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JOHN R. ERICKSON AND KATHERINE S. McGOVERN: EQUAL EMPLOYMENT PRACTICE GUIDE

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BOOK REVIEW

EQUAL EMPLOYMENT PRACTICE GUIDE. By John R. Erickson and Katherine S. McGovern. Washington, D.C.: Federal Bar Association 1979.

*Reviewed by Wendy Susco**

Conversations between government agencies enforcing equal employment opportunity laws¹ and employer groups resemble some accounts of warfare between Eskimo tribes. Each side stands on his side of the battle line shouting epithets, brandishing sticks and making comments disparaging the character of the other. The object of such an exercise is not to prevail or to vanquish one's opponents, but to vent hostility so that one can get back to everyday living. After fifteen years of such spleen venting, neither side appears ready to retire. The conversations continue to generate much heat, some light and a burgeoning cottage industry of conferences and consultants.

The *Equal Employment Practice Guide*, a two-volume set,

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1. The federal statutes which forbid discrimination in employment include the Equal Pay Act, 29 U.S.C. § 206 (d)(1)(1976), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1976), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976), *as amended by* the Age Discrimination in Employment Act Amendments of 1978, 29 U.S.C.A. §§ 623, 624, 626, 631, 633a, 634 (West Cum. Supp. 1979). Executive Order No. 11,246, 3 C.F.R. at 339 (1965), *as amended by* Exec. Order No. 11,375, 3 C.F.R. at 320 (1966-1970 Comp.) requires inclusion in federal contracts of a contractor's non-discrimination pledge as well as a promise to take affirmative action to ensure nondiscrimination. The Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2012 (1976), require federal contractors to take affirmative action to employ and promote qualified handicapped persons and veterans who are disabled or who served on active duty between August 5, 1964 and May 7, 1975. While the Department of Labor was originally charged with enforcement of the Equal Pay and Age Discrimination in Employment Acts, President Carter's Reorganization Plan No. 1 of 1978, 3 C.F.R. at 321 (1979), transferred enforcement responsibilities for these statutes to the Equal Employment Opportunity Commission (EEOC). The EEOC has had the authority to enforce title VII since its effective date in 1965. The Office of Federal Contract Compliance Programs of the Department of Labor administers Exec. Order No. 11,246, *as amended*, as well as provisions of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act.

contains in volume one a compilation of articles on a variety of topics prepared for a series of such equal employment opportunity conferences. Volume two contains a trial manual for equal employment litigation. The *Guide* suffers from a malady common to such conferences, lack of a common level of knowledge or sophistication about the subject area amongst the conferees. Some of the *Guide's* articles are too basic to be of use to those with some knowledge of the area.² Others assume a good deal of sophistication, leaving neophytes feeling as though they have come in at the middle of a debate.³ The subjects cover the "hot topics" of employment opportunity law: Equal pay for comparable work,⁴ pregnancy-related disabilities,⁵ discrimination against Vietnam-era veterans,⁶ the handicapped⁷ and older workers,⁸ and reorganization of federal en-

2. See, e.g., Clauss, *The Age Discrimination in Employment Act*, in 1 EQUAL EMPLOYMENT PRACTICE GUIDE V-1 (1979).

3. See, e.g., Cody, *The Comparable Worth Slot Machine; Does Job Evaluation Give Every Player an Even Break?*, in 1 EQUAL EMPLOYMENT PRACTICE GUIDE IV-15 (1979).

4. The contention is that wage rates for jobs traditionally held by women are lower than those for jobs traditionally held by men and that the difference can be ascribed to sex discrimination built into market wage rates. While the Equal Pay Act forbids sex-based salary discrimination in jobs which are substantially equal, Congress did not intend to require wholesale changes in job evaluation systems. 108 CONG. REC. 14,767-68 (1962). See *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 285 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975). It is unclear, however, whether title VII's ban on discrimination on the basis of sex in compensation is likewise limited. The so-called Bennett Amendment to title VII, 42 U.S.C. § 2000e-2(h) (1976), allows for differentiation upon the basis of sex in determining compensation if the differentiation "is authorized" by the provisions of the Equal Pay Act. *Compare Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977) with *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979).

5. The Congress amended title VII in 1978 to define sex discrimination to include discrimination on the basis of "pregnancy, childbirth or related medical conditions." Pub. L. No. 95-555 § 1, 92 Stat. 2076 (amending 42 U.S.C. § 2000e (1976)). Such action was necessary to clarify title VII after the United States Supreme Court ruled in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) that title VII's ban on sex discrimination did not forbid exclusion of pregnancy related disabilities from a company's disability income protection plan. The amendment, which adds subsection (k) to 42 U.S.C. § 2000e (1976), requires employers to treat women who are affected by "pregnancy, childbirth, or related medical conditions" the same "for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . ." *Id.*

6. The Vietnam Era Veterans' Readjustment Assistance Act requires federal contractors to take affirmative action to employ and promote qualified disabled and Vietnam-era veterans. 38 U.S.C. § 2012 (1976). See Erickson & Ryan, *Obligations of Government Contractors with Respect to Disabled Veterans, Veterans of the Vietnam Era and Handicapped Individuals*, in 1 EQUAL EMPLOYMENT PRACTICE GUIDE VIII-9 (1979).

