NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
0400 Affirmative Action

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NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #08-03

0400 Affirmative Action **October 2008**

T0: Department and Agency Counsels; Personnel, Human Resources, and Affirmative Action Officers; and ADA Coordinators

FROM: Judith Ratner, General Counsel

SUBJECT: Recent Amendments to the Americans with Disabilities Act

As you may be aware, on September 25, 2008 the President signed into law amendments to the Americans with Disabilities Act ("ADA"). Public Law 110-325. The amendments take effect on January 1, 2009.

The ADA amendments focus primarily on the definition of "disability," and are intended to shift the Court's analysis away from an extensive review of whether a claimant is disabled. The amendments set forth explicit guidelines regarding "disability" under the ADA, reflecting the intention to reject recent Supreme Court holdings in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) and their companion cases, which narrowed the scope of the ADA.

For State agencies, the ADA amendments provide insight on two particular issues with respect to the definition of "disability." First, the amendments provide that an impairment that is episodic or in remission is a disability if it substantially limits a major life activity **when active**. Second, the amendments provide that whether the impairment substantially limits a major life activity shall be determined without consideration of the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. Examples of mitigating measures set forth in the amendments include medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies, use of assistive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications.

While these amendments may be significant with respect to the ADA, New York State's own Human Rights Law (HRL) contains a broader definition of "disability." Contrary to the ADA, the State's definition of disability found in Section 292 of the HRL does not require the impairment to "substantially limit" a major life activity, but rather that the impairment either prevent the exercise of a normal (not major) bodily function or be demonstrated by medical diagnostic techniques. HRL § 292(21). State agencies should thus consider the ADA amendments to provide guidance with respect to impairments that are episodic in nature or in remission, or are ameliorated by mitigating measures.

In addition, agencies are reminded that SPMM Advisory Memorandum #02-04 is still in effect, and that information received during the review of a reasonable accommodation request may **only** be used to evaluate the request. Such information cannot be used as a basis for referring an employee for a medical examination to determine fitness for duty pursuant to section 72(1) of the Civil Service Law, or placing the employee on an involuntary leave of absence pursuant to Civil Service Law section 72(5), or for other personnel actions.

A more thorough review of the ADA amendments can be found at the Proskauer website, http://www.proskauer.com/news_publications/client_alerts/index, by selecting the September 2008 Client Alert entitled "Congress Amends the Americans with Disabilities Act; President Bush Expected to Sign New Law."

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #02-04

0400 Affirmative Action **August 30, 2002**

TO: Department and Agency Counsel, Personnel, Human Resource, Affirmative Action Officers and ADA Coordinators

FROM: Patricia A. Hite, Director, Law Bureau

SUBJECT: Confidentiality of Medical Information Obtained During the Reasonable Accommodation Process

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As you are aware, by Executive Chamber Memorandum dated April 11, 1996, all agencies were advised that they are expected to follow the guidelines set forth in the *Procedures for Implementing Reasonable Accommodation in New York State Agencies*, in reviewing and processing requests for accommodation under the federal Americans with Disabilities Act and the State Human Rights Law.

In accordance with statutory mandates, and as specified in the guidelines, there are very strict limitations on the use of medical information obtained through the reasonable accommodation process.

Agencies are reminded that while they may request documentation or require a medical examination, to identify an individual's functional limitations to support and evaluate the accommodation request, they must protect and maintain the privacy and confidentiality of medical information provided by, or on behalf of, such individuals. This limitation applies to information obtained from medical examinations or inquiries of such individuals.

In addition, agencies are advised that any medical documentation submitted or obtained may **only** be used to evaluate the request for accommodation. Documentation obtained during this process cannot be used as a basis for referring an employee for a medical examination to determine fitness for duty pursuant to section 72(1) of the Civil Service Law, or placing the employee on an involuntary leave of absence pursuant to Civil Service Law section 72(5), or for other personnel actions.

Please direct any questions to the Department of Civil Service at (518) 457-6207 or the Office of Advocate for Persons with Disabilities at (518) 473-4609.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #90-07

0400 AFFIRMATIVE ACTION **March 26, 1990**

TO: Agency Personnel Offices and Affirmative Action Offices

FROM: Policy & Program Analysis, Division of Staffing Services

SUBJECT: NYS DCS Publication, "The Legal Environment of Affirmative Action"

DATE: March 26, 1990

The attached was compiled by our Legal Bureau with the assistance of our Division of Affirmative Careers.

It replaces the document issued May 30, 1989 with General Information Bulletin No. 89-14 which we suggested that you keep in the Appendix, Section 3000, in the back of your State Personnel Management Manual. There have been a number of revisions and additions, and that copy should be destroyed.

We suggest that you file the new version in your SPMM in 0400 AFFIRMATIVE ACTION.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #93-03
0400 Affirmative Action May 1993

TO: Department and Agency Personnel/Affirmative Action Officers

FROM: Candice T. Carter, Executive Deputy Commissioner

Americans with Disabilities Act: Reasonable Accommodations

Under the Americans with Disabilities Act (ADA), agencies are required to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability if an accommodation would enable the applicant or employee to perform the essential functions of the job to which he/she is seeking appointment or in which he/she is employed, unless it can be demonstrated that the accommodation would constitute an undue hardship on the operations of the agency. (42 U.S.C. §12112(5)(A)).

