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Title VII: An Overview of Some Common Employer Pitfalls

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TITLE VII OF THE CIVIL RIGHTS ACT of 1964 and other supporting acts and laws have established certain employment rights for the vast majority of employees throughout the United States, and the procedures for enforcing those rights. Substantial efforts have been made by federal and state agencies, as well as minority interest groups, to publicize the laws and their enforcement procedures. In 1974 it can be safely assumed that virtually all employees affected by the equal employment laws are familiar with their rights or, minimally, know where to obtain sufficient information to be fully apprised of those rights.

Surprisingly, the corollary is not true. Employers often are woefully uninformed regarding permitted and prohibited employment practices. Often, employment relations are a minor or even insignificant facet of the general operation of a business. Problems rarely occur as a result of an overt desire to violate the equal employment laws or the rights of any employees. On the contrary, management's policies and practices are most often genuinely motivated by a desire to maintain or improve the conduct of business. However, decisions implemented without sufficient knowledge of or concern for protected employee rights can prove to be disastrous, as will be discussed later in this article.

Equal Employment Laws Generally

Prior to a discussion of the many employment pitfalls in the path of the employer, it is essential to have a basic familiarity with the applicable laws. Title VII of the Civil Rights Act of 1964, as amended in 1972, is relatively simple in concept.[1] As affecting employers, Section 703 of the Act provides:

> It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

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[1] 42 U.S.C. § 2000e *et seq.* (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).

> or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[2]

It should be noted that there are, of course, many other provisions in the act. However, the foregoing are the fundamental prohibited employment practices.

There are additional federal laws which prohibit discrimination in employment, two of which have significant impact. The Age Discrimination in Employment Act of 1967[3] forbids discrimination in employment on the basis of age, against persons who are between the ages of forty and sixty-five. The Equal Pay Act of 1963[4] requires that all employees receive equal pay for equal work, regardless of sex.

It is Title VII of the Civil Rights Act of 1964 which has provided the greatest number of problems for the employer, resulting in a substantial amount of litigation throughout the country. As a result, this article will focus on the enforcement provisions contained within it, as well as on the burgeoning body of federal court decisions under it.

To be subject to any of the provisions of Title VII, an employer must meet certain conditions. These conditions are contained within the definition of an employer as stated in Section 701(b):

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .[5]

Basically, then, there are three conditions which, if present, require the employer to operate within the limits of Title VII. These conditions are:

> A. the employer conducts a business in an industry affecting interstate commerce
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> B. there are 15 or more persons employed by the employer
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> C. the employer has employed at least fifteen persons for each working day in each of twenty or more calendar weeks during either the current year or the preceding year.

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[2] 42 U.S.C. § 2000e-2 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-2 (1970).

[3] 29 U.S.C. § 621 *et seq.* (1970).

[4] 29 U.S.C. § 206(d)(1) (1970).

[5] 42 U.S.C. § 2000e(b) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e(b) (1970).

It should be obvious that most employers meet these conditions.[6]

There must be included in this discussion of applicable laws, the issuance of Executive Orders Nos. 11246[7] and 11478.[8] Executive Order No. 11246 was published in September of 1965 and was subsequently amended in 1967 to include sex discrimination.[9] Revised Order No. 4,[10] effective September 30, 1972, and Revised Order No. 14,[11] effective April 15, 1974, coupled with the Executive Orders, provide certain affirmative action requirements for government contractors or their subcontractors.

Section 60-60.2(a) of Revised Order No. 14 provides:

> Each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more is required to develop a written affirmative action program for each of its establishments . . . .[12]

For certain government contractors and subcontractors, mere compliance with the various employment laws is clearly not sufficient. They are required to develop an affirmative action program. The enforcement agencies consider "affirmative action" to be active efforts by an employer to eliminate any racial, sexual, or other minority imbalances which may exist in the employer's work force. However, an affirmative action program acceptable to the Office of Federal Contract Compliance (OFCC) must include an analysis by the employer of its under-utilization of minority employees, establishment of goals or "quotas" relating to minority employees, a time table within which the goals are to be accomplished, and the establishment of a plan to meet the goals within the allotted period of time.

Failure to adopt or conform to an affirmative action program can result in a determination by the OFCC cancelling existing contracts between the government and the employer. It can also result in a refusal to award any new government contracts.[13] It is sug-

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[6] It should be pointed out that the Ohio Civil Rights Act has an even broader impact, being applicable to all employers who have four or more employees. OHIO REV. CODE ANN. §§ 4122.01 *et seq.* (Page 1973). As a result, Ohio employers generally must take deliberate pains to satisfy both the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission guidelines to avoid, prospectively, substantial back pay awards, protracted litigation, and payment of the employee's attorney fees.

