Title VII of the Civil Rights Act and the EEOC: An Agency in the Midst of Change

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I. INTRODUCTION

There was a time when it was believed that Congress could enact laws which, within a reasonable time, would effect changes in the very fabric of society whether those laws related to economic impairments, political inequities, or social injustice. That certainly was a commonly held view with regard to Title VII of the Civil Rights Act of 1964[1] and its potential to redress individuals harmed by employment discrimination. Title VII would stand as a direct frontal attack on the workforce status quo and would be a legislative effort designed to correct a legacy of injustice and inequity by injecting legal teeth into the concept of equal economic opportunity.[2]

While it is not too late to believe that the workplace can be restructured to meet the demands of the law, there are certain problems which have surfaced that have encumbered such restructuring. On the one hand, an uncooperative Supreme Court has fashioned a number of opinions that procedurely and substantively appear to limit the government and private individuals in their attempts to enforce the law. On the other hand, to administer the law Congress created an Agency[3] which, until recently, appeared overwhelmed by the task. As to the first concern, the Supreme Court in recent rulings appears to define the limits of Title VII so as to make it increasingly difficult for minorities and women to prove that an employer has engaged in unlawful discrimination.[4]

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1. 42 U.S.C.A. § 2000e (1974 & Supp. 1977).

2. SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (Comm. Print 1972).

3. 42 U.S.C.A. §2000e-4(a)(1974).

4. *See, e.g.*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); and International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). In *Gilbert*, the Supreme Court took its holding in Geduldig v. Aiello, 417 U.S. 484 (1974) (under the Constitution a state disability insurance program does not have to treat disabilities arising from pregnancy the same as other temporary disabilities) a step further and concluded that Title

As to the second concern, the U.S. Equal Employment Opportunity Commission is in the process of undergoing a massive internal as well as a proposed[5] external reorganization in order to meet the task assigned to it by the Congress. Although the EEOC has been recognized over the years as the most "progressive" of the major equal employment enforcement agencies, its credibility had become gravely impaired by the manner in which it administered the law.[6] Preeminent among its apparent deficiencies in recent years was a backlog of unresolved administrative complaints resulting from processing delays.[7] Some of the specific concerns as cited by a U.S. General Accounting Office report were:

1) An unwillingness to speed up its individual charge resolution process with creative procedures (no-fault settlements, arbitration, full faith reliance upon equivalent state and local machinery);

2) A lack of ability to function as a collegial decision-making body so essential to the integrity of all processes generated by a Commission format;

3) In need of an investigative staff upgraded by effective training and a reasonable rate of productivity;

4) An inadequate use of litigation authority;

5) An insufficient capacity to reorder resources from individual cases

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VII also did not require similar treatment for pregnancy related disabilities; *i.e.*, there was no disability for which men were insured and women not. The potentially harmful ramifications for women in the workforce led to the introduction of bills S. 995 and H.R. 6075, 95th Cong., 1st Sess. (1977), to amend Title VII so as to "overrule" *Gilbert*. For text of the bills, see *Discrimination on Basis of Pregnancy, Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 3, 459 (1977). In *Evans*, the Supreme Court held that a stewardess, fired in 1968 because she had violated the airline's no marriage rule and rehired in 1972 as a new employee, was not entitled to seniority based on her prior employment because she had neither filed an administrative charge of discrimination at the time of her illegal firing in 1968 nor had she challenged the bona fides of her 1973 charge. As a result, the Court found no support for a claim of continuing violation. In *Hardison*, the Court took a narrow view of an employer's duty to accommodate the religious practices of an employee. In *Teamsters*, the Court held that §703(h) of Title VII, 42 U.S.C.A. §2000e-12(h) (1974), immunized bona fide seniority systems regardless of whether they perpetuated pre-Act discrimination. This ruling inhibits efforts aimed at rectifying the present effects of past discrimination.

5. On February 23, 1978, the President proposed significant changes in the Government's equal employment opportunity enforcement apparatus. This plan, if adopted, would consolidate within the U.S. Equal Employment Opportunity Commission (EEOC) major federal enforcement authorities currently administered elsewhere in the federal government. See discussion under Part VI, "The Future," *infra*.

6. COMPTROLLER GENERAL'S REPORT TO THE HOUSE OVERSIGHT SUBCOMMITTEE (GAO No. HRD-76-147, Sept. 28, 1976) [hereinafter cited as GAO REPORT] ("The Equal Employment Opportunity Commission has made limited progress in eliminating employment discrimination"). *See also* REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1977 (Dec. 1977).