7. The Rehabilitation Act of 1973 (ACT) imposes similar affirmative action re-

forcement efforts.⁹ The articles also touch on class action problems and attorneys' fees, along with the perennial issue of employee selection devices.

The controversy raging over permissible employee selection devices belies the optimism of those who thought invidious discrimination to be the root of job maldistribution.¹⁰ In 1971, the United States Supreme Court put to rest the notion that Title VII of the Civil Rights Act forbade only "intentional" discrimination.¹¹ The Court accepted the argument that a neutral practice is likewise forbidden if the practice has a disproportionately adverse impact on members of any group protected by title VII, unless the practice is shown to be related to job performance or can be justified by business necessity.¹² Employee selection devices run the gamut from aptitude and skills tests, through required levels of education, to unstructured and unscored interviews. Many employers use a succession of different devices to winnow employees from the pool of applicants. Each procedure used by the employer can be "examined" for its effect on screening out a larger percentage of minority or female applicants than white, male applicants.

Disparate impact analysis remains a major sore point among employers. Such analysis is seen, variously, as the major weapon to

quirements with respect to qualified handicapped persons. 29 U.S.C. § 793 (1976). The Act defines handicapped person as one who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment or is regarded as having such an impairment. 29 U.S.C. § 706(6)(1976).

8. The Age Discrimination in Employment Act prohibits discrimination on the basis of age against those between the ages of 40 and 70. 29 U.S.C. §§ 621-634 (1976), *as amended by* Pub. L. No. 95-256, 92 Stat. 189.

9. Under President Carter's Reorganization Plan No. 1 of 1978, 3 C.F.R. at 321 (1979), enforcement of federal equal employment opportunity requirements has been centralized in the EEOC. Executive Order 12,067, 3 C.F.R. 206 (1979) gives to the EEOC authority to issue guidelines and policies defining employment discrimination under all statutes and Executive Orders. Centralization of federal contract compliance efforts in the office of Federal Contract Compliance Programs was accomplished by Exec. Order No. 12,086, 3 C.F.R. at 230 (1979).

10. See additional views on H.R. REP. NO. 7152, 88 Cong., 2d Sess. (1964) by Hon. William M. McCulloch, *reprinted in* [1964] 2 U.S. CODE CONG. & AD. NEWS 2487, 2516. "It must also be stressed that the Commission [EEOC] must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment." *Id.*

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

12. In *Griggs*, the United States Supreme Court used the terms "job performance" and "business necessity" synonymously. *Id.* See Comment, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974) for an exposition of theories of "business necessity."

accomplish desegregation in employment by extending the stick with which Big Brother will force the nation's employers to abandon job standards. A finding that an employer's job requisite or candidate screening device affects protected group members disproportionately triggers the need for validation of the employer's practice which is an expensive, time-consuming and often impossible task.¹³ Employers thus strive to avoid finding that their selection procedures have a disparate impact. Enforcement agencies and disappointed job seekers, however, argue that if selection standards are used, employers should use those which have the least disparate impact on protected groups.¹⁴

Into this fray come the legions of statisticians, industrial psychologists, labor economists and demographers, the mercenaries and the shamans offering to plaintiffs and defendants an array of modern weaponry with which to fight evil employers, avaricious incompetents and overreaching bureaucrats. Now that the Supreme Court has discussed standards of deviation and probability theory,¹⁵ no self-respecting employment litigator can afford to be illiterate in statistics and demography. The jargon of the job evaluator is as dense as legalese.¹⁶ Job analysis, description of the content of a particular job, is the prerequisite to a determination of job requisites. To determine whether it is likely that an employer is discriminating illegally, one must know how many minority group members or women possess those requisites. Composition of the labor pool is then compared to the composition of the work force or, at least, to the composition of the group recently hired.

13. The Uniform Guidelines on Employee Selection Procedures (Guidelines), 29 C.F.R. § 1607 (1978) require that procedures which have disparate impact on protected groups be modified, eliminated or validated. Validation requires a showing of a clear relationship between performance under the procedure in question and job performance. The Guidelines set out standards for validity studies and their use.