[7] 3 C.F.R. 173 (Supp. 1973), 42 U.S.C. § 2000e (1970).

[8] 3 C.F.R. 214 (Supp. 1973), 42 U.S.C. § 2000e (1970).

[9] Exec. Order No. 11375, 3 C.F.R. 320 (Supp. 1967) superseded by Exec. Order No. 11478, 3 C.F.R. 214 (Supp. 1973), 42 U.S.C. § 2000e (Supp. II, 1972).

[10] 37 Fed. Reg. 20536 (1972).

[11] 39 Fed. Reg. 5630 (1974).

[12] *Id.*

[13] Revised Order No. 4, 41 C.F.R. § 60-2.2(c)(2).

[14] 42 U.S.C. § 2000e-4 (Supp. II, 1972).

gested that employers should familiarize themselves with the basic laws relating to equal employment practices. Many summary pamphlets are available. A minimum familiarity may considerably lessen an employer's exposure to the various types of civil rights litigation.

The Equal Employment Opportunity Commission

As well as enacting legislation to prohibit many forms of discrimination, Title VII also established the Equal Employment Opportunity Commission (EEOC).[14] This agency is empowered to accept and investigate charges of discrimination. The investigation is conducted to determine the validity or invalidity of the charges and to conclude whether or not there is reasonable cause to believe the employer has discriminated.[15]

In order to file a charge, an aggrieved person or a member of the commission is required to file a written statement, signed and notarized, outlining the events which allegedly amounted to a discriminatory practice.[16] Such a filing must be made within one hundred eighty days of the employer's alleged discriminatory action.

If, after its investigation, the Commission determines that there is reasonable cause to believe that an employer is guilty of a discriminatory practice, the EEOC then attempts to "eliminate any such unlawful employment practices by informal methods of conference, conciliation and persuasion."[17] The conciliation process does not permit a discussion of the merits of the claim of the affected employee by the employer. Even if the employer genuinely believes that the EEOC has made an erroneous decision, the employer is still required to enter into conciliation conferences. The conferences are initiated upon the assumption that the employer has discriminated in the past and sincerely desires to correct his prior unlawful practices. When an employer genuinely disputes the EEOC determination, the conciliation process becomes a meeting or series of meetings of futile employer protests.

If no agreement is reached, the commission determines that the parties are at an impasse and issues its "90 day letter" to the employee, notifying him of the fact that conciliation has failed and

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[15] 42 U.S.C. § 2000e-5(b) (Supp. II, 1972). For a discussion of deferral of EEOC investigation and conciliation procedures see text at note 32, *infra.*

[16] 29 C.F.R. 1601.5. The amendments of 1972 permit a filing of a charge by someone on behalf of a party. *See* 42 U.S.C. § 2000e-5(b) (Supp. II, 1972). If the charge is not sworn to or inaccurate it may be amended after it is filed. The courts apparently will not hold form over substance. *See, e.g.,* Georgia Power Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969).

[17] 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

that he (or she) may bring a civil action within ninety days.[18] Prior to the issuance of the 90 day letter the EEOC file is considered to be confidential. The employer is not permitted to view its contents. Following the issuance of the letter the Commission file on the matter thereupon loses its confidential status and it may then be reviewed by the parties for use during the litigation.

In March of 1972, Title VII was amended, broadening the powers of the Commission.[19] The amendments also liberalized certain procedures for the benefit of those claiming relief under the Act. The supervision of state and local governments by the EEOC was extended,[20] as well as that of educational institution employees.[21] In addition, the EEOC was given the power to institute its own court actions against employers.[22] The Amendments extended its coverage from employers with twenty-five or more employees, to those with fifteen or more employees.[23]

The prior law required charges to be filed by the employee with the EEOC within ninety days of the alleged unlawful employment practice. With the 1972 amendments this has been extended to one hundred eighty days.[24] A statute of limitations requiring the employee to file suit within a period of time after receipt of his "right-to-sue" letter from EEOC was extended from thirty to ninety days.[25] The employee also was given the right to institute private litigation after the EEOC has dismissed the charge with a finding that there is no reasonable cause to believe that a discriminatory practice has occurred.[26] The amended law thus attempts to ease the filing and processing of charges against a large group of employers. Subsequent decisions by the EEOC have succeeded to even further broaden the effect of the law.