The Equal Employment Opportunity Commission's Technical Assistance Manual on Title I of the ADA provides that, if an applicant or employee requests an accommodation and the need for an accommodation is not obvious, or if an employer does not believe that an accommodation is needed, the employer may request documentation or require a medical examination to identify the individual's functional limitations to support the request. The Manual advises that a reasonable accommodation must take into consideration the specific abilities and functional limitations of a particular applicant or employee with a disability and the specific functional requirements of a particular job. Therefore, the focus should be on identifying the abilities and limitations of an individual, and not upon the diagnosis and prognosis of a physical or mental condition.

The following procedure, which has been approved by the State Office of the Advocate for the Disabled, should be used to verify an applicant's or employee's need for a requested accommodation.

1. When the need for an accommodation is not obvious, agencies, before providing a reasonable accommodation, may require that the applicant or employee with a disability provide documentation of the need for the accommodation. This documentation should identify the specific physical or mental limitations of the employee and the precise job limitations imposed by the disability so that the agency may determine if the individual is an individual with a disability entitled to an accommodation and/or to identify an appropriate accommodation.

2. Employees have the right to supply the documentation from a physician or other medical professional, psychologist, social worker, rehabilitation counselor, occupational or physical therapist, independent living specialist or other professional with knowledge of the employee's disability.

3. Agencies may apply their own criteria to the documentation submitted for purposes of determining adequacy and veracity, provided that such criteria are clearly established and applied consistently.

4. If the agency determines that the medical documentation is inadequate to support the request or has reason to doubt its veracity, the agency should specify to the individual why the documentation is unacceptable and provide the employee with an opportunity to submit additional documentation supporting the request.

5. Where an agency finds that the need for an accommodation is not clearly established based on its criteria, it may require the employee to submit to a medical examination by the Employee Health Service of this Department or an appropriate medical professional designated by the agency.

6. If the employee fails to submit documentation meeting agency criteria or refuses to submit to a medical examination required by the agency, the agency may deny the requested accommodation. Any medical documentation submitted may be used only to evaluate the employee's request for accommodation. An agency may not use documentation obtained during this process or the refusal to submit to the medical examination as a basis for taking any adverse personnel action.

The key issue in all cases is the degree to which medical documentation supports the need for the requested accommodation. While an agency may seek technical assistance from a medical professional, State or local rehabilitation agencies or disability constituent organizations in determining how to accommodate a particular individual in a specific situation, the decision as to what is and what is not an appropriate accommodation is to be made by the agency.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #93-04
0400 Affirmative Action
May 1993

TO: Department and Agency Personnel/Affirmative Action Officers

FROM: Candice T. Carter, Executive Deputy Commissioner

Americans with Disabilities Act: Collection of Information Concerning Disabilities from Applicants

Title I of the Americans with Disabilities Act (ADA) prohibits employers from making inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature and severity of such disability. (42 U.S.C. §12112(d)(2)(A)). The Interpretive Guidance on Title I of the Americans with Disabilities Act published by the Equal Employment Opportunity Commission, notes that collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted. (Appendix to 29 CFR Part 1630, §1630.14(b)). Section 503 of the Rehabilitation Act mandates that an affirmative action provision be included in federal contracts in excess of $10,000.00.

We have been advised that many agencies continue to request applicants to provide information as to whether they are disabled and as to the nature of their disability on a survey of applicants form. It appears from the language of the ADA and the Interpretive Guidance of the EEOC, that such data collection may be unlawful.

Until further guidance is provided by the EEOC regarding this issue, this Department, together with the Office of Advocate for the Disabled, is recommending that you discontinue collection of information from applicants regarding the existence and/or nature of a disability, even if applicants are requested to self-identify on a voluntary basis, unless you are otherwise required to do so under section 503.

Agencies' affirmative action obligations under Executive Order No. 6 remain unchanged and, in furtherance thereof, agencies are expected to aggressively pursue their efforts to hire and promote persons with disabilities through community outreach and recruitment.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #94-04
0400 Affirmative Action June 29, 1994

TO: Department and Agency Personnel/Affirmative Action Officers

FROM: Candice T. Carter, Executive Deputy Commissioner CTC

Americans with Disabilities Act: Collection of Information Concerning Disabilities from Applicants

This is an update to Advisory Memorandum #93-04 issued in May 1993, in which this department, together with the Office of Advocate for the Disabled, recommended that you discontinue collection of information from applicants regarding the existence and/or nature of a disability pending further guidance by the Equal Employment Opportunity Commission (EEOC) regarding their position on the lawfulness of the collection of such information under the Americans with Disabilities Act (ADA).