7. *See* GAO REPORT, *supra* note 6, at 7.

to accommodate wholesale attacks against systemic patterns and practices of discrimination.[8]

To deal more effectively with these concerns, the Commission is currently in the midst of a major reorganization. This article will focus on that reorganization after a look at the functioning of the Agency under its prior organization.[9]

II. BACKGROUND

In order to understand and appreciate the changes the Commission is instituting, it is necessary to look closely at the Agency as it previously administered the law. Individual parties alleging employment discrimination had been led to believe that the U.S. Government would process their individual complaints of discrimination with a full field investigation in each and every instance.[10] The EEOC sought to process these complaints with the greater part of its budget. Additionally, under the mandate of Title VII, the nation was led to believe that institutionalized job discrimination would be uprooted and wiped out. Having the authority to attack systemic patterns and practices of discrimination under §707 of the Act,[11] the Agency sought to remedy institutionalized discrimination with a bare fraction of its resources. Unfortunately, neither objective could be met and the frustration level became understandably high.

The individual charge process and the manner in which it was handled administratively conjoined to plague the Agency and hampered its at-

8. *See* GAO REPORT, *supra* note 6.

9. 42 U.S.C.A. §2000e-12(d) (1974) provides that the EEOC "shall have authority . . . to issue . . . procedural regulations to carry out the provisions of this subchapter [Title VII]." Pursuant to this authority, the EEOC published its regulations which are codified in 29 C.F.R. §1601 (1976) (current version at 42 Fed. Reg. 55,388-396 (1977)). Moreover, the EEOC maintains a Compliance Manual which is the source of policy, procedures, and standards for the enforcement effort of the Commission. The Compliance Manual is a public document, available for inspection at agency field offices and published for sale by the Commerce Clearing House. EEOC COMPL. MAN. (CCH).

10. Section 703(a) of Title VII, 42 U.S.C.A. §2000e-2(a)(1)(1974) provides in part:

"It shall be an unlawful employment practice for an employer—(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 . . . ."

Section 706(b) of Title VII, 42 U.S.C.A. §2000e-5(b) (1974) provides, in part:

"Whenever a charge is filed by . . . a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . and shall make an investigation thereof . . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice . . . ."

11. 42 U.S.C.A. §2000e-6(e) (1974) provides that: "[T]he Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by . . . a person claiming to be aggrieved or by a member of the Commission."

tempts to meet its overall mission. As the EEOC's experience evolved, it was never the Commission deciding how best to utilize its scarce resources in behalf of discrimination victims. Rather, it was the individual charging party, indeed thousands upon thousands of them, whose individual claims collectively over the years dictated and compelled the expenditure of agency resources. Administration of the law was not based upon any given rationale or systematic inquiry into workforce discrimination. Instead, the Agency yielded to the individual complaint process whereby the Agency's enforcement efforts were determined by individual allegations and how the allegations were crafted in terms of their breadth or complexity. The Agency was a tree caught up in an avalanche: rootless, out of control, directed by outside forces. The ultimate losers were the individual victims as their cases became mired and enmeshed in the bureaucratic morass.[12]

In this morass, what about the Commission's use of the litigation authority that was granted to it in 1972 in lieu of cease and desist power?[13] In implementing this authority, the Commission failed to rivet its lawyers structurally into the administrative process. The administrative side of the Agency was left both procedurally and institutionally separate and apart from the legal arm, the Office of the General Counsel.

Litigation potential was to have provided the voice of authority when speaking at conciliation conferences and it should have put the force of law behind administrative findings of discrimination.[14] It did not. Once again the Commission was controlled by circumstances. Once empowered to sue, the General Counsel's Office was immediately faced with thousands of potential vehicles upon which to institute litigation. As it turned out, however, there was nothing to prevent offenders from "playing the percentages." By gambling that no law suit would be prosecuted, the offenders pursued the administrative process on each and every individual charge to its limit, and in the end, refused to conciliate. Their assessment was correct. In approximately nine out of every ten charges processed through the "reasonable cause" stage up to a failure of conciliation, the Agency held that the evidence failed to meet a standard of proof that would support litigation. Moreover, in those cases where litigation was ordered by the Commission, the parties faced a trial de novo which was often protracted and costly. It is not unusual to find suits instituted in 1972 pending in litigation today.[15] In addition, Agency attempts to end discrimination na-

12. GAO REPORT, *supra* note 6, at 8-17.

13. Title VII of the Civil Rights Act of 1964 was amended by Pub. L. No. 92-261, §4, 86 Stat. 104 (1972). Specifically, §706(f)(1) of Title VII, 42 U.S.C.A. §2000e-5(f)(1) (1974) was amended to provide that "If . . . the Commission has been unable *to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent. . . .*" (Language added in 1972 italicized.)

14. SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT ACT OF 1972 (Comm. Print 1972).

15. In early 1972 Mari Ross and Sandra Wetzel filed a nationwide suit in the Western

tionwide faced a hurdle not presented to members of the private bar trying one discreet case. As in other areas of the law, a Title VII decision in one circuit[16] did not mean an end to litigation on a particular issue. Litigation often meant pursuing the same point for many years before numerous other courts, including the U.S. Supreme Court. The legal time and financial commitment on a single procedural question, could be staggering.[17] In addition to the Commission's direct lawsuits, there have been numerous brush-fire wars initiated by the Commission where it has filed hundreds of amicus briefs[18] and intervened in private suits.

As the Agency became further enmeshed in the web it had spun for processing charges and prosecuting offenders, the Commission lost sight of its fundamental responsibility to function as a decision-making institution having rigid adherence to those standards which are indispensable to the integrity of substantive decisions. The Commission's decision-making function should have been paramount, whether it was deciding the merits of a case, addressing frontier issues, developing guidelines on which respondents and charging parties could rely, promulgating regulations, or making policy. Only by weaving integrity into that process could the Commission compel the acceptance of its administrative judgments by the

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District of Pennsylvania against Liberty Mutual Insurance Co. alleging that the company discriminated against women on the basis of sex in its policies and practices affecting hiring, promotion, and terms and conditions of employment. In the ensuing six years, the following has occurred: Plaintiffs moved for and were granted summary judgment on all claims other than those known as the "equal pay" allegation. Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974). The defendant took two separate appeals to the Third Circuit—one dealing with hiring and promotion and the other with maternity. The Third Circuit affirmed the district court in both, 508 F.2d 239 (1975) (hiring and promotion) and 511 F.2d 199 (1975) (maternity disability). Liberty Mutual then filed petitions for certiorari, and plaintiffs filed oppositions. The Supreme Court denied certiorari on the hiring and promotion question, 421 U.S. 1011 (1975), but granted it as to maternity disability, 421 U.S. 987 (1975), and on review, ordered the court of appeals to dismiss the appeal, 424 U.S. 737 (1976). The appeal was vacated, 535 F.2d 1248 (3d Cir. 1976), but after the Supreme Court decision in *Gilbert*, plaintiffs appealed the maternity issue to the Third Circuit and lost, 558 F.2d 1028 (3d Cir. 1977). Their petition for certiorari was denied, 46 U.S.L.W. 3453, No. 77-338 (U.S. Jan. 16, 1978).

In October of 1975, a trial, which consumed many weeks, was held on the equal pay violations. On April 17, 1978, the court found that the jobs were similar and held for the plaintiffs. Wetzel v. Liberty Mutual Ins. Co., No. 72-169 (W.D. Pa. 1978).

16. *E.g.*, EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

17. *Id.* The Fourth Circuit held that the EEOC did not have to file suit within 180 days of receiving a charge or be forever barred. Repeatedly the Agency has had to face the same issue: EEOC v. E.I. duPont de Nemour & Co., 516 F.2d 1297 (3rd Cir. 1975); EEOC v. Louisville & Nashville R. Co., 505 F.2d 610 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); EEOC v. Duval Corp., 528 F.2d 945 (10th Cir. 1976); EEOC v. Local 41 Bartenders Int'l Union, 369 F. Supp. 827 (N.D.Cal. 1973). This issue was finally put to rest by the Supreme Court a few months ago. Occidental Life v. EEOC, 432 U.S. 355 (1977).

18. In *Wetzel* alone, *supra* note 15, the Commission has thus far filed seven amicus briefs.

courts, respondents, discrimination victims, and the public. As the Supreme Court noted in *General Electric Company v. Gilbert:* "The weight of an administrative judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it control."[19] The Court went on specifically to condemn EEOC and its guidelines saying, "they do not fare well under these standards."[20]

III. THE NEW ADMINISTRATIVE PROCESS

What steps then has the EEOC taken in an effort to reshape itself into a more effective administrative enforcement agency? In July of 1977, the Commission voted unanimously to approve[21] what has been characterized as "the most massive overhaul of the agency structure and its processes since the establishment of the Commission in 1965."[22] Shortly thereafter three model field offices were opened in Chicago, Dallas, and Baltimore, in accordance with an approved plan to accommodate the phase-in of the entire field operations of the Agency over the coming months.[23]

First of all, in order to gain control of the 7,000 or more individual discrimination charges lodged each month, the whole charge processing system is being revamped within the field offices themselves. The intake filter is being upgraded by having the judgment of skilled professionals, which is reinforced by lawyers, replace what has often been a haphazard and unskilled eye at the beginning of the process. This step was taken to avoid building up in the future long lines of potential victims whose ranks are filled today with too many people over whom the EEOC has no jurisdiction as well as those whose charges are frivolous or spurious. Last year the Commission processed 80,000 charges. Of these, 40,000 were administratively closed, often because they should never have been filed with the EEOC. While before it took many thousands of hours to review those charges that ultimately were closed administratively, under the new procedures, spurious claims will be reviewed and rejected immediately to make way for those whose claims appear legitimate.[24]

19. 429 U.S. 125, 142 (1976), *quoting,* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1974). *Cf.* Griggs v. Duke Power co., 401 U.S. 424 (1971)(Supreme Court accorded deference to the EEOC's Guidelines on Employee Selection Procedures, 29 C.F.R. §1607 (1976)).