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[18] There are generally recognized two jurisdictional prerequisities that a person must meet before filing a civil action. First there must be a proper filing with the EEOC. *See* Stebbins v. Nationwide Mutual Insurance Co., 382 F.2d 267 (4th Cir. 1967), *cert. denied,* 390 U.S. 910 (1968); Perrino v. Southern Bell Telephone & Telegraph Co., 3 E.P.D. ¶ 8178 (S.D. Fla. 1970), *aff'd per curiam* 440 F.2d 791 (5th Cir. 1971). *But see* DeFigueiredo v. Trans World Airlines, 322 F.Supp. 1384 (S.D.N.Y. 1971). The second prerequisite is receipt of notice from the EEOC that conciliation efforts have failed, *i.e.,* the 90-day letter. *See e.g., Stebbins, supra.*

[19] PUB. L. NO. 92-261 §§ 2-8, 10, 11, 13, 86 Stat. 103, *amending* 42 U.S.C. §§ 2000e, 2000e-1 to 6, e-8, e-9, e-13, e-14 (1970) (codified at 42 U.S.C. §§ 2000e, 2000e-1 to 6, e-8, e-9, e-13, e-14, e-16, e-17 (Supp. II, 1972).

[20] 42 U.S.C. § 2000e(a) (Supp. II, 1972).

[21] 42 U.S.C. § 2000e-1 (Supp. II, 1972).

[22] 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

[23] 42 U.S.C. § 2000e(b) (Supp. II, 1972).

[24] 42 U.S.C. § 2000e-5(e) (Supp. II, 1972).

[25] 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

[26] *Id.*

The Ohio Civil Rights Commission

The State of Ohio has adopted civil rights laws similar to the federal laws.[27] The chief difference is that an employer is defined as "any person employing four or more persons in the state . . . ."[28] Virtually all employers are subject to the provisions of the Ohio laws against discrimination. These laws are administered by the Ohio Civil Rights Commission (OCRC). The Commission's procedures differ somewhat from those of the EEOC.

If the OCRC determines, after investigating a charge, that it is probable that unlawful practices have been or are being engaged in, it institutes conciliation conferences.[29] However, if the employer and the Commission fail to enter into a conciliation agreement, suit is not immediately instituted. Instead, a complaint is filed by the Commission and the matter is scheduled for a hearing before a Hearing Examiner. The Attorney General represents the Commission and presents whatever evidence is available in support of the complaint.[30] If the Commission determines that the employer is guilty of discriminatory practices, it will issue an order requiring the employer to cease and desist its unlawful practices.[31] If the employer disagrees with the Commission, it is incumbent upon it then to seek judicial review by instituting suit in the appropriate common pleas court.[32]

Often, disgruntled employees file charges with both the EEOC and the OCRC. In this situation the EEOC is required to defer their investigation to the appropriate state agency: in Ohio, the OCRC.[33] The EEOC may make its referral to the state agency orally and then may commence its own investigation after sixty days.[34] As a result, if the state agency is still conducting its investigation and hearings, and EEOC begins its investigation, it is possible for an employer to be subjected to two investigations at the same time.[35]

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[27] OHIO REV. CODE ANN. § 4112.01 *et seq.* (Page 1973).

[28] OHIO REV. CODE ANN. § 4112.01(B) (Page 1973.)

[29] OHIO REV. CODE ANN. § 4112.05(B) (Page 1973).

[30] *Id.*

[31] OHIO REV. CODE ANN. § 4112.05(G) (Page 1973).

[32] OHIO REV. CODE ANN. § 4112.06 (Page 1973).

[33] 29 C.F.R. 160.12 (1973). *See* Crosslin v. Mountain States Telephone & Telegraph Co., 400 U.S. 1004 (1971).

[34] Love v. Pullman Co., 404 U.S. 522 (1972); United States v. Pullman Co., 404 U.S. 522 (1972). It would appear that a complaint need not be refiled with the EEOC at the end of the 60 day period. *See* EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1968); Wright v. Railway & Steamship Clerk, 3 E.P.D. ¶8174 (D. Kan. 1971); Nishiyama v. North American Rockwell Corp., 49 F.R.D. 288 (C.D. Cal 1970).

[35] *See* Voutsis v. Union Carbide Corp. 321 F.Supp. 830 (S.D.N.Y. 1970).