The EEOC recently issued *Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990,* for interim use by EEOC investigators. The *Guidance* notes that the ADA does not prohibit affirmative action for persons with disabilities and that Congress, in enacting the ADA, indicated that an employer should be allowed to ask applicants to voluntarily self-identify if the employer actually provides affirmative action for such individuals with disabilities. In the *Guidance*, the EEOC states its position that an employer may invite applicants at the pre-offer stage to voluntarily supply disability-related information needed by the employer to provide affirmative action if the employer is **actually undertaking** voluntary affirmative action for individuals with disabilities.

The EEOC advises that their investigators will examine whether the employer is using the information to actually benefit individuals with disabilities with respect to employment opportunities (e.g., job offers, promotion, etc.). Additionally, the *Guidance* provides that if the employer invites applicants to voluntarily self-identify, the employer must take the following steps:

1. state clearly and conspicuously on any written questionnaire used for this purpose, or state clearly orally (if no written questionnaire is used), that the specific information requested is intended for use solely in connection with its affirmative action efforts; and
2. state clearly and conspicuously that the specific information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

While we reevaluate our earlier recommendation in light of the clarification by the EEOC of its position, this department and the Office of Advocate for the Disabled request that you **not** resume collection of such information until we provide you with further guidance. We would caution that the position of the EEOC was set forth in an internal notice which is subject to challenge. While the courts give deference to the administrative interpretation of agencies with the responsibility for enforcement of a federal statute, the courts are not bound by such interpretation.

One copy of EEOC Notice No. 915.002, *Enforcement Guidance: Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990,* dated May 19, 1994, is enclosed. [Only for Personnel offices and Affirmative Action offices.]

To: Department and Agency Personnel and Affirmative Action Officers

From: Virginia M. Apuzzo, Commissioner

Subject: Civil Service Law Sections 55-b and 55-c: Americans With Disabilities Act

Civil Service Law section 55-b provides the State Civil Service Commission with the authority to determine up to 1,200 positions with duties such as can be performed by persons with a physical or mental disability who are found otherwise qualified to satisfactorily perform the duties of any such position. Upon such a determination by the Commission, section 55-b provides that such positions shall be classified in the non-competitive class, and may be filled by persons who have been certified by the Employee Health Service (EHS) of this department as being a person with a physical or mental disability, but capable of performing the duties of the position sought.

Section 55-c provides the Commission with the same authority with respect to 300 positions with duties such as can be performed by **veterans** with a physical or mental disability.

As we have previously advised you, (see Advisory Memorandum #92-03, in Section 2620 (F) of this manual) the Americans with Disabilities Act (ADA) prohibits employers from making any inquiries as to the nature and extent of an applicant's or eligible's disability or from conducting any medical examinations at the pre-offer stage. This memorandum is to serve as a reminder that such inquiries are prohibited with respect to all applicants, including 55-b and 55-c applicants.

Therefore, while applicants seeking appointment pursuant to section 55-b or 55-c must provide medical documentation to EHS as to their physical or mental disability in order to establish program eligibility, agencies nominating a 55-b or 55-c eligible for appointment may not make any further medical inquiries of such person regarding the nature and extent of their disability, or require him/her to undergo a medical examination by EHS unless:

1. a conditional offer of appointment has been made;
2. there are established physical/medical requirements for the position, and
3. all entering employees are required to submit to a medical examination.

Agencies will have to determine whether a 55-b or 55-c eligible is capable of performing the duties of a specific position by making such inquiries, consistent with the ADA, as are made of all other eligibles. Please refer to the EEOC's Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990, issued under cover of Advisory Memorandum #94-04, (in this section of the manual), for guidance.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #96-02

0400 Affirmative Action **February 14, 1996**

TO: Department and Agency Personnel, Human Resource and Affirmative Action Offices

FROM: Daniel E. Wall, General Counsel

SUBJECT: ADA: Questions Employers May Ask Prior to a Job Offer

The Equal Employment Opportunity Commission (EEOC) recently issued final guidance on preemployment disability-related questions and medical examinations under the Americans with Disabilities Act (ADA). (ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, October 10, 1995). While the final guidance is quite similar to the interim guidance issued by the EEOC in May, 1994 (See SPMM Advisory Memorandum #94-04 in this section), it does clarify what questions an employer may ask about reasonable accommodation at the pre-offer stage.

The guidance provides that, in general, an employer may **not** ask questions on an application or in an interview about whether an applicant will need reasonable accommodation to perform the duties of the position sought because such questions are likely to elicit whether the applicant has a disability. However, the guidance provides that where an employer could reasonably believe that an applicant will need reasonable accommodation to perform the functions of the position sought, the employer may ask whether the applicant needs reasonable accommodation and what type of accommodation would be needed to perform the functions of the position.

According to the guidance, an employer may ask questions regarding the need for accommodation where:

- the employer reasonably believes the applicant will need reasonable accommodation because the applicant has an obvious disability;
- the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or
- an applicant has voluntarily disclosed to the employer that he or she needs reasonable accommodation to perform the job.

While an employer may inquire as to the need for an accommodation and the type of accommodation needed in these limited circumstances, an employer should **not** make inquiries concerning the nature and/or extent of the underlying disability.