20. 429 U.S. at 142.

21. Commission Reorganization Plan, approved July 20, 1977, and published in 42 Fed. Reg. 47,829 (1977). Subsequent implementation resolutions were passed on August 2, August 30, and September 22, 1977.

22. *Oversight Hearing on Equal Employment Opportunities Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor,* 95th Cong., 1st Sess. 6 (1977) (statement of Eleanor Holmes Norton).

23. Commission Reorganization Phasing Plan, approved October 26, 1977, as revised January 23, 1978.

24. *See* EEOC COMPL. MAN. (CCH) §§1-10 [hereinafter referred to as EEOC COMPL.

In an effort to expedite resolution of the viable charges, the Commission is institutionalizing nationwide uniform Rapid Charge Resolution procedures. Beyond extensive charging party interviews, the plan calls for the reduction of the charge to its narrowest scope, immediate contact with the named respondent as to the specifics of each and every allegation, and an invitation to the respondent to respond immediately.[25] As of December 1, 1977, all field offices of the EEOC had switched over to the new intake procedures. By September of this year the whole field operation is scheduled to be functioning fully under the new charge processes.[26]

No longer will the Commission be expending its time and resources haphazardly on behalf of broad based so-called kitchen sink allegations. In the past such an approach created somewhat of a bureaucratic "Catch 22" situation. In examining an employer, the Commission sought to make the point that its investigations were not circumscribed by the parameters of an individual complaint and that an investigation could extend beyond the complaint's specific allegations. The courts ruled that an investigation and subsequent lawsuit may indeed deal with issues "like and related" to those named in the charge.[27] While this is an invaluable legal tool, as a practical matter not every charge has the potential for major impact as occurred when Willy Griggs filed a charge against the Duke Power Company.[28] And while "like and related" issues must be examined and litigated selectively, resources are now to be more carefully applied when seeking to broaden a complaint. Under the new procedures, the primary thrust of administrative enforcement will be to narrow the scope of the administrative charge and to facilitate quick settlement on a no-fault basis at the earliest stages of the process.[29] Negotiation immediately after a charge is

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MAN.] which covers the EEOC's procedures from initial inquiry through the charge-taking process. The new procedures include an exhaustive interview with the complainant (§1.3, ¶ 153) as a way to identify non-jurisdictional and non-meritorious claims.

25. As to the intake process and narrowing the scope of the complaint, the new regulations, 42 Fed. Reg. 55,388-391 (1977) (to be codified in scattered sections of 40 C.F.R. §1601), require detailed information in the charge. Section 1601.12(a)(3) requires a "clear and concise statement of the facts;" §1601.15(b) provides that the Commission may require the charging party to state:(1) "each specific harm that the person has suffered," (2) the alleged unlawful act, policy or practice which led to the practice, and (3) "the facts which led the person . . . to believe that the act, policy or practice is discriminatory." Further, §1601.19(c) provides that "where the person claiming to be aggrieved fails to provide requested necessary information . . . the Commission may dismiss the charge." Procedures covering service of the charge are described in §14.4, ¶524 of the EEOC COMPL. MAN., *supra* note 24.

26. *See* note 21, *supra*.

27. Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973); Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971); Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971).

28. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd on other grounds*, 401 U.S. 424 (1971).

29. The Commission's administrative process has always accommodated resolutions before issuing findings on the merits (predetermination settlements). *See* EEOC COMPL. MAN.

filed is becoming standard operating procedure. This is a very practical, common sense approach, since facts are easier to gather, memories are fresher, and costs are lower at the time the charge is filed.

Failing immediate settlement, the Commission will move promptly to a fact-finding conference,[30] which will involve face-to-face negotiations with the charging party and the respondent. For the EEOC, this is a new procedure and it represents the core of the "new" administrative process. This new mediation technique is designed to reduce the time it takes to investigate as required by the Act and, at the same time, to enhance the prospects for settlement. With the record of such a fact-finding meeting, the EEOC will more often be able to make its initial finding that discrimination has occurred or that the case lacks merit and ought to be dismissed.[31]