Even more common is the situation in which the EEOC experiences delay in the commencement of its investigation, sometimes as long as a year or more. In many cases, the original charge is a dead issue as far as both the OCRC and the employer are concerned, and yet the employer is required to reopen its files, report information, and make management personnel available for EEOC's investigation, long after the original problem has been rectified. The investigations themselves can be costly to the employer in the amount of time spent by its personnel in explaining its records, systems, and policies. Many employers are required to prepare summary charts or lists from their records, identifying present and former employees, classifying them as to their sex, race, job category, promotions, demotions, discharges, reasons for discharges, and voluntary terminations.

Due to the time-consuming nature of an investigation, employers have often requested that they be subject to one investigation, by either agency. However, as a matter of policy both the EEOC and the OCRC insist upon conducting separate and distinct investgations, although based upon the identical charge of unfair employment practices. Hopefully, the two agencies will eventually establish a policy of accepting each other's findings and content themselves with a single investigation.

Consequences of Discriminatory Practices

If there has been a judicial determination that the employer has engaged in discriminatory employment practices, there can be a number of possible undesirable consequences. Employers should be informed of what may result from hiring or failing to hire an employee, disciplining or discharging an employee, or for that matter, making *any* change in employment conditions, where overtones of race, color, religion, sex, or national origin may be present.

Back Pay Awards

When a court determines that the employer has intentionally engaged or is engaging in a discriminatory and therefore unlawful practice, the court is empowered by Title VII to:

> . . . enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or

> amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.[36]

The imposition of a back pay award exposes the employer to the entry of a substantial judgment against it. Though the act provides that a back pay award may not be granted for more than two years before the charge was filed with the EEOC, that limitation provides an employer with little comfort.

Assume that an employee was discharged in May of 1970, having an annual income of $6,000. He filed a charge with the EEOC within one hundred-eighty days of the discharge. Although the Commission will immediately notify the employer of the existence of the charge, it may take one and one-half to two years before the matter is scheduled for an investigation and an eventual determination. Following commencement of litigation, it may easily take another two years before entry of a final judgment. Without a reduction for interim earnings, the back pay award in this example (a four-year period) would amount to $24,000 for a single employee.

A suit filed by a single employee invariably includes a claim that he represents a class of employees similarly situated.[37] If a class action is successful, back pay awards may dramatically increase the eventual judgment entered against the employer. In *Hecht v. Cooperative for American Relief Everywhere, Inc.*[38] the employer (C.A.R.E.) was determined to have been guilty of sex discrimination. It was ordered to pay back wages of $25,000. More noteworthy, however, is *Bryan v. Pittsburgh Plate Glass Co.*,[39] a major class action again presenting claims of sex discrimination. During the trial of that action, the employer agreed to a settlement and entry of an order which included a back pay award of $931,724. There are innumerable decisions granting back pay awards in varying amounts.[40]

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[36] 42 U.S.C. § 2000e-5(g) (Supp. II, 1972). *See* Green v. Aluminum Co. of America, 3 E.P.D. ¶8002 (W.D. Texas 1970) for lauguage regarding the requirement that there be a finding that the discriminatory practice was "intentional."

However, in Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973), Westinghouse defended on the grounds of reliance on conflicting state statutes and that therefore it did not intentionally engage in an unlawful employment practice. The court held:

> We conclude that it is now the law that discrimination based on reliance on conflicting state statutes is an intentional unfair employment practice. Intentional unfair employment practices are those engaged in deliberately and not accidentally. No wilfullness on the part of the employer need be shown to establish a violation of Section 706(g).

[37] FED. R. CIV. P. 23.

[38] 7 E.P.D. ¶ 9049 (S.D.N.Y. Sept. 18, 1973), *approving settlement of* 351 F.Supp. 305 (S.D.N.Y. 1972).

[39] 6 E.P.D. ¶ 8935 (W.D. Pa. 1973).

[40] *See e.g.*, Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973) ($5,300 award); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969) ($30,761 award); Jurinko v. Weigand Co., 331 F.Supp 1148 (W.D. Pa. 1971) ($15,784 award).

Attorneys' Fees

Reinstatement and back wages are not the only possible penalties to which an employer may be subject. The Court may also require the employer to pay the employee's attorneys' fees. Section 706(k) of the Act provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[41]

It would be fair to assume that in the example of the $24,000 back pay award, the employer would also be required to pay the employee's attorneys' fees. A reasonable estimate would be in the range of $5,000 to $10,000. In the *Hecht*[42] case, attorneys' fees were awarded to the employee in the amount of $13,000. Having prevailed in a class action, the court awarded the employees in the *Pittsburgh Plate Glass Co.*[43] case $201,250 as reasonable attorneys' fees.

