identified, the next step is to assess the obstacles (generally, forms of "systemic discrimination" such as those described above) which have produced it, and to design corrective affirmative action accordingly. (41 CFR 60-1.40; 60-2.24.)

The kinds of affirmative action which may be appropriate are as diverse as the forms of systemic discrimination themselves. The OFCC regulations (41 CFR 60-2.24) list a host of affirmative actions which may be appropriate. These include actions in the area of determining qualifications, recruitment, training, promotion, counseling, and other areas.

The absence of a court order does not permit employers legally to continue otherwise discriminatory employment practices. All employers covered by Title VII and all Federal contractors covered by E.O. 11246 have a legal obligation to obey the law, and thus take steps to eliminate any discriminatory employment practices that may persist in their businesses or institutions. Since continuation of discriminatory practices may eventually give rise to an EEOC action or private litigation, with its concomitant remedies of reinstatement, back pay, affirmative recruitment, proportionate hiring, etc., common sense and sound legal advice should compel the employer to take such steps. Thus, the employer would be well-advised to eliminate unlawful practices himself, as opposed to awaiting future court or administrative action. Given the polarization which stems,

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'affected class' who by virtue of past discrimination continue to suffer the present effects of that discrimination." 41 CFR 60-2.1. Thus, the term "minorities" applies generally to blacks, Indians, and Spanish surnamed Americans. In certain contexts, depending upon the geographic area and a past history of discriminatory practices, Asian Americans, Jews, and white ethnic groups may also be deemed "minorities" within the meaning of 41 CFR 60-2.10, 60-2.11.

[7] In the absence of such gross and unmistakable underutilization, discrimination and/or the present effects of past discrimination would, of course, have to be shown as the basis for any affirmative action effort.

in part, from the existing gross disparities in employment opportunity, such steps are not only legally proper but are also consonant with sound management principles.

1. Employer A never has had to recruit employees for an 800-person industrial plant engaged in interstate commerce. An abundant number of applicants always has been produced through word-of-mouth references from present employees. Because the employer's work force is all-white, the applicants obtained by employee word-of-mouth are similarly all-white. Despite an abundance of present white applicants, and despite the expense involved, the employer nonetheless embarks on an intensive recruitment campaign, directed specifically at areas of minority residential concentration.

Such remedial recruitment efforts are directly supported by judicial decisions. In *Parham* v. *Southwestern Bell Telephone Company*, 433 F. 2d 421 (8th Cir. 1970), the court held that an ostensibly non-discriminatory method of recruitment—by word-of-mouth through present employees—comprised illegal discrimination. See also, *Lea* v. *Cone Mills Corp.*, 301 F. Supp. 97 (M.D.N.C. 1969), *aff'd in part and vacated in part on other grounds per curiam*, 438 F. 2d 86 (4th Cir. 1971); *Clark* v. *American Marine Corp.* 304 F. Supp. 603, 606 (E.D. La. 1969).

In these circumstances, affirmative efforts to recruit minorities are necessary to counterbalance the pro-white bias inherent in word-of-mouth recruitment through a predominantly white work force.

The United States Supreme Court has stated a more general rule, of which the above case is an application. In a case pertaining to tests used in appraising applicants, the Court held that ostensibly "objective" criteria for employment or promotion are discriminatory if they result in a relative disadvantage for minority persons, without being plainly compelled by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

2. In designing an affirmative recruitment campaign, the president of State College B, an institution with numerous HEW research contracts, may learn that the dearth of professional minority personnel employed at the college is due in substantial part to the fact that

the college has a history in the black community as one which traditionally has not employed black faculty and staff. Although under no judicial compunction to take remedial action, the president may, nevertheless, conclude that the college is in a situation which requires remedial action. Such action typically involves affirmative steps assuring the minority community that the institution will afford minority applicants meaningful equal employment opportunity and that employment of qualified minority applicants will not be limited to mere token representation. To achieve such assurance the president of State College B might well embark upon a program designed to increase the pool of minority applicants for positions at the school and involving, at least for a limited period of time, a program of hiring a reasonable ratio of minority applicants.[8]

The premise of ratio hiring is that the employer has a pool of applicants—including whites and minorities—who are qualified for the job in question. The rationale of *Carter* v. *Gallagher* is that such ratio hiring will provide an assurance necessary to overcome the deterrent effect which past discriminatory practices have had upon minority applicants.[9]

The ratio hiring principle of these cases may be used by the president of the college in the design of the school's affirmative

[8] The principle here involved has been enunciated as follows:

> Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis. *Carter* v. *Gallagher,* 452 F. 2d 315, 331 (8th Cir. 1972).