Related to the new Rapid Charge Processing procedures is the problem of dealing with the already existing backlog of individual complaints which have accumulated over the years and have been prejudiced by the passage of time. The issue has engulfed the Commission in recent years. Because no reform of the Commission's activities could occur without addressing the matter in a separate and distinct fashion, special backlog teams are being created in each field office. Staff members are being transferred from backlog free areas to backlog impacted areas, and charges are being consolidated according to individual respondents. Particular efforts are being employed to locate charging parties and to deal with their claims as quickly as possible, emphasizing again procedures with face-to-face conferences aimed at achieving "no-fault" settlements.[32] As a result of these changes, it is anticipated that the charge inventory will be reduced by as much as one-half of what it is today by the end of the fiscal year in September, 1979. The charge inventory reduction would be the first substantial decrease in the Agency's history.[33]

With respect to litigation efforts, the Agency's lawyers are being transferred from separate litigation centers, which are being abandoned, into the heart of the administrative process.[34] They are taking with them a knowledge of the judicial standard of proof required to support a legal

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§15, *supra* note 24, and the Commission's Procedural Regulations, 29 C.F.R. §1601.19a (1976) (current version at 42 Fed. Reg. 55,391-392 (1977) (to be codified at 29 C.F.R. § 1601.20)). Under the new procedures, much more emphasis has attached to this objective.

30. The "fact finding conference" is established under §1601.15(c), 42 Fed. Reg. 55390(1977)(to be codified at 29 C.F.R. §1601.15(c)).

31. The fact-finding conference procedures are set out in the EEOC COMPL. MAN. §14, *supra* note 24. The purpose of the meeting is to bring the parties together within two to four weeks after the filing of the charge. It is an information investigative technique directed by a Commission representative. The role of counsel for the parties, if they appear, is "limited to an advisory role and [they] will not be permitted to speak for their client or cross-examine." See EEOC COMPL. MAN. §14.5, ¶525, *supra* note 24.

32. EEOC COMPL. MAN. §15, *supra* note 24.

33. *See* note 36, *infra*.

34. *See* note 21, *supra*.

finding of discrimination. Up to now, there has been a bifurcated standard on which discrimination findings were based. A "reasonable cause" finding existed for administrative efforts, while a judicial "probable cause" finding was needed to support a Commission vote to litigate. That discrepancy in standards no longer exists. Now, "reasonable cause" as prescribed in the Act is defined to mean that the facts as found will support the decision to litigate.[35] It is believed that such a standard will provide the EEOC with a voice of authority when sitting at the conciliation table as well as a way to instill credibility into the Commission's administrative judgments. In this fashion, assuming sufficient resources and barring conciliation, the Commission should be prepared to vindicate its administrative findings in court in each and every case where it issues a positive determination that discrimination has occurred.

IV. Increased Emphasis on Systemic Enforcement Activity

The new Rapid Charge Process should mean that charging parties with meritorious claims will obtain relief in greater numbers and with greater efficiency than ever before.[36] The respondents will receive equity by the elimination of ponderous and inordinate delays where, in the past, liability exposure for backpay mounted day by day, year by year. The Agency will be able to eliminate not only long lines of individual plaintiffs, but also the unreasonable processes that for too long reflected the "hammer and chisel" approach to attacking workforce discrimination. In the past, most resources were directed toward individual cases. While important, this concentration served to drain attention from the equally vital task of identifying and attacking employment systems that illegally operated to exclude whole classes of people from jobs or promotions.

As a part of these new procedures, the EEOC will begin to develop a

35. On July 20, 1977, the Commission voted as follows: "The reasonable cause decision will constitute a determination that the claim has sufficient merit to warrant litigation if the matter is not thereafter conciliated by the Commission or the charging party." *See* EEOC Compl. Man. §30.1, *supra* note 24.

36. While still too early to formulate precise projections, a 14 weeks' experience report relating to Rapid Charge Processing in the Baltimore, Chicago and Dallas model offices exhibits the following indications: Charge intake was reduced by 36%; within the first 14 weeks, 30% of these new charges were already closed; almost 50% were settled—contrasted with a settlement rate of only 6% the previous year; settlement was reached, on the average, within 36 days from the filing of the charge; 30% of the closures were "no cause," found on the average of 51 days from filing to closing; the administrative closure rate for new charges was only 6%, compared with 45% last year; even backlog charges show an increased settlement rate—13% this year over last year's 6%; benefits from both rapid charge and backlog settlements are significant, totalling $527,664; backlog was frozen when the Model Offices opened—their 10,300 case backlog was reduced by 11% in this 14 week period. At this rate, the backlog could be eliminated in a little over two years; finally, closures are exceeding receipts by 47%. We received 922 and closed 1432 charges during this period.

capacity to attack institutional discrimination by devoting a much larger share of its resources to the eradication of these illegal systemic activities. A new Office of Systemic Programs, created expressly to deal with systemic discrimination,[37] will enable the EEOC to concentrate increasingly on exclusionary employment patterns, practices, and policies. Ultimately each field office will have a separate Systemic Unit. Program work, investigations and actions will be generated primarily by charges of discrimination lodged by individual Commissioners.[38]

In order to select those workplace practices most appropriate for review, the Commission has instituted an information capacity that will have the capability of identifying the most serious issues for attention. Fundamental to the systemic program, therefore, is the notion that major investigations[39] will be launched generally in accordance with rationally conceived plans designed to achieve the greatest impact.