It becomes readily apparent that any decision of an employer affecting employment practices must be considered carefully. It is of crucial importance that the implementation of such decisions be documented thoroughly to withstand charges of discriminatory conduct. It is quite possible to discharge an employee for what seemed to be nondiscriminatory purposes at the time, only to subsequently result in reinstatement of the employee with a sizable back pay award, plus payment of the employee's attorneys' fees.

Employment Pitfalls

It would not be practical to categorize in this article the myriad decisions detailing all prohibited employment practices. However, certain fundamental practices, common to most employers, should be treated. Identification and elimination of potential pitfalls will reduce future involvement with the civil rights agencies and the courts.

Employment Applications

Often, employment applications ask whether the applicant has ever been arrested for any crimes other than minor traffic offenses. A subsequent question normally inquires of convictions.

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[41] 42 U.S.C. § 2000e-5(k) (Supp. II, 1972). In Gunn v. Layne & Bowler, Inc., 1 E.P.D. ¶ 9823 (W.D. Tenn. 1967) plaintiff was permitted to recover attorney fees for that portion of the case in which he prevailed. For recovery by unsuccessful plaintiffs, *see* Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

[42] 7 E.P.D. ¶ 9094 (S.D.N.Y. Sept. 18, 1973), *approving settlement of* 351 F.Supp. 305 (S.D.N.Y. 1972).

[43] 6 E.P.D. ¶ 8935 (W.D. Pa. June 12, 1973).

In *Gregory v. Litton Systems, Inc.*,[44] a black applicant noted on his employment application that he had been arrested fourteen times; however, he had not been convicted of any crimes. The employer refused to hire the applicant. At trial it was demonstrated through the use of statistics that proportionately more blacks are arrested than whites. The court found that the employer was guilty of a discriminatory practice in refusing to hire the applicant and in requesting discriminatory information on its employment application. The employer was required to pay a back pay award as well as the applicant's attorneys' fees.[45]

The *Gregory* decision was specifically limited to arrests, without convictions. In fact, the court deliberately referred to arrests, without convictions, a number of times throughout the opinion. The decision was based upon the traditional concept that the presumption of innocence carries through any case until there is an acceptance of a guilty plea or a determination of guilt beyond a reasonable doubt following a trial on the merits. The statistical evidence presented to the court in *Gregory* demonstrated that blacks are arrested disproportionately to whites where no convictions result. It was explained that often blacks are arrested for suspicion of a crime, the charges subsequently being dropped. A significant reason for such arrests was simply due to the defendant's color. It was, therefore concluded that the disporportionate number of blacks arrested without convictions was principally due to the fact that they were black. It therefore logically follows that use of such arrest records to determine an applicant's suitability for employment is a clear violation of Title VII of the Civil Rights Act.

The Commission has extended the rationale of the *Gregory* case to include convictions as well.[46] It is submitted that such an extension is unwarranted. For a conviction to be discriminatory in nature it should be proven that a black is convicted *because he is black.* Such a proposition ignores the requirement that a conviction can only result if the defendant is proven guilty beyond a reasonable doubt. It is not acceptable to believe that courts of law generally convict blacks of crimes because they are black. However, due to the current holdings of the Commission, it is suggested that questions relating to arrests and conviction records be excluded from employment

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[44] 316 F.Supp. 401 (C.D. Cal. 1970), *aff'd as modified,* 472 F.2d 631 (9th Cir. 1972).

[45] *See* Merriweather v. American Cast Iron Pipe Co., 362 F.Supp. 670 (N.D. Ala. 1973), where the court upheld the discharge of an employee for falsifying information on his employment application and there was no showing of discriminatory hiring practices. For use of statics to find discrimination *see e.g.,* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

[46] EEOC Dec. No. 72-1460 (3-19-72) CCH EEOC Dec. ¶6341 (1973).

applications. Instead it is recommended that a security check be made while the employee is still on probationary status.