[9] The same remedial principle of ratios was adopted by the court in *Local 53* v. *Vogler,* 407 F. 2d 1047 (5th Cir. 1969), requiring a union, which in the past had discriminatorily excluded minorities from membership, to refer for employment—in its capacity as hiring hall—whites and blacks on an alternating basis. The one-for-one formula has been used in other Title VII cases as well. See, also upholding a one-for-one ratio: *NAACP* v. *Allen,* 340 F. Supp. 703 (M.D. Ala. 1972) (hiring of Alabama State police); *United States* v. *Local 10 Sheet Metal Workers,* 3 CCH EPD 8068 (D. N.J. 1970) (referral of temporary apprentices or seasonal help); *United States* v. *Central Motor Lines,* 325 F. Supp. 478 (W.D.N.C. 1970) (hiring of road drivers) entered on stipulated facts; *Coffey* v. *Brady,* No. 71-44-Civ-J (M.D. Fla. 1971) (hiring of firemen). A one-for-two ratio was upheld in *United States* v. *Ironworkers, Local 86,* 443 R. 2d 544 (9th Cir. 1971), *cert. den.* 404 U.S. 984 (1971).

action program. Thus, the college may determine that it will be approximately two months before its recruitment efforts pay off in terms of substantial numbers of minority applicants. Inasmuch as hiring needs are flexible, the employer may determine to defer a certain proportion of hiring until he has a substantial number of qualified majority and minority applicants. Such an affirmative action program by State College B would be goal-oriented within the framework of Executive Order 11246.

It may be argued, as it was in *Carter,* that such ratio hiring does violence to the concept of "first come, first served," thereby violating the constitutional rights of white applicants already on a qualified list. But the very essence of affirmative action is that white males have the "inside track" to the job opportunities (for example, through word-of-mouth channels) and that—until affirmative recruitment has taken hold sufficiently to overcome that advantage—the first come, first served principle will continue to give a discriminatory advantage to whites. Moreover, in some contexts, the first come, first served principle has no real meaning. In the case of construction employment, for example, the allocation of job opportunities among nonunion (often predominantly minority) and union (often predominantly white) sources often must be done through a process of deliberate allocation, there being no mechanism for hiring on a first come, first served basis equitably between the two sources.

Another common misconception is that affirmative action does violence to the concept of preferring the "better qualified" applicant. Proponents of this view maintain that if an applicant has made a higher score on the employer's aptitude test, or if he has more years of education, he should be preferred as "better qualified" than another applicant who—while eminently qualified for the job —has a lower score or less education. But often comparative test scores or years of education do *not* accurately measure the applicant's ability to perform the job. Moreover, minorities and women have suffered decades of discrimination both in employment and in opportunities to obtain the education and training that are requisites for many jobs. The use of standards unrelated to the duties of the jobs being sought, and having the effect of depriving such admittedly

qualified persons from obtaining such jobs, thus perpetuates discrimination. Accordingly, the courts have recognized that job standards must *realistically* and *specifically* be fitted to the jobs for which they apply. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (holding that the "qualified" standard must be applied in a strictly job-related context).

3. The ratio hiring required in *Carter* v. *Gallagher,* it was noted, was predicated on the need to provide an assurance to minority employees that they will, in fact, be hired on a more than token basis. A similar kind of assurance may be necessary for affirmative recruitment to be successful wherever the likelihood of new employees being laid off is of major concern. Thus, where the last-hired, first-fired principle is applied, this may provide a serious obstacle to affirmative action recruitment—especially in industries subject to employment fluctuations. By shortening the work week for all employees, by giving a special period of guarantee against lay-off for affirmatively recruited employees, or by other means, the adverse effects of the lay-off threat upon affirmative recruitment may be limited. This can and should be done without being used as a basis for discharging present employees to make room for minority applicants.

4. Hospital C, another Federal contractor, notes that while minorities are applying in increasing numbers, many cannot meet the criteria established for entry job classifications. In addition to carefully screening and "validating" such criteria, the employer also may expand the range of employees he is able to hire by instituting programs of entry-level training. There are a variety of programs administered by the Department of Labor, under the Manpower Development and Training Act, pursuant to which an employer may receive Federal financial assistance in support of such programs.