On March 14 of this year the Commission took the first of two major steps toward an operational systemic program by approving the following motion which establishes standards for the selection of possible systemic cases.

STANDARDS FOR SELECTION OF SUBJECTS FOR SYSTEMIC DISCRIMINATION PROCEEDINGS

On July 20, 1977, the Commission authorized the establishment of a program intended to address systemic practices of employers and others which discriminate against minorities and women. On September 21, 1977, the Commission authorized and directed the establishment of the Office of Systemic Programs in Headquarters.

The objectives of systemic proceedings shall be to eliminate discriminatory pat-

37. Commission Resolution of July 20, 1977, as amended by Commission Resolution of September 22, 1977.

38. *See* note 2, *supra.* Incorporated within the Agency's new procedures is a Systemic Charge Processing System which will be based on Commissioner charges against selected "patterns and practices." Title VII, §707(e), 42 U.S.C.A. §2000e-6(e) (1974) empowers any EEOC Commissioner with sweeping authority to institute actions alleging patterns or practices of discrimination. *See* EEOC COMPL. MAN. §§16-19, *supra* note 24. *See also* §1601.6, 42 Fed. Reg. 55,389 (1977)(to be codified at 29 C.F.R. §1601.6) ("Any person or organization may request the issuance of a Commissioner charge for an inquiry into . . . systematic discrimination").

39. The Commission is currently developing the criteria upon which systemic investigations will generally be instituted. The Commission has recognized that its policy to investigate charges narrowly and to limit the scope of inquiry might be thought to limit the scope of broad impact (systemic) cases arising from individual complaints. It therefore justified its action to narrow individual complaints by notice published in 42 Fed. Reg. 54,595 (1977). In pertinent part it reads: ". . . the decision . . . to limit investigations of charges of employment discrimination . . . is based on the necessity of allocating limited Commission resources . . . . Therefore the decision to limit investigations is not intended to, and should not, affect the charging party's right to seek relief in a private suit for all discriminatory practices which might have been uncovered if the Commission had sufficient resources to investigate all charges more extensively."

terns and practices and assure that employment systems operate fairly; eliminate the effects of prior discrimination and obtain for members of the affected class the specific relief to which they are entitled under Title VII.

The Commission hereby approves the following standards for the selection of subjects for systemic inquiry. It shall be sufficient for the Commission to institute a systemic proceeding that a respondent meet one of the standards for selection. These standards are for internal guidance in the exercise of administrative discretion and do not create rights on the part of any person who may become a subject of a systemic proceeding, or any obligation on the part of the Commission to proceed against any particular person. These standards do not foreclose the Commission from instituting systemic proceedings against any other employer or other persons subject to Title VII whose acts or practices are such that a systemic proceeding will effectuate the purposes of Title VII.

1. Employers or other persons subject to Title VII who continue in effect policies and practices which result in low utilization of available minorities and women despite the clear obligation in Title VII to fairly recruit, hire and promote such persons.
2. Employers or other persons subject to Title VII who employ available minorities and women at a substantially lower rate than other employers in the same labor market who employ persons with the same general level of skills.
3. Employers or other persons subject to Title VII who employ substantial numbers of minorities and women, but employ them at significantly lower rates in higher paid job categories.
4. Employers or other persons subject to Title VII who maintain specific recruitment, hiring, job assignment, promotion, discharge, and other policies and practices relating to the terms and conditions of employment that have an adverse impact on minorities and women, and are not justified by business necessity. Such policies and practices may include, but are not limited to, those prohibited in Commission Guidelines on Sex Discrimination, 29 C.F.R. 1604; Religious Discrimination, 29 C.F.R. 1605; National Origin Discrimination, 29 C.F.R. 1606 and the Guidelines on Employee Selection Procedures, 29 C.F.R. 1607, and other guidelines as they may be adopted and amended from time to time.
5. Employers or others subject to Title VII whose employment practices have had the effect of restricting or excluding available minorities and women from significant employment opportunities, and who are likely to be used as models for other employers because of such factors as the number of their employees, their impact on the local economy, or their competitive position in the indsustry.
6. Employers (a) who because of expanding employment or significant turnover rates, even if the employer's workforce is stable or in retrenchment, are likely to have substantial numbers of employment opportunities, and (b) whose practices may not provide available minorities and women with fair access to these opportunities.