One employer has demonstrated the ideal method for resolving the problem of hiring or discharging an employee with a conviction record. In *Richardson v. Hotel Corporation of America*,[47] the plaintiff applied for a bellman position at a newly constructed hotel. Although he admitted on his application that he had a conviction record, a clerical error resulted in his being hired as a bellman. Shortly after being hired, it was discovered that he had been convicted of theft and receipt of stolen property. He was informed that he could not continue as a bellman, but was offered another position. The employee refused the offer and was discharged. He was replaced by another bellman.

The court determined that a bellman's position was "security sensitive," having access to guests' rooms, and that the employer was justified in its policy of requiring bellmen to be reasonably free from convictions for serious property-related crimes. However, the court carefully pointed out certain factors which resulted in a decision favorable to the employer. These factors included:

1. The employee was offered another job at a similar rate of pay.

2. The employer discharged two white bellmen for the same reasons at the same time.

3. The employer replaced the employee with a black bellman.

4. The work force of the hotel was composed of 61.7 percent minority group members while the surrounding population was composed of only 31.0 percent negroes.

Similar planning by any employer can be highly effective in preventing unwarranted claims for relief by disgruntled employees.

Testing and Screening

After completion of an employment application, prospective employees are usually interviewed and tested before being offered a position with the company. Testing a prospective employee has historically been considered to be the most reliable method of selection. It may be thought that uniformly applied testing procedures are nondiscriminatory in character. However, the EEOC and federal courts have held to the contrary. The leading case is *Griggs v. Duke*

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[47] 332 F. Supp. 519 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

Power Company.[48]

In *Griggs* the employer required employees transferring into certain higher-paying positions in the company to have a high school education, as well as to register satisfactory scores on two professionally-prepared tests. The two tests were the Wonderlic Personnel Test, a test designed to measure general intelligence, and the Bennet Mechanical Comprehension Test, a test designed to measure general mechanical aptitudes and abilities.

> The Civil Rights Act provides that:
> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[49]

Nonetheless, the United States Supreme Court determined that the testing procedures in *Griggs* were invalid, having a discriminatory effect. The Court held that neither test was intended to measure the ability to learn or to perform a specific job. The Court further stated that blacks have traditionally received inferior educations as compared to whites, and it was shown statistically that blacks uniformly score lower than whites on such tests as the Wonderlic and Bennet tests. Chief Justice Burger concluded:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. *If an employment practice which operates to exclude negroes cannot be shown to be related to job performance, the practice is prohibited.*[50] (emphasis added).

Accordingly, tests must be specifically related to measure the skills required for a particular job. Thus, testing for a secretarial position may properly include shorthand, typing, and transcription tests. Machinists may be tested for their machining capabilities. A bricklayer may be tested to determine his ability and skill in that occupation. Employers should generally be wary of purchasing professionally-developed tests unless they can be demonstrated to be job-related.

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[48] 401 U.S. 424 (1971).

[49] 42 U.S.C. § 2000e-2(h) (Supp. II, 1972).

[50] 401 U.S. 424 (1971). *See also,* Chance v. Board of Education, 330 F.Supp. 203 (S.D. N.Y. 1971), *aff'd,* 458 F.2d 1167 (2d Cir. 1972); Smith v. East Cleveland, 363 F.Supp. 1131 (N.D. Ohio 1973).

Advertising

Traditionally, employers[51] have sought employees with special characteristics or skills through the use of help-wanted advertisements in the newspaper. Since the enactment of Title VII, such advertisements have been and continue to be carefully scrutinized to prevent sex and age discrimination.

It has been held not permissible to advertise in such a manner that the advertisement designates the sex of the prospective employee. Thus, advertisements cannot request "waitress," "draftsman," "stewardess," "salesman," "barmaid," and the like. The EEOC revised its Guidelines on Discrimination Because of Sex[52] and summarized its position on advertising thusly:

> It is a violation of Title VII for help-wanted advertising to indicate a preference, limitation, specification or discrimination based on sex. Placement of advertisements in sex-segregated columns is considered just such an expression of preference.[53]

The Age Discrimination in Employment Act of 1967[54] similarly prohibits discrimination based on age.[55] Terms still commonly used, but not acceptable, include "college student," "age 21 to 35," "recent college graduate," and "boy" or "girl." Employers should be cautioned to avoid these seemingly technical violations. Awareness of these prohibitions prior to placement of advertisements should sufficiently alert the employer.