Further, the EEOC notes in the guidance that where an employer fails to hire an applicant who has been questioned as to their need for an accommodation, the EEOC will carefully scrutinize whether the need to provide accommodation was a reason for rejecting the applicant. Therefore, employers should document the business related reasons for their determination not to hire such an applicant.

THE LEGAL ENVIRONMENT OF AFFIRMATIVE ACTION

March 1990

INTRODUCTION

The legal evolution of affirmative action requirements has its roots in the United States Constitution. First, civil rights were provided for increasing numbers of citizens. Next, acts interfering with those rights were prohibited, which in turn provided the foundation for the laws and regulations that require affirmative action to provide redress for citizens denied the exercise of those rights.

The following is a summary of the major laws, regulations and court cases which affect current policy and programs dealing with employment practices.

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Federal Laws and Executive Orders

1791
1st Amendment to the Constitution - provides for the free establishment and exercise of religion, freedom of speech and the press, the right to peacefully assemble, and the right to petition the government to redress grievances.

1791
5th Amendment to the Constitution - provides for due process of law if a person is to be deprived of life, liberty or property.

1865
13th Amendment to the Constitution - abolished slavery and involuntary servitude and provides for Congressional enforcement by appropriate legislation.

1868
14th Amendment to the Constitution - prohibits the states from making or enforcing any law which diminishes the privileges and immunities of citizens of the United States; prohibits states from depriving any person of life, liberty or property without due process of law or denying any person the equal protection of the laws.

1866
Civil Rights Act of 1866 and 1870 (42 USC Section 1981) - 1870 "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."

1871
Civil Rights Act of 1871 (42 USC Section 1983) - "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

1871
Civil Rights Act of 1871 (42 USC Section 1985) - makes it unlawful to conspire to deprive any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws. It allows the injured party to take action to recover damages from one or more of the conspirators.

1964
Presidential Executive Order 11141 (29 FR 2477) - prohibits discrimination by Federal contractors and subcontractors against persons because of their age in connection with the employment, advancement, or discharge of employees, or in connection with the terms, conditions, or privileges of their employment except upon the basis of a bona fide occupational qualification (b.f.o.q.), retirement plan or statutory requirement. Additionally, it prohibits contractors and subcontractors from specifying a maximum age limitation in solicitations or advertisements for employees, unless a b.f.o.q.

1964

Civil Rights Act of 1964 - Title VI (42 USC Section 2000d) - prohibits discrimination on the basis of race, color or national origin, in programs or activities that receive Federal financial assistance.

Title VII (42 USC Section 2000e, et seq) - defines unlawful employment practices and prohibits employment discrimination on the basis of race, color, religion, sex or national origin. The Equal Employment Opportunity Act of 1972 extended coverage of Title VII to all states and their political subdivisions.

1965

Presidential Executive Order 11246 (30 FR 12319) - requires every nonexempt Federal government contract to contain pro- visions barring contractors and subcontractors from discriminating against employees or applicants on the basis of race, color, religion, sex or national origin. It mandates the use of affirmative action to insure that applicants and employees are employed without regard to those factors. Responsibility for administration was delegated to the Secretary of Labor.

Further, it prohibits discrimination in Federal employment on the basis of race, color, religion, sex or national origin and delegates authority to the U.S. Civil Service Commission to provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment.

1967

Presidential Executive Order 11375 (32 FR 14303) - amended Executive Order 11246 to change creed to religion and to prohibit sex discrimination.

Age Discrimination in Employment Act of 1967, as amended in 1978, (ADEA) (29 USC Sections 621-634) - prohibits employers, labor organizations, employment agencies, and State and political subdivisions from employment discrimination against individuals who are at least 40 but less than 70 years of age. The EEOC is responsible for enforcing the ADEA.

The ADEA was amended in 1986 to remove the maximum age limitation and to provide that it shall not be unlawful for a state, a political subdivision, agency, its subsidiary, or an interstate agency to fail or refuse or hire or to discharge individuals because of age due to to their employment as firefighters or law enforcement officers because of an age requirement in state or local law in effect on March 3, 1983. Enforcement of the law in the hiring of firefighters and law enforcement officers is suspended until December 31, 1993.

1968

Civil Rights Act of 1968 (18 USC Section 245) - similar to the Civil Rights Act of 1871, it lists certain federally protected rights and makes it unlawful to willfully injure, intimidate or interfere with any person because of their race, color, religion or national origin or because they are exercising rights which include, but are not limited to: a person's participation in federal protected benefits or activities, such as enrolling or attending public school or college; serving in any court as a grand or petit juror, and traveling in or using any facility of inter-state commerce. It provides for enforcement by the U.S. Attorney General.

1969

Presidential Executive Order 11478 (34 FR 12985) - superseded Part I of Executive Order 11246 and those parts of Executive Order 11375 which apply to federal employment. It prohibits discrimination in federal employment on the basis of race, color, religion, sex or national origin and requires the head of each executive department and agency to establish and maintain an affirmative program of equal employment opportunity. It assigns responsibility to the U.S. Civil Service Commission to provide leadership and guidance and to provide for the prompt, fair, and impartial consideration of discrimination complaints.

