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Affirmative Action: The Legal Implications of Interviewing and Employment Practices

by Robert J. Shoop and William E. Sparkman

Affirmative action is not created as a permanent fixture of the work place. It will cease to be needed once an employer corrects the discriminatory practices that have pronounced white male bias. When correctly done, affirmative action will bring permanent institutionalized change to an organization.

The adoption of strong affirmative measures is necessary to bring about equity in American society. However, it seems clear that the term "affirmative action" is among the least understood and most controversial social correctives in American society today. The term affirmative action refers to a process of eliminating artificial denial of employment and advancement opportunities that are based on race, sex or other non-job-related criteria. The goal of affirmative action programs is to ensure that minority, female, and other classes of people who have historically been discriminated against achieve a position of equity consistent to what they would have achieved had they not been discriminated against.

Affirmative action in employment decision is not a gratuity or benefit for the purpose of awarding jobs and other benefits to the unfit or undeserving. It is the legal remedy that has been developed in thousands of court cases after minorities and women have established discrimination by the preponderance of evidence.[1]

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The employment process is becoming more complex each year. In 1940, the U.S. Department of Labor had the responsibility to enforce only 16 statutes and executive orders affecting personnel practices; by 1983, there were over 118 such laws.[2] In all there are 494 pages of laws, rules and regulations that relate to equal employment opportunity. The growing complexity of employment relations can be traced primarily to the enactment of Title VII of the Civil Rights Act of 1964. Title VII established into law the fundamental concept of equal employment opportunity, which has become the guiding principle of employment practices in the United States today. Subsequent amendments to Title VII and the enactment of other federal laws governing employment practices have broadened the scope of protection for employees and have restricted discriminatory employment practices by employers.

Federal laws prohibiting employment discrimination flow from both the 13th and 14th amendments to the U.S. Constitution. These post-Civil War amendments served as the basis for the Civil Rights Acts of 1866, 1870, and 1871, which were enacted by Congress during the Reconstruction Period to define and protect the newly established rights of freedmen. These civil rights acts were codified as Sections 1981, 1982, and 1983 of Title 42 of the U.S. Code. Section 1981 provides that all persons shall have the right in every state to make and enforce contracts. Full and equal property rights are guaranteed to all citizens in every state under Section 1982. Section 1983 provides for legal remedies when citizens are deprived of civil rights by state actions. It should be noted that the protections against discrimination apply to state actions as well as to the actions of private persons. While state action denying civil rights on the basis of race is clearly prohibited under the 14th Amendment, the U.S. Supreme Court has concluded that both sections 1981 and 1982 were based on the 13th Amendment and held that private persons could not discriminate on the basis of race in the sale of property or in the making of a contract or its enforcement. The importance of this is that both state and private discrimination is prohibited.

During the past twenty years federal legislation has expanded the protections afforded employees including job applicants. The purpose of these laws is to reduce discrimination in the workplace. The following brief descriptions of the major laws are provided so that those persons involved in making employment decisions might be made more aware of their responsibilities in this area.

Title VII of the Civil Rights Act of 1964

This federal law prohibits discrimination in employment or membership by employers, employment agencies, and unions on the basis of race, color, religion, sex, or national origin.[3] This is probably the most pervasive federal legislation governing employment practices. This law was amended in 1972 to include

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state and local governments, governmental agencies, and political subdivisions. Not only are employees protected from discriminatory practices by the provisions of the law, it is illegal to refuse to hire any individual on the basis of race, color, religion, sex, or national origin.

The Equal Pay Act of 1963

The Equal Pay Act is an amendment to the Fair Labor Standards Act of 1938, which governs various labor practices including minimum wages and overtime. This act prohibits wage discrimination between employees on the basis of sex for equal work on jobs requiring equal skill effort, and responsibility and which are performed under similar working conditions.[4] Legitimate wage rate differences are permissible under certain circumstances; for example, a seniority system or a merit pay plan.

The Age Discrimination in Employment Act of 1967

This law prohibits employment discrimination against individuals between the ages of 40 and 70.[5] Employees, as well as job applicants, are protected under the terms of this act. Employers are prohibited from hiring, firing, compensating, classifying, referring, or making decisions relative to the terms and conditions of employment based on an individual's age. The act was amended in 1974 to extend to state and local governments. The original law provided coverage up to age 65, but an amendment in 1978 increased the age limit to 70 years.

The Age Discrimination Act of 1975

This act prohibits discrimination on the basis of age in programs and activities receiving federal funds. It specifically provides that " . . . no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[6] This 1975 law differs from the Age Discrimination in Employment Act of 1967 in that there are no age limitations.

The Rehabilitation Act of 1973

This law is a comprehensive statute designed to aid handicapped individuals in securing rehabilitation training and access to federally funded programs, public buildings, and employment. Section 504 of the act provides, in part, that "no otherwise qualified handicapped individual in the United States . . . shall solely by reason of his (sic) handicap, be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance."[7] The law is designed to protect handicapped individuals who are "otherwise qualified" for the particular program or activity; that is, those who can perform the job requirements in spite of their handicapping condition.[8]

A handicapped individual is " . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[9] The term handicap covers a wide range of diseases and conditions such as epilepsy, emotional illness, and orthopedic impairments, to name only a few. The law excludes from employment protection active alcoholics or drug abusers who cannot perform the essential functions of their jobs or whose employment would constitute a direct threat to property or to the safety of others.