While such affirmative action training opportunities, of course, are not restricted to minorities, it is entirely appropriate for such programs to be aimed principally at them. Thus, for example, the hospital can recruit for the program principally in central city, heavily minority areas. Equally basic to the MDTA training scheme is the relationship between identity as a minority individual and

qualification as a "disadvantaged person." In order to qualify for MDTA on-the-job training assistance, an employee must have been identified as a "disadvantaged person" by the local employment service or Concentrated Employment Program. One of the indicia of being a "disadvantaged person" (when coupled with another factor such as youth, lack of education, poverty, etc.) is minority status. Closely related to MDTA on-the-job training programs may be a restructuring of jobs, so as to create "job ladders" up which the disadvantaged are better able to rise.

5. Employer D, a medium corporation listed on the New York Stock Exchange, is considering a shift of its facilities from the central city to a suburban area. The employer carefully weighs the impact of the move upon minority employees.

As a Federal contractor, subject to Executive Order 11246, the contractor is required to assure that the move would not have an adverse disparate effect upon minority employees. The General Counsel of the Equal Employment Opportunity Commission has taken the position that the same requirement of affirmative action arises under Title VII. Thus, the EEOC General Counsel has stated:

> The transfer of an employer's facilities constitutes a *prima facie* violation of Title VII if (1) the community from which an employer moves has a higher percentage of minority workers than the community to which he moves, or (2) the transfer affects the employment situation of the employer's minority workers more adversely than it affects his remaining workers, and (3) the employer fails to take measures to correct such disparate effect.[10]

Thus, under both Executive Order 11246 and Title VII, the employer must recognize barriers to minority access to employment in suburbia as an instance of "systemic discrimination," which must be combatted by affirmative action measures.

[10] EEOC Memorandum, General Counsel to Chairman, July 7, 1971, at 2. This is the same principle as that declared in *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968), where the court held that the relocation authority was required to recognize, and to take steps to overcome, the relocation problems special to minority relocatees.

6. As a final example, among the requirements used by employer E, a Federal contractor, in selecting applicants for employment is that they have no police record. Employer E has utilized this policy because he is convinced that as a group persons without police records make better employees than those with police records. In addition, some of his employees have stated support for this policy, indicating they feel it a protection to them. Nonetheless, noting that minority applicants are much more likely to have police records than are white applicants, and therefore are rejected in disproportionate numbers because of this fact, employer E determines to discontinue the requirement.

Judicial decisions squarely support this course. Indeed, they state that it may be mandated under Title VII of the Civil Rights Act of 1964. Thus, in *Gregory* v. *Litton Systems,* 316 F. Supp. 401 (D.C. Ca. 1970), the court ruled that it constituted unlawful discrimination for an employer to reject employees with arrest records, since this resulted in the rejection of a disproportionately large number of minority applicants, without adequate justification in business necessity.[11]

The United States Supreme Court has stated a more general rule, of which the above case is an application. In a case pertaining to tests used in appraising applicants, the Court held that ostensibly "objective" criteria for employment or promotion are discriminatory if they result in a relative disadvantage for minority persons, without being plainly compelled by business necessity. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *U.S.* v. *Hayes International Corp.,* 456 F. 2d 112, 118 (5th Cir. 1972).

PART II

To state the law fairly is one thing; to administer it fairly may at times be a very different matter. The law relevant to employment

[11] The discriminatory effect of rejecting employees on the basis of arrest records may be seen, for example, in the fact that minority persons, dwelling in high crime areas, are more likely to be arrested on "suspicion" than are other persons. Thus, nationally, while blacks comprise 11 percent of the population, they account for 45 percent of all "suspicion arrests." *Gregory* v. *Litton Systems,* 316 F. Supp., at 403.

discrimination is clear and receives few arguments. But the administration of Title VII, and more especially Executive Order 11246, has given rise to a number of terms and concepts that have created controversy. Thus, this Commission finds it necessary to define conscientiously the concepts that it endorses to overcome the past and possible consequences of employment discrimination.

We have defined "affirmative action" as steps taken to remedy the grossly disparate staffing and recruitment patterns that are the present consequences of past discrimination and to prevent the occurrence of employment discrimination in the future. In order to properly undertake an affirmative action program under E.O. 11246, the Federal contractor must analyze its employment patterns and "utilization" of minorities and women.[12]

Essential to an affirmative action program is the development of a comprehensive inventory of all employees by race, sex, and ethnicity. Data should be collected by organizational unit and by pay grade. It is important that figures be collected concerning the number by race, sex, and ethnicity of job applicants, accepted and rejected, including the reasons for rejections, promotions, training opportunities offered, terminations, awards, transfers, and other matters relating to employee work conditions. These figures should be compared for each job category with estimates which are made of the availability of women and each minority group within the recruiting area designated.