14. See Robertson, *Uniform Selection Guidelines in a Nutshell*, in 1 EQUAL EMPLOYMENT PRACTICE GUIDE II-1,6 (1979). See also Guidelines, § 5(G), 43 Fed. Reg. 38,290, 38,298 (1978). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court recognized that after an employer has shown job relatedness, a complainant might be able to show the availability of other devices which might have little or no disparate effect. This showing, said the Court, would be evidence that utilization by the employer of the device *sub judice* was a pretext for discrimination. See also *Furnco Constr. Co. v. Waters*, 437 U.S. 535 (1978). That, of course, means that if an employer is aware of a device with impact less disparate than the one currently employed, he runs the risk of a finding that continued use will be seen as a pretext for discrimination.

15. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 310-12 (1977).

16. Cody, *supra* note 3; Snider, *Measurement of Availability: A Conceptual Issue*, in 1 EQUAL EMPLOYMENT PRACTICE GUIDE VI-23 (1979).

Significant disparities give rise to an inference of discrimination. Understanding the conceptual underpinnings of job evaluation and analysis is essential to litigating most employment discrimination issues.

Of course, the employer's objective is to avoid litigation. The temptation to play a "numbers game" is strong, although that brings with it some other pitfalls.¹⁷ Hiring warm bodies to make the work force racial and sexual profiles look good may merely shift the focus of inquiry from hiring to the promotion and discharge decisions.¹⁸

Interestingly enough, the *Guide* offers little discussion of first principles. No one is articulating publicly an employer's right to discriminate against women or minority group members. Acknowledged is the employer's right to use selection procedures which predict future job success with a high degree of accuracy though the procedures may have adverse impact on women or minorities. Beyond those small areas of consensus, the battle rages with parties arguing that reality lies closest to whichever goal line promises victory.

Reading the *Equal Employment Practice Guide* must be a chilling experience for lay persons who must confront the problems of employment discrimination. The expense of proving what disappointed applicants "know" or what employers "know," the parade of experts with charts and graphs, the arguments over whether labor markets include suburbs and city, and the analysis of commuting patterns can seem an exercise designed to benefit all except those with interests at stake, employees and employers. One might dare to hope that less costly methods of dispute resolution will be used to provide solutions for those who cannot afford this modern warfare. Yet, nowhere in the *Guide* does one find the suggestion that, for example, union contract grievance procedures may provide one such alternative in appropriate cases. While *Alexander v. Gardner-Denver Co.*¹⁹ precludes exclusive reliance on such mecha-

17. See Charf, *Uniform Guidelines: Competence or Numbers?*, in 1 EQUAL EMPLOYMENT PRACTICE GUIDE II-70 (1979).

18. McCulloch, *Establishing Systems for Protecting Employers from Class Liability Because of Promotion, Transfer and Assignment Practices*, in 1 EQUAL EMPLOYMENT PRACTICE GUIDE VII-1 (1979). The Guidelines, *supra* note 13, at § 2(B), purport to apply to procedures used as a basis for any employment decision, including decisions on promotion and retention.

19. 415 U.S. 36 (1974) (Petitioner, who brought claim of race discrimination to arbitration pursuant to a collective bargaining agreement still possessed statutory right to a trial de novo under title VII).

nisms, they may represent a less drastic alternative for aggrieved employees. Such avenues ought to be explored by plaintiff's counsel before and, perhaps in addition to, rushing into federal court. While title VII itself expresses a legislative desire that discrimination complaints be resolved informally through conciliation, the Equal Employment Opportunity Commission's (EEOC) backlog of cases has made this difficult. Furthermore, employers may be reluctant to engage in serious conciliation efforts with an agency many have come to regard as biased against them. Experiments with neutral mediators may prove more successful.

While the trial manual volume contains helpful forms and checklists along with annotations, strategy is discussed only minimally. A client's ability to bear the cost of protracted litigation is a key factor. The plaintiff may be unable to afford to wait for judicial vindication even if victory carries with it an award of attorneys' fees and costs. Defendants can and do "paper" plaintiffs into submission. The ability of plaintiff's counsel to handle the avalanche of information may affect whether it is worthwhile to reach a settlement. Unless preliminary injunctions are granted, plaintiffs may well be without employment during some or all of the litigation. Clients may take all of this personally. Disappointed job seekers may handle rejection badly. Employers resent implications that they are racists, sexists or age discriminators. Compromise may be seen as an admission of lack of qualification, on the one hand, or bigotry, on the other. A lawyer's counselling skills may be sorely taxed. It is this "human" dimension that the *Guide* largely ignores.

The treatment of equal employment opportunity as a battle has made it less likely that the real needs of workers and employers will be accommodated. If, indeed, the venting of hostility does not make it possible to get on with the business at hand, progress can be slow and grudging, at best. If change in the workplace is to be accomplished, it should be viewed in the long-term interest of those at both sides of our work force.