Pregnancy

Sex discrimination cases are recently being brought on a more frequent basis. The principal issue being raised is the treatment of pregnant employees, wed or unwed. Employers generally have a policy that pregnant employees must either resign or obtain a leave of absence from their employment a certain number of months after having become pregnant. Usually employers request the pregnant employee to cease working between the end of the fourth to the

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[51] The term *employer* is used here, but employment agencies and labor organizations, as defined, are also affected. *See* 42 U.S.C. § 2000(e) (Supp. II, 1972).

[52] 29 C. F. R. § 1604.5 (1973). An exception is permitted with regard to religion, sex, or national origin (not race or color) if it is a bona fide occupational qualification and only when it is reasonably related to the normal operation of the job. *See* 42 U.S.C. § 2000e-2(e) (Supp. II, 1972). A *possible* example would be an advertisement for a wet nurse, requiring a female.

[53] 7 EEOC ANN. REP. (1972).

[54] 29 U.S.C. § 621 *et seq.* (1970).

[55] 29 U.S.C. § 623(e) (1970). Section 631 limits the Act to persons between the ages of 40 and 65.

end of the sixth month of pregnancy. A number of employer justifications are offered, including protection of the affected employee's health, as well as the health of the unborn child.

Such a policy is squarely in violation with the EEOC Sex Discrimination Guidelines.[56] The following is the most significant paragraph detailing the Commission's viewpoint:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.[57]

The EEOC, and more recently some federal courts,[58] have held that the establishing of any kind of policy in this area amounts to sex discrimination. Instead of establishing a policy, employers are required to treat each pregnant employee on an individual basis. Some women of frail health might be required to leave employment at a very early stage of a pregnancy. Others of more robust health might be able to work up to the later stages of pregnancy.

Factors to be considered include the individual employee's general health, willingness to continue work, rate of production or performance, and the specific nature of her job. The EEOC in a recent decision outlined its approach:

> Title VII forbids any policy for the termination of pregnant female employees that is based solely on the fact of pregnancy, or a specific number of months of pregnancy, and not upon individual capacities or characteristics such as ability to perform specific duties of employment, efficiency, personal medical safety, or willingness to continue work.[59]

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[56] 29 C.F.R. § 1604.10 (1973).

[57] *Id.* 29 C.F.R. § 1604.10(b) (1973).

[58] Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973); Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973); Cleveland Board of Education v. La Fleur, 465 F.2d 1184 (6th Cir. 1972), *aff'd.*, ... U.S. ....., 94 S.Ct. 791 (1974).

[59] EEOC Dec. No. 73-0520, (6/14/73), 2 CCH EMPLOYMENT PRACTICES ¶ 6389, at 4045.

In support of its decision, the EEOC cited *Schattman v. Texas Employment Commission.*[60] Curiously, the EEOC noted that the authority it relied upon had subsequently been reversed by the Fifth Circuit Court of Appeals.[61] The issue involved the termination of a pregnant employee two months prior to the expected delivery date. The district court held that such a policy violated Title VII and the equal protection clause of the fourteenth amendment.[62] The Court of Appeals reversed, stating:

> . . . [W]e hold that Mrs. Schattman had failed in her efforts to show that the Regulation in question is unreasonable or arbitrary or not reasonably related to a permissible state objective. To the contrary, we are of the view, that the Regulation is shown to be reasonable and rationally related to a permissible state purpose.[63]

Notwithstanding the explicit reversal, the EEOC held:

> Accordingly, we believe that the principle stated by the District Court in *Schattman,* which accurately reflects the Commission's position, is unaffected by the Fifth Circuit's reversal.[64]

Recently the Supreme Court considered this question in *Cleveland Board of Education v. La Fleur.*[65] Here the Court found that under the 14th amendment, *not Title VII,* public schools that required pregnant teachers to take a leave of absence at the fourth or fifth month of pregnancy had violated the teachers' due process. The Court went on to say that each case had to be considered on its merits and that the school's countervailing interests did not overcome the teachers' rights regarding marriage and children. Finally the Court found as improper, the schools' requirement that the teacher could not return until three months after the child was born. It can therefore be expected that any standard policy requiring an employee to terminate her employment within any period of time practically up to her delivery date may well be deemed discriminatory in nature upon review by the EEOC.

Garnishments

Employers have commonly enforced garnishment rules to the effect that excessive garnishments of wages are justifiable grounds for discharge. Besides the inconvenience inherent in processing garnishment notices, certain civil liabilities are imposed upon employers

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[60] 330 F.Supp. 328 (W.D. Tex. 1971), *cert. denied,* 409 U.S. 1107 (1973).