The Commission will shortly be considering procedural standards for the handling of those charges selected for systemic litigation.

V. The Development of Policy

Moreover, the EEOC has sought to respond to the judgment that the Commission as a "commission" lost its capacity to make decisions with integrity and decisions that would justify deference and serve to sanctify the Commission's position as the preeminent civil rights agency.[40] There are a whole host of reforms at the top of the Agency which are designed to instill credibility into the Commission's Title VII interpretations. The Office of Policy Implementation, for example, has been created to identify important policy issues and to facilitate their evolution through a quasi-judicial distillation process. Guideline development, interpretations, and decisions on frontier cases of first impression are to be processed in a manner that will withstand the most rigid examination.[41]

Two major products of the reorganization channeled through the Policy Office are already before the public for comment. The first is the proposed Guidelines on Remedial and/or Affirmative Action[42] which are designed to encourage employers and unions to voluntarily seek a restructuring of their workforces or memberships prior to being asked to do so by the EEOC or ordered to by the courts. Basically, in the spirit of affirmative action, these proposed guidelines would call for an analysis leading to conclusions incorporating the following elements:

> (1) That the employer or union has reason to believe that its employment practices are or have been discriminatory;
> (2) That the individuals hired or promoted must be able to do the job to which they apply;
> (3) That the affirmative action program is not permanent *(i.e.,* once the effects of discrimination have ended, so must the program);
> (4) That the hiring or promotion of women or minorities must not absolutely preclude the hiring of white males;
> (5) That the ratio of new employees or of those promoted must reasonably be designed to redress the effects of prior practices that operated to exclude;
> (6) That the specific course of action chosen would minimize the adverse impact upon majority group members.

If approved, these guidelines suggest that the EEOC is prepared to define the legal boundaries of Title VII in a manner designed to engender reliance by all persons subject to the Act.[43]

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40. *See* note 5, *supra,* regarding the President's judgment that the EEOC should serve as the centerpiece for most civil rights enforcement authority.

41. Commission Resolution of July 20, 1977, as amended by Commission Resolution of September 22, 1977.

42. 42 Fed. Reg. 64,826 (1977).

43. Specifically, the guidelines are issued expressly pursuant to §713(b) of Title VII, 42 U.S.C.A. §2000e-12(b)(1974) which provides in pertinent part as follows: "In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject

The second major new policy initiative of the Agency involves the question of employee selection procedures. On December 30, 1977, the EEOC was joined by three other federal agencies in publishing for comment proposed Uniform Guidelines on Employee Selection Procedures.[44] Presently there exist two sets of federally approved guidelines which speak to employee selection guidelines, a highly important subject involving the examination of tests and other criteria used to select individuals for jobs or promotions.[45] The purpose of this initiative is to achieve uniformity in the standards by which all government agencies scrutinize employee selection criteria pursuant to antidiscrimination laws.

VI. THE FUTURE

This reorganization, then, is the beginning of a major overhaul of an agency that for whatever reason, real or apparent, was at best badly impaired and at worse, a major encumbrance in the effort to achieve equal employment opportunity objectives. What these reforms underscore is that civil rights in this decade have assumed a different posture. For one thing, it is seldom the "Bull Conners" of America who are involved. Rather it is often a businessman, a union official, or someone from the legal community—people generally who are efficient, effective, and respected. These reforms are a recognition that in order to administer a civil rights law effectively, the EEOC as an agency must become just as efficient and just as respected as the people involved with civil rights reform. In this quest there is room for even further change both within the agency as well as from without.

Companies, unions, and state and local governments could get involved sooner. For example, the states could set up their own machinery and resolve their own individual discrimination complaints. It is not a question of putting the proverbial fox in the chicken coop. The impetus of the reforms suggests that the states put their own employment houses in order so that a federal law enforcement agency or a court is not compelled to do it for them.

There is also a need to explore the possible application of existing dis-

to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice *if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . .*" (Emphasis supplied.)

44. 42 Fed. Reg. 65,542 (1977). The other agencies are the Department of Justice, the Department of Labor, and the Civil Service Commission.

45. Guidelines of the Equal Employment Opportunity Commission, 29 C.F.R. §1607 (1976); and the Federal Executive Agency Guidelines on Employee Selection Procedures, 41 Fed. Reg. 51,734-759 (1976) (51,734-743 (Justice Dept.) to be codified at 28 C.F.R. §50.14; 51,744-751 (Office of Fed. Contract Compliance) 41 C.F.R. §60-3 (1977); 51,752-759 (Civil Service Com.) Fed. Personnel Man. Supp.).

pute resolution mechanisms to Title VII matters. Existing arbitration arrangements may become effective in settling individual complaints.