1972

State and Local Fiscal Assistance Act of 1972 - Revenue Sharing Act (31 USC Section 6701, et seq) - provides for the sharing of funds collected from the federal income tax with state and local governments. Section 6716, the nondiscrimination provision of the Act, prohibits a state government or unit of local government from discriminating on the basis of race, color, national origin or sex under any program or activity receiving funds made available by the Act; applies prohibitions of the Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973; prohibits discrimination on the basis of religion as provided in the Civil Rights Acts of 1964 and Title VIII of the Civil Rights Act of 1968. This Act falls under the authority of the Secretary of the Treasury, who is required to try to make agreements with heads of state agencies to investigate non-compliance. The United States Attorney General has been delegated the authority to initiate pattern-or-practice suits against state or local governments for violations of this provision.

1973

Rehabilitation Act of 1973, as amended (29 USC Section 701 et seq) authorizes programs to promote and expand employment opportunities in the public and private sectors for handicapped individuals.

Important provisions:

a. Section 501 - requires affirmative action in Federal employment.

b. Section 503 - Obliges federal contractors and subcontractors not to discriminate against employees and applicants on the basis of handicap and to undertake affirmative action to provide employment opportunities for the handicapped. Responsibility for enforcement rests with the OFCCP of the U.S. Department of Labor.

c. Section 504 - Prohibits discrimination against otherwise qualified handicapped persons by federal agencies and in programs or activities receiving federal financial assistance. Enforced by compliance offices in each individual federal agency with overall enforcement responsibility held by the Attorney General. The penalty for noncompliance is termination of funding to the program found to be in violation.

1974

Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 USC Sections 2011, 2012, 2014) - requires federal contractors to take affirmative action to employ and advance qualified special disabled veterans and veterans of the Vietnam Era. The term "special disabled veteran" means a veteran who is entitled to compensation under laws administered by the Veterans' Administration for a disability rated at 30 percent or more, or a person discharged or released from active duty because of a service connected disability. The Act provides for the Secretary of Labor to investigate and take appropriate action with regard to complaints by such veterans that contractors are not carrying out these provisions.

1975

Age Discrimination Act of 1975 - This Act, similar to Title VI of the Civil Rights Act of 1964, prohibits dis- crimination on the basis of age in programs or activities receiving federal financial assistance, including assistance under the State and Local Fiscal Assistance Act of 1972. The Department of Justice is responsible for enforcement. This Act does not supersede or modify the Age Discrimination in Employment Act of 1967.

1976

Civil Rights Attorney's Fees Awards Act of 1976 (42 USC Section 1988) - permits courts to allow reasonable attorney's fees as part of costs to the prevailing party, other than the United States, in actions to enforce 42 USC Sections 1981, 1983, 1985 and 1986, Title VI of the Civil Rights Act of 1964 and Title IX of Public Law 92-318.

1980

Presidential Executive Order 12250 (45 FR 72995) - revokes Executive Order No. 11764 and provides for the Attorney General to coordinate the implementation and enforcement of the following laws: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973, as amended. Although in effect, this order is "under review" by the Federal Task Force on Regulatory Relief.

Federal Agency Regulations

Department of Education

Nondiscrimination in Programs Receiving Federal Financial Assistance through the Department of Education - effectuation of Title VI (34 CFR, Subtitle B, Chapter I Part 100)

Prohibits discrimination based on race, color or national origin directly, or through contracts, with regard to participation in or the provision of benefits under any program or activity receiving federal financial assistance.

Nondiscrimination on the Basis of Handicap (34 CFR, Subtitle B, Chapter I, Part 104)

Implements Section 504 of the Rehabilitation Act of 1973 which is designed to eliminate discrimination on the basis of handicap in programs or activities receiving federal financial assistance and applies to recipients of federal financial assistance from the Department of Education and to programs or activities receiving or benefiting from such assistance. It prohibits discrimin- ation in the provision of benefits and participation in those programs or activities. Further, it requires those employers to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless it can be demonstrated that such an accommodation would impose an undue hardship on the operation of its program.

Nondiscrimination in Employment in Education Programs and Activities (34 CFR, Subtitle B, Chapter I, Part 106)

Implements Title IX of the Education Amendments of 1972, as amended. It prohibits discrimination based on sex in any education program receiving federal financial assistance. It also requires those employers to conduct a self- evaluation of their current policies and practices and authorizes them to undertake affirmative action to change any existing conditions that could limit participation by persons of a particular sex.

Equal Employment Opportunity Commission

Reporting and Recordkeeping (29 CFR, Chapter XIV, Part 1602)

Describes the type, manner and duration of records required to be maintained by an employer. Sections 1602.30 - 1602.37 specifically apply to state and local governments.

Sex Discrimination Guidelines (29 CFR, Chapter XIV, Part 1604)

Provides guidelines to employers, labor organizations and employment agencies regarding the principles the EEOC will follow in effectuating Title VII's prohibition against discrimination on the basis of sex. The guidelines define sexual harassment and make such conduct a violation of Title VII.