Similarly an employer must determine the recruitment, hiring, and promotion standards and practices which govern the operation of each organizational unit. It is important to determine if any of these factors have the effect of denying equal employment opportunity and benefits to persons on a basis of their race, sex, or ethnicity. To the extent that these studies demonstrate that a problem exists with regard to the utilization of minority groups and women by the employer, then the matter must be treated in the same manner as other management questions. Goals, which are reasonably attainable by applying good faith efforts, should be established to overcome

[12] See discussion of OFCC regulations, *supra*.

the underutilization. The goals should be based on such matters as employee turnover rate, rate of new hires, as well as upgrading and promotion actions. It is well recognized that the setting of goals provides a valid bench mark against which progress can be measured and the need for further action diagnosed.

Although it is possible that underutilization results from one practice of an employer, it is more likely that a number of accepted and institutionalized practices have caused an exclusion of women and minority groups from fair opportunity for employment. In the course of identifying areas in which minorities and women have been discriminated against, whether intentionally or inadvertently, an employer must first examine the recruitment and hiring policies and practices. Recruitment and hiring are two parts of one process whereby employees are brought into the work force, yet each have special problems which must be examined and dealt with separately.

Recruitment is the process by which an institution develops an applicant pool from which hiring decisions are made. It can be an active process, in which the employer seeks to communicate employment needs to candidates through advertisement, word-of-mouth, notification to schools or training institutes, conventions or job registers. Recruitment, however, may also be a passive function, the evaluation or inclusion in the applicant pool of only those persons who on their own motion or by unsolicited recommendation apply to the employer for a position.

Where underutilization is attributable to the fact that the number of minorities recruited is lower than the size of the available number of qualified persons within the minority labor force in the employer's recruitment area, then a strengthened search network must be developed. Sources other than the traditional avenues through which promising candidates have been located (e.g., professional journals, newspapers, and referrals from present staff and associates) must be utilized. These new sources would consist of individuals at predominantly minority colleges, minorities engaged in related industries and in government, minorities in training programs or engaged in research, and minorities involved in community advocacy and development work.

Once a nondiscriminatory applicant pool has been established, the process of selection from that pool must itself be subjected to careful examination. All criteria used to select employees, whether or not they are discriminatory on their face, must be reviewed to determine if they have a disproportionately negative effect on minorities. If so, they must be further examined to determine whether they are relevant to the duties of the particular position in question.

Tests must be validated to insure that they are both job related and not culturally biased. Other employment criteria must likewise be job related. This insures that they are not unnecessarily high and inadvertently discriminatory. Other selection techniques such as credit check, martial status considerations or arrest records must also be reviewed to determine if they cause a disparate result in employment patterns and whether they are objectively valid and job related.

In many cases an employer would want to consider additional factors in evaluating an individual's potential contribution to the establishment as, for example, the value which diversity in perspective and life experience may contribute to an academic program or the extent to which service to a Spanish speaking or black population might be improved by the employment of bilingual and bicultural staff. This does not imply that unqualified persons should be hired or that genuinely valid standards should be eliminated or diluted. It simply means that the criteria which have traditionally been used in hiring and promoting must be broadened to include consideration of minorities and women. Where the qualifications of such applicants are substantially the same or better than nonminority male applicants, and where the recruitment involved is in an area of employment in which there has been a dearth of equal opportunity for minority and women applicants, a substantial effort must be made to recruit minorities and women and thereby redress the imbalance.

The Federal contractor within the context of its own "self-analysis" identifies "goals and timetables" as part of the affirmative action program. Thus, the basis for affirmative action is the contractor's

underutilization analysis of minorities and women, an underutilization that under existing case law raises a presumption of employment discrimination.

The employer's affirmative action plan "goals and timetables," then, set out the numerical increase in minority and female employment, by job classification, which the contractor aims to achieve in correcting identified underutilization.

As we have noted, one aim of affirmative action is to assure against the continuation of discriminatory practices. Another aim is to redress patterns of minority and female underutilization. The best test for determining whether these aims are being achieved is by a results test. Whether expressed in terms of applications, hires, or promotions, the results test is the best indicator of whether women and minorities *in fact* are achieving the access to employment opportunities required pursuant to the twin aims of affirmative action.