Employers are required by the law to make reasonable accommodations for those handicapped persons who are otherwise qualified for the job. This does not mean that employers must make substantial modifications of the job requirements or incur more than minimal costs to reasonably accommodate handicapped persons.

Veterans' Reemployment Rights

Federal law provides certain protections and benefits to veterans of military service.[10] Individuals who have left employment for the purpose of serving in the military are guaranteed certain reemployment rights. The law provides that veterans, if still qualified, shall be restored to their former position or one of like senority, status, and pay upon their return from military service. If a returning veteran is no longer qualified for the former position by reason of a disability sustained during military service, but is able to perform the duties of any other position with the employer, then he or she is entitled to an offer of reemployment in the position that will provide similar seniority, status, and pay.

In 1974, the law was expanded to include Vietnam era veterans.[11] One provision of the change requires that contractors entering into contracts of $10,000 or more with the federal government are required to take affirmative action on behalf of Vietnam era veterans.

Title IX of the Education Amendments of 1972

This law provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[12] In 1975, the Department of Health, Education, and Welfare (HEW) issued regulations governing the operation of federally funded education programs. These regulations were based on HEW's interpretation that the term "person" in Title IX included employees, as well as students.[13]

What followed was a series of contradictory federal court rulings on the issues of the validity of HEW's regulations and whether employees were, in

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fact, covered by Title IX.[14] Finally, in 1982, the United States Supreme Court clarified the issue. In **North Haven Board of Education v. Bell,** the Supreme Court held that the regulations promulgated by HEW interpreting "persons" to encompass employees was a valid exercise of the department's regulatory authority.[15] However, the Supreme Court also ruled that HEW's authority to make regulations and terminate federal funds was limited to the specific programs receiving the financial assistance. It is clear from the North Haven case that employees in federally funded education programs are protected from sex discrimination.

In **Grove City College v. Bell,** the United States Supreme Court held that the receipt of federal financial assistance by some of the college's students did not trigger institutionwide coverage under Title IX, but rather limited coverage to the specific program.[16]

The final aspect of Title IX that has direct application to employment practices are the remedies for violation of an individual's rights under the law. The express remedy under the law is the termination of federal funds to the specific programs. In 1979, the United States Supreme Court held in **Cannon v. University of Chicago** that a private cause of action, though not explicitly provided in Title IX, was an implied remedy under the law.[17] Thus, educational institutions that practice employment discrimination based on sex may now face termination of federal funds, as well as private litigation, by the aggrieved employee.

Staff Selection

As indicated in the previous section, a number of federal laws and court cases have established constraints on employment decisions in an effort to reduce discrimination in the workplace. Employment decisions must be based on nondiscriminatory factors, and apply to both employees and job applicants. An important theme that has emerged from the plethora of laws is that all selection criteria and employment decisions must be based on job-related standards. In other words, any criteria used, information required, or interview questions asked must be demonstrated to be related to the required job performance.

The goal of the selection process remains that of securing the services of the best-qualified individual for a particular job. Equal employment laws were enacted to expand employment opportunities for qualified minorities and females who have been at a disadvantage in the labor market and workplace. It is clear that the impact of the above-mentioned statutes have been felt in our society. However, it is equally clear that all vestiges of sex discrimination, past and present, have not been eradicated. Despite the progress that has been made, aggressive affirmative action programs must continue.

Notes

1. Norton, Eleanor Holmes, "Race and Sex Conscious Remedies are Working—And Must Be Continued," **Civil Liberties,** May, 1982.
2. **Employment Practices Guide,** Vol. 2, Commerce Clearinghouse, Chicago, Ill. 1979, p. 2005-2449 (This volume includes laws that went into effect in 1983).
3. 42 U.S.C. Section 2003-2 (1976 and Supp V 1981).
4. 29 U.S.C. Section 206 (1982).
5. 29 U.S.C. Section 621 et seg. (1976).
6. 42 U.S.C. Section 6101 et seg. (1976).
7. 29 U.S.C. Section 794 (1982).
8. Southeastern Community College v. Davis, 442 U.S. 397 (1979).
9. 29 U.S.C. 706 Section (7) (B) (1982).
10. 38 U.S.C. Section 2021 et seg. (1976 and Supp. V).
11. Schaller v. Bd. of Educ. of Elmwood Local Sch. Dist., 1 449 F. Supp. 30 (N.D. Ohio, 1978).
12. 20 U.S.C. Section 901(a), (1982).
13. 34 C.R.F. Section 106.51-106.61 (1980).
14. M. McCarthy and N. Camabron, **Public School Law: Teachers' and Students' Rights** 94 (1981).
15. North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982).
16. Grove City College v. Bell, 52 U.S.L.W. 4283 (1984).
17. Cannon v. University of Chicago, 99 S. Ct. 1946 (1979).