Guidelines on Sexual Harassment

Sexual Harassment is defined by the EEOC Guidelines as:

"Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature when:

1. submission to the conduct is either an implicit or explicit term or condition of

employment; or

2. submission to or rejection of the conduct is used as a basis for an employment decision affecting the person rejecting or submitting to the conduct; or
3. the conduct has the purpose or effect of unreasonably interfering with an affected person's work performance, or creating an intimidating, hostile or offensive work environment."

Religious Discrimination (29 CFR, Part 1605)

Defines religious practice and clarifies the obligation imposed by Title VII on employers to accommodate the religious practices of employees and prospective employees unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.

National Origin Discrimination Guidelines (29 CFR, Part 1606)

Defines national origin discrimination broadly as including, but not limited to, the denial of equal employment. The guidelines prohibit citizenship requirements where the purpose or effect is discrimination on the basis of national origin. They advise that a requirement to speak English only at all times in the workplace is in violation of Title VII and will be closely scrutinized. The EEOC will apply the Uniform Guidelines on Employee Selection Procedures (see below) in determining if an employer's selection procedures had an adverse impact on the basis of national origin. Users are expected to evaluate height and weight requirements having adverse impact.

Section 102 of the Immigration Reform and Control Act of 1986 provides for the appointment of a Special Counsel to prosecute "unfair immigration-related employment practices" which are protected by the Act. It is unlawful to intentionally discriminate in employment because of a person's national origin, citizenship status or intended citizenship status if an individual is lawfully entitled to work in the United States.

Uniform Guidelines on Employee Selection Procedures (29 CFR, Part 1607, 9/25/78)

These guidelines, adopted jointly by the EEOC, the U.S. Civil Service Commission, the U.S. Department of Labor, and the U.S. Department of Justice, incorporate a single set of principles designed to assist employers, labor unions, employment agencies and licensing and certification boards in complying with the requirements of federal law prohibiting employment practices which discriminate on the basis of race, color, religion, sex and national origin. The guidelines apply to tests and other selection procedures which are used as a basis for making an employment decision. They require users to conduct validation studies, as described in the guidelines, where a selection procedure has had an adverse impact. In determining whether a selection procedure has had an adverse impact, the guidelines provide that the enforcing agencies will use the 4/5ths or 80% rule as a "rule of thumb": where the selection rate for any race, sex or ethnic group is less than 4/5ths or 80% of the selection rate of the majority group, it will be generally regarded as evidence of adverse impact.

Guidelines for Affirmative Action under Title VII of the Civil Rights Act of 1964 (29 CFR, Part 1608, 2/20/79)

These guidelines provide guidance for employers in the development and implementation of voluntary affirmative action programs. They list circumstances under which voluntary affirmative action is appropriate. These include the remedying of adverse impact, correcting the effects of prior discriminatory practices and expanding limited labor pools. The guidelines prescribe three elements for affirmative action programs:

- a reasonable self-analysis;
- a reasonable basis for concluding action is appropriate; and
- reasonable action.

Department of Health and Human Services

Sex Discrimination in Health-Related Training Programs (45 CFR, Part 83)

Effectuate certain provisions of the Public Health Service Act. The objective of the regulations is to abolish the use of sex as admission criterion of individuals to all entities receiving support under the Act. This Act allows the maximum use of all available human resources in meeting the nation's need for qualified health personnel.

Nondiscrimination on the Basis of Handicap Rules for Federally Assisted Programs (45 CFR, Part 84)

This Act prohibits any program or activity receiving federal financial assistance from the Department of Health and Human Services from any form of handicapped-based discrimination, especially if that discrimination affects participation in any benefits that could be derived from the program.

Department of Labor

Apprenticeship and Training - Equal Employment Opportunity (29 CFR, Part 30, 4/12/78)

This Act is designed to promote equality of opportunity in apprenticeship programs by prohibiting discrimination based on race, color, religion, national origin or sex. It requires affirmative action to provide equal opportunity.

Affirmative Action Requirements for Government Non- construction Contractors (Revised Order #4) - (41 CFR, Part 60-2)

These requirements are for non-construction contractors and subcontractors who meet certain other conditions, to develop a written affirmative action plan for each of their establishments and to designate an equal opportunity director. The required contents of an affirmative action program, including a utilization analysis and goals and timetables, are set forth in detail.

Affirmative Action Requirements for Government Construction Contractors (41 CFR, Part 60-4)

These apply to all contractors and subcontractors which hold any federal or federally assisted construction contract in excess of $10,000. Specific published goals for the employment of women and minorities are issued by the Director of the OFCCP.

Sex Discrimination Guidelines for Government Contractors (41 CFR, Part 60-20)

These guidelines prohibit employment discrimination on the basis of sex and provide that wages must not be based on or related to the sex of an employee. They require employers to take affirmative action to recruit women to apply for those jobs from which they have been previously excluded.