More self-enforcing mechanisms may be needed. There is a vast untapped resource for broader antidiscrimination enforcement activities to be discovered in the rights, grants, licenses, and privileges parcelled out competitively to the private sector by the federal government. Title VII concepts ought to become engrained in the public mind and provide competition for these employment opportunity benefits. Industry and union computers that formulate budgets, balance sheets, dues, and dividends must begin to reflect the true costs of continuing to discriminate as well as the true costs of correcting the effects of discrimination. But, it is unlikely that computer reprograming will occur until it becomes clear that contracts, and for that matter whatever else government is empowered to grant, will be scrutinized routinely under Title VII standards and that the EEOC administrative findings will be given recognition in reviewing applications for charters, routes and rates, and licenses.[46]

For now, the functional redesign of the internal operations of the Agency is the Commission's main concern. But ultimately, internal reorganization, however massive, will not be enough. Nor will getting rid of the backlog of individual complaints, stronger statutes, more money, or more people necessarily solve the structural irregularities which exist in society today.

The latest economic indicators as reported by the Bureau of Labor Statistics demonstrate a diversity in the nation which continues to be reflected between haves and have-nots as depicted by skin color, sex and whatever. It is to the attack on that status quo that it was believed that Title VII was directed, with the goal of bringing blacks, Hispanics, and women into the mainstream of the economy. Ultimately it is to fulfill that objective that the EEOC administrative processes are being overhauled so massively today.

Still lingering in that regard is the larger problem of overhauling the entire compliance and enforcement effort of the government into perhaps a single or a combination facility. This is an issue the Congress must address, and which the President has just begun to address. The issue is framed as follows: Should there be lodged at a high and visible level of government a facility having an integrated perception of all aspects of job discrimination in this nation, with the capacity to sort out the inconsistencies, to remedy the duplications, and to prevent the left hand of government from doing that which is contrary to what the right hand has already done? In examining the government's antidiscrimination efforts today, it

46. On February 28, 1978, the EEOC approved a Proposed Memorandum of Understanding with the Federal Communications Commission, wherein upon the EEOC's finding of discrimination against an employer/broadcaster, the broadcast license or application would be reviewed for action.

appears a little like the old circus act with five clowns in a tiny car: One honking the horn, one turning and spinning the wheel, one with a foot on the brake, another with a foot on the gas pedal and a fifth sitting on top shouting and waving. Efforts should be made to dissolve images like that.

Ideally, all the tools needed to end job discrimination could and should be merged with a host and variety of remedies. If it is a banking institution that discriminates, it may be an easy matter to employ debarment as a sanction or to suspend its national charter or its right to manage government securities.[47] A defense contractor building a vital weapons system may require a different approach. In the latter situation, a law suit may be the appropriate remedy. A determination also needs to be made concerning the interdependence of these matters. It may be that by ending an industry-wide practice of discrimination, the Agency could put an end to the individual charges produced by that practice. Perhaps a host of tailor-made remedies lodged together at one vantage may produce the collapse of the multiple and complex conditions that exist in America to deny to women and minorities not only jobs but the very best jobs in all institutions.

As a first step to that end, the President has proposed that once the EEOC's administrative reforms are in place, certain added authorities currently administered elsewhere in government would be shifted to the Agency. Specifically, on February 23, 1978, the President submitted to the Congress, Reorganization Plan No. 1 of 1978.[48] Unless vetoed by either House of Congress within sixty working days from the date of its submission, this plan would accomplish, *inter alia,* the following:

> [1] On July 1, 1978, abolish the Equal Employment Opportunity Coordinating Council (42 U.S.C. 2000e-14) and transfer its duties to the EEOC . . .
>
> [2] On October 1, 1978, shift enforcement of equal employment opportunity for Federal employees from the CSC to the EEOC . . .
>
> [3] On July 1, 1979, shift responsibility for enforcing both the Equal Pay Act and the Age Discrimination in Employment Act from the Labor Department to the EEOC . . .
>
> [4] Clarify the Attorney General's authority to initiate "pattern or practice" suits under Title VII in the public sector.[49]

Even with greater emphasis on uniformity, however, and in the most ideal of political circumstances, government cannot do this job by itself.

47. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), dealing with the use of the procurement power of government as used to achieve equal employment opportunity goals.

48. 124 CONG. REC. H1457 (daily ed. Feb. 23, 1978)(to be printed as H.R. DOC. No. 95-295); [1978] U.S. CODE CONG. & AD NEWS 593.

49. 124 CONG. REV. H1457, *supra* note 48; [1978] U.S. CODE CONG & AD. NEWS 593, 594-95.

At best, it can only lead with integrity. That is all that is sought with this reorganization—to put integrity into that leadership. Title VII of the Civil Rights Act: A law destined to make change. EEOC: An agency in the midst of change.