[61] Schattman v. Texas Employment Comm'n., 459 F.2d 32 (5th Cir. 1972), *rev'g* 330 F.Supp. 328 (W.D. Tex. 1971), *cert. denied,* 409 U.S. 1107 (1973).

[62] 330 F.Supp. 328 (W.D. Tex. 1971).

[63] *Id.* at 41.

[64] EEOC Dec. No. 73-0520, (6/14/73), 2 CCH EMPLOYMENT PRACTICES ¶ 6389, at 4045.

[65] ____ U.S. ____, 94 S.Ct. 791 (1974).

for failing to respond to them. In *Johnson v. Pike Corporation of America*,[66] an employee's wages had been garnisheed several times. After the issuance of several warnings, the employee was discharged pursuant to a long standing company policy. The district court statistically determined that minority group members suffer wage garnishments substantially more often than others. Thereupon the court concluded in this emphatic manner:

> The discrimination practiced against members of minority groups by an employer's policy of firing garnishees is not really intended by the employer. It is the result of broader patterns of exclusion and discrimination practiced by third parties and fostered by the whole environment in which most minorities must live. It may seem unfair that the employer should be made to suffer for the discrimination practiced by others. But this was the price Congress determined necessary to end discrimination. If the employer were permitted to discriminate because other employees, his customers or third persons, were prejudiced against minorities, the effort to break the desperate ring of discrimination would soon fail. Similarly, if the employer were permitted to discharge an employee because it cost a little more to attend to the clerical work when his wages are garnisheed, the effort to end discrimination would fail. Racial discrimination in employment cannot be tolerated, the expense or inconvenience in complying with the law notwithstanding.[67]

Again, it is apparent that because the *effect*, not the *intent* of an employer policy regarding garnishments discriminates against a particular group of employees, it will be attacked by the EEOC and some federal courts.

In *Wallace v. Debron Corporation*.[68] an employee was discharged for two garnishments received in a 12-month period. In that action the court upheld the discharge, stating:

> The plaintiff or other employees must, independently of company action, overextend his credit to be discharged. The reasons for the policy, less efficiency and productivity, are job-related, and the policy is sufficiently circumscribed, more than once in a 12-month period, to prevent application on

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[66] 332 F. Supp. 490 (C.D. Cal. 1971).

[67] *Id.* at 496.

[68] 363 F. Supp. 837 (E.D. Mo. 1973).

> remote events. Any employee regardless of race, who violates the policy, is discharged.[69]

Obviously the law is indecisive in this area. However, unless an employer can clearly demonstrate that loss of production or high administrative costs in the processing of garnishments are job-related, it would be prudent to avoid this potential danger.

Conclusion

Title VII of the Civil Rights Act of 1964, a major piece of federal legislation, is still in its infancy. As a result, there will continue to be widely varying and sometimes contradictory decisions. Unfortunately, the employer is often required to make a hasty decision with all the facts, but not all the law, before him.

The EEOC has undergone a number of substantial changes during its short existence. Many of its members nationally, as well as locally, have come and gone, practically on an annual basis. As a consequence, it lacks a sense of solidarity and continuity found in other federal agencies. Undoubtedly, due to its zeal and relative youth as a federal agency, it at times seems not to investigate a specific charge to fairly determine its validity or nonvalidity, but instead seeks to ferret out discriminatory practices it "knows" exist.

As mentioned at the outset, most minority employees are familiar with their right to file discrimination charges and their ability to institute a subsequent class action. A not uncommon practice of certain employees is to file unjustified and actually fraudulent workmen's compensation or unemployment compensation claims. The same could be true of claims of discrimination. One court expressed its concern regarding potential actions as follows:

> . . . [A] disgruntled employee who happens to be black may discover a weapon of revenge in the form of a major class action suit under Title VII, when the reason for that employee's discontent stems from causes other than race or sex discrimination. The opportunity for harassment of employers abounds regardless of the final outcome of the litigation.[70]

It is, therefore, of crucial importance that employers limit any potential exposure in this area by familiarizing themeselves with the employment practices uniformly prohibited. Thereupon, employers must thoroughly document all employment practices so that a subsequent investigation will find those practices to be nondiscriminatory.

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[69] It should be noted that plaintiff was only the second employee fired by the defendant pursuant to this policy. Perhaps the court felt that this fact made the consideration of statistical evidence unnecessary or irrelevant.

[70] Tolbert v. Western Electric Co., 56 F.R.D. 108 (N.D. Ga. 1972).