Guidelines on Discrimination Because of Religion or National Origin (41 CFR, Part 60-50)

These prohibit discrimination by employers on the basis of national origin or religion and require affirmative action to remedy underutilization. They require employers to make accommodations for religious observances and practice unless they would cause undue hardship on the performance of the contractor's business.

Affirmative Action Program for Disabled Veterans and Veterans of the Vietnam Era (41 CFR, Part 60-250)

This program applies to government contracts totaling $10,000 or more. It requires government contractors to take affirmative action to employ and advance qualified disabled veterans and veterans of the Vietnam Era. It requires each agency and contractor to include the affirmative action clause, as set forth in the regulation, in each of its contracts, which includes a statement that they will list all suitable openings with the appropriate office of the state employment service system. Contractors employing 50 or more employees who meet certain requirements are required to have a written affirmative action plan. They are also mandated to accommodate the physical or mental handicap of a disabled veteran unless it can be shown that it imposes an undue hardship on the business' operation. In determining the extent of a contractor's obligation, business necessity and financial costs and expenses may be considered.

Affirmative Action Obligations for Handicapped Workers (41 CFR, Part 60-741)

Government contractors with contracts of $2,500 or more are required to take affirmative action to employ and advance qualified handicapped individuals. Employers with 50 or more employees who meet certain other requirements are required to provide written affirmative action plans. Contractors must make reasonable accommodation to the physical or mental limitations of employees and prospective employees unless such accommodations can be shown to impose an undue hardship on the business' operation. Further, employers are required to designate an affirmative action director and to evaluate supervisors on the basis of their affirmative action effort.

Equal Pay for Equal Work under Fair Labor Standards Act (29 CFR, Part 800)

This Act provides official Department of Labor interpretations on the meaning and application of the equal pay provisions added to the Fair Labor Standards Act by the Equal Pay Act of 1983; it included a provision which prohibits discrimination on the basis of sex in the payment of wages with the exceptions of differentials based on:

1. a seniority system,
2. a merit system,
3. a system which measures earnings by production quality or quantity,
4. any other factor other than sex. Equality of pay cannot be achieved by lowering the wage rate of any employee. Equal work in jobs is measured by equality of skill, effort, and responsibility required for performance and similarity of working conditions.

Age Discrimination in Employment (29 CFR, Part 860)

This provides guidelines to employers and employees as to how the Department of Labor will apply the Age Discrimination in Employment Act of 1967.

Office of Personnel Management

Nondiscrimination in Federally Assisted Programs in the Office of Personnel Management (5 CFR, Part 900, Subpart D)

Designed to effectuate Title VI of the Civil Rights Act of 1964, these regulations prohibit discrimination based on race, color or national origin in programs or activities receiving federal financial assistance from OPM. No person may be excluded from participation in, be denied the benefits of or be otherwise subjected to discrimination on those bases in any such program or activity. Application for assistance must contain an assurance that the requirements of this part will be complied with.

Standards for a Merit System of Personnel Administration (5 CFR, Part 900, Subpart F)

This part is designed to implement Title II of the Inter- governmental Personnel Act of 1970. It relates to federally required merit personnel systems in state and local agencies for employees engaged in administration of grant-aided programs. The standards include but are not limited to;

a. recruitment, selection and advancement of employees on the basis of relative ability, knowledge and skill, including open consideration of qualified applicants for initial appointment;

b. provision of equitable and adequate compensation; and

c. training employees, as needed, to assure high quality performance.

Nondiscrimination on the Basis of Handicap - Rules for OPM Assisted Programs (5 CFR, Part 900, Subpart G)

This effectuates Section 504 of the Rehabilitation Act of 1973 to eliminate discrimination on the basis of handicap in any program or activity receiving Federal assistance from OPM.

State Laws and Executive Orders

New York State Human Rights Law (Executive Law, Article 15)

The Human Rights Law provides that it shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency, labor organization or joint labor-management committee controlling apprentice training programs to discriminate against any individual on the basis of his/her age, race, creed, national origin, sex or disability or marital status or to make any inquiry regarding these factors. (With respect to age, the Human Rights Law prohibits discrimination against any individual 18 years of age or older except where age is a bona fide occupational qualification.)

The law also provides that it shall be an unlawful discriminatory practice to deny a license or employment to an individual on the basis of his/her having been convicted of one or more offenses or by reason of a finding of lack of good moral character when such denial would be a violation under Article 23-A of the Correction Law. It is also unlawful to inquire as to, or act adversely upon, any arrest or criminal accusation not then pending against an individual which was followed by a termination of that criminal action or proceeding in favor of the individual.

Correction Law, Article 23-A, Section 752

This law prohibits discrimination in the granting of a license or employment against persons previously convicted of one or more criminal offenses, or who have been found to lack "good moral character", when such finding is based upon the fact that the person has been convicted of one or more criminal offenses unless:

1. there is a direct relationship between one or more of the previous offenses and the license or employment sought; or
2. the issuance of the license or granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Labor Law (Article 8, Section 220e)

All contracts with the state or municipality require the insertion of a clause by which the contractor and/or subcontractors agree not to discriminate on the basis of race, creed, color, national origin, disability or sex in the hiring and employment of persons.