In essence, equal opportunity goals and timetables are no different from the performance goals familiar in many business contexts—for example , in sales campaigns. In all such instances, the key to effective management is a reasoned determination of what results ought to be achieved. Those targeted results then become the foundation for supervisory determinations as to when the ongoing effort should be strengthened. Thus, for example, if sales figures drop below targeted goals, this sounds a signal for corrective action. Similarly, if minority or women hires fall below targeted goals, this is a signal for a careful examination of whether systemic barriers to equal employment opportunity have been overcome, and whether more satisfactory progress can be made in redressing patterns of underutilization.

The crucial factor to be kept in mind with respect to goals and timetables is that they are a complement to affirmative action. They comprise a guide to determine whether the affirmative action plan is working. The ultimate legal obligation of the employer is *not* to achieve the established goals, but "the results which could reasonably be expected from [the contractor's] putting forth every good faith effort to make his overall affirmative action program work." (41 CFR 60-2.12(a).)

Thus, for example, the opinion of the Attorney General of the

United States upholding the "Philadelphia Plan" for remedying the effects of past discrimination in the construction industry, 42 Op. Atty. Gen., N. 37 (1969),. makes clear that the key question in the use of "goals" for increasing minority employment pursuant to the Plan is whether "good faith efforts" have been made to achieve such goals.

As we have seen, there is an enormous range of possible affirmative action steps, each of which can be pursued with varying degrees of intensity and resource commitment. Because of this open-ended nature of affirmative action, it is virtually always possible for the employer to readjust performance upwards to assure adequate results. For this reason, "goals and timetables" are necessary for meaningful evaluation of equal employment opportunity efforts.

PART III

The Commission's position regarding the implementation of affirmative action by Federal contractors can be stated as responses to some commonly asked questions about this subject.

1. Question—Are not goals and timetables the same as quotas for racial, ethnic, and sex groups?

Answer—No. The essential difference is that under a quota system a fixed number or percentage of minorities or females is imposed upon the employer, who has an absolute obligation to meet that fixed number. No excuses are accepted, nor can failure to meet the quota be justified.

Goals and timetables, by contrast, are result-oriented procedures by which the employer—subject only to the requirement that the targeted results are as much as reasonably can be expected—determines goals and a time schedule for correcting minority underutilization, and then makes every good-faith effort to achieve the self-imposed goals. Contrary to what would be true in the case of quotas, failure to meet goals and timetables is excused if the employer can show that good-faith efforts have really been made. However, an employer must be prepared to demonstrate in detail why good-faith efforts failed to produce desired results.

In a sense, goals and timetables represent a shifting of the burden of proof from the government to the employer on the question of whether or not the employer used good-faith efforts to hire more minority individuals and women.

2. Question—Why are goals and timetables necessary?

Answer—The necessity for goals and timetables arose out of long and painful experience in which lip service to equal employment opportunity was paid by employers who then did little to correct the situation. It also arose out of the realization that *procedures* for assuring equal employment opportunity can accomplish little unless they are tied closely to results.

After generations of intentional and systemic discrimination against minorities and women, the pattern of unequal employment opportunity persists. Although intentional discriminatory practices are now illegal, many systemic practices still exist that limit the opportunities available to minorities and women. Patterns of employment have become firmly established, creating many positions that minorities and women no longer even try to fill. Accordingly, if they are truly to get a fair deal in the job market, there is a compelling need for an effective program of affirmative action assuring women and minorities that meaningful equal employment opportunity—not mere tokenism—is what they can reasonably expect. To achieve such assurance employers must *affirmatively* seek out minorities and women and place them in jobs for which they are qualified but from which they have long been excluded. To bring about such affirmative action is precisely what goals and timetables are intended to do.

3. Question—Do not goals and timetables result in hiring on the basis of race or sex, rather than on the basis of who is best qualified for the job, thereby undermining the merit system?