Executive Law (Article 15-A, Section 310, et seq)

Requires all state contracts and all documents soliciting bids or proposals for state contracts to contain or make references to a provision, among others, that the contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Further, requires contractors to make good faith efforts to solicit active participation by minority or women-owned business enterprises.

Gubernatorial Executive Orders

Executive Order No. 5 (2/16/83) - Established the Women's Division in the Executive Chamber to advise the Governor on all matters relating to women and to work closely with state agencies to insure that women's interests and perspectives are considered in the formulation of public policy.

Executive Order No. 6 (2/18/83) - Assigned responsibility to the Department of Civil Service and some other state agencies for insuring equal employment opportun- ities for women, minorities, disabled person and Vietnam Era veterans.

Executive Order No. 7 (2/18/83) - Established a Governor's Advisory Committee for Hispanic Affairs.

Executive Order No. 19 (5/31/83) - New York State policy statement on sexual harassment in the workplace.

Executive Order No. 28 (11/18/83) - Established a Task Force on Sexual Orientation Discrimination. The Executive Order prohibits discrimination on the basis of sexual orientation by a state agency or instrumentality in the provision of any services or benefits. Further, it requires agencies and departments to prohibit discrimination based on sexual orientation in any matter pertaining to employment and directs the Office of Employee Relations to promulgate clear and consistent guidelines prohibiting discrimination on such basis.

Executive Order No. 28.1 (4/27/87) - Amends Executive Order No. 28 by directing that the responsibility to review and promulgate regulations prohibiting discrimination on the basis of sexual orientation and to implement a procedure to ensure the swift and thorough investigation of complaints of discrimination based on sexual orientation be transferred from the Governor's Office of Employee Relations to the Division of Human Rights.

Executive Order No. 66 (6/5/85) - Establishes a Governor's Advisory Committee for Black Affairs.

Executive Order No. 82 (5/2/86) - Establishes the Governor's Office for Hispanic Affairs.

Executive Order No. 96 (4/27/87) - Promotes the New York State policy against age discrimination in the workplace by requiring the head of each agency, department, board, commission or other entity to issue and provide to all employees a statement defining and prohibiting age discrimination in the workplace and to examine the age distribution of their workforce to facilitate compliance with State and Federal law and the achievement of a non-discriminatory work environment.

Major Federal Court Cases

Adverse Impact

Griggs v. Duke Power Company, 401 U.S. 424 (1971)

Facts:

Petitioners, a group of incumbent black employees, instituted an action against the Duke Power Company, their employer, challenging the requirement of a high school education or the passing of two standardized general intelligence tests for employment in or transfer to certain jobs.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Duke Power Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River Plant. The Plant was divided into five operating departments: (1)Labor, (2)Coal Handling, (3)Operations, (4)Maintenance, and (5)Laboratory and Test. Blacks were restricted to employment in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other departments. In 1955 a policy was instituted requiring a high school education for initial assignment to any department except Labor and for transfer from Coal Handling to any of the three "inside" Departments of Operations, Maintenance and Laboratory and Test.

In 1965, Blacks were no longer restricted to the Labor Department but were required to have a high school education to transfer. New employees were required to pass two professionally developed tests as well as to have a high school diploma. Transfers were permitted from Labor or Coal Handling without a high school education if the applicant passed two tests - the Wonderlic Personnel Test and the Bennett Mechanical Aptitude Test. Neither test was directed or intended to measure the ability to perform a particular job or category of jobs and operated to disqualify blacks at a substantially higher rate than white applicants.

Decision:

The Court held that under Title VII of the Civil Rights Act of 1964, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be used if they operate to "freeze" the status quo of prior discriminatory practices. Title VII prohibits not only overt discrimination but also employment practices that are fair in form, but discriminatory in operation. Such practices are prohibited unless they can be shown to be related to job performance. Any given requirement must have a manifest relationship to the employment in question, the touchstone being business necessity.

The Court further upheld the Equal Employment Opportunity Commission's interpretation of Section 703 (h) of Title VII, which authorizes the use of "any professionally developed ability test which is not designed, intended, or used to discriminate because of race", as permitting the use of job related tests.

Wards Cove Packing Company, Inc., et al. v. Frank Atonio, et al., 490 U.S.___, 104 LEd 2d 733, (1989)*

Facts:

Respondents, a class of non-white cannery workers who were employed at petitioners' salmon canneries, brought a suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, alleging that a variety of petitioners' hiring and promotion practices had denied them and other non-whites employment in the higher paying non-cannery jobs on the basis of their race.

Decision:

The Court set forth the proper application of Title VII's disparate impact theory of liability. The Court held that the proper statistical comparison, which generally forms the basis for the initial inquiry in a disparate impact case, is between the racial composition of the qualified persons in the labor market and the racial composition of persons holding the jobs at issue. The Court noted that racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions.

Secondly, the Court held that a plaintiff's burden in establishing a prima facie case goes beyond a