Answer—No. There is a myth abroad that, in years past, hiring decisions always were made on the basis of objective and proven methods for assessing applicants' "qualifications." In fact, the hiring decisions of many, if not of most, employers were based in large

measure on subjective and unproven criteria. As a result, racial and sexist stereotypes operated to exclude women and minorities without regard for their actual qualifications. Indeed, such criteria in some degree were institutionalized within the "merit system" itself. For example, under the well established "rule of three," public employers have been free to use subjective and unsubstantiated criteria in selecting among the top three candidates for a post. Following the principle of the *Griggs* case (discussed above), therefore, a major affirmative action step to be taken in achieving minority employment goals is to assure that job qualifications *are* accurately appraised. Thus, if a hiring standard disproportionately excludes women or minorities, the employer can use that standard only if such standard demonstrably assesses qualifications for the job. This does not weaken, but rather strengthens, the role of applicant "qualifications" in determining employee selection.

4. Question—Do not affirmative action plans establish preferential treatment for minority groups and women?

Answer—No. On the contrary, their purpose is to undo a preferential system many years in the making and to redress the historic imbalances now favoring white males in the job market.

Redressing this imbalance requires that discriminatory patterns be eradicated and some measure of equity be established for persons who have been discriminatorily excluded in the past. Implementation of affirmative action plans must, therefore, necessarily involve a selection process aimed at achieving these goals.

For the purpose of remedying discriminatory practices, a selection process designed to achieve such goals is a valid technique so long as it does not produce a pattern of discrimination against qualified members of another group. The fact is that very few persons are ever hired on a totally objective basis. Even the Civil Service merit system rarely requires the selection of a *specific* person from among a group of qualified applicants. The requirement is that from among such a group a person be selected. Obviously many subjective elements then enter into the selection process. The candidate's personality, disposition, experience, and apparent judgment are just a few of the elements that always influence a selection. Unfortunately,

a significant reason for the paucity of minority group persons and women in many job categories is that these subjective factors never included providing a fair share of employment opportunities to them.

An affirmative action plan must require some action that has not heretofore taken place. Otherwise it is useless. One of the requirements, therefore, is that in the subjective evaluations that always occur in the selection process, one factor previously excluded should now be included—a concern that a reasonable number of qualified minorities and women be hired until equity is attained.

5. Question—Are goals and timetables aimed at achieving proportional representation of minorities and women?

Answer—The concept of goals and timetables is *not* synonymous with proportional representation. Rather, the concept comes into play when it has been determined that women or minorities are underutilized or underrepresented in one or more job classifications. When underutilization has been established, affirmative action programs (as already described) are employed to bring minorities and women into the labor force in the numbers that "would reasonably be expected by their availability." Goals and timetables may be viewed as the measure or yardstick to determine whether the affirmative action programs are, in fact, achieving the goals of increasing the number of women and minorities in the labor force.

The concept of goals and timetables often conjures up an image of some precise mathematical division of a pie, whereby each group or subgroup gets a share dependent upon the size of the group. But the concept in no way depends upon a precise mathematical formula. Rather, it focuses on the demonstrable results of past discrimination (the underutilization) and seeks to remedy that by compensatory programs (affirmative action). The "goal" that we refer to is nothing more than a description of what that labor force would look like absent the effects of illegal racial or sexual discrimination, and the "timetable" is the informed estimate of time needed to achieve the discrimination-free labor force without disrupting the industry or denying anyone the opportunity for employment.

PART IV

The moral and ethical imperatives of affirmative action in employment should need no further expansion. This need, we trust, was accepted by the American public long ago. This Commission, however, is concerned that in the current economic situation effective implementation of affirmative action will require greater—not less—commitment to the goal of equal opportunity in employment. And, with the unemployment of minorities twice as high as that of whites, with underemployment showing an even greater gap, the Commission feels the necessity to call again to the attention of the American public its obligation to create an equitable society for all.

Equity cannot be obtained without the application of effort and, in some cases, unusual measures. The measures now enacted into law or issued as Executive orders are not so unusual either in substance or in general practice as to evoke resistance on the part of Americans to adhere to them. This is as true in the employment of persons to serve in the Federal Government as it is private employment. In fact, it is incumbent on the Federal Government to establish the pattern and set the pace. We believe that where quotas as defined in this statement have been established without a judicial finding of discrimination, such practices should cease. Goals and timetables, as defined in this statement are, we believe, fair and equitable. They present the minimum measures necessary to assure that all Americans can be assured equal treatment under the law. It is not complimentary of the American society to find it necessary to *require* any action designed to provide all citizens an equal opportunity to use their energies and their talents.

Unfortunately, in the immediate future the test of our commitment to the principles upon which the Nation stands may be less related to our willingness to do voluntarily what is right than to our acquiescence in following the law as it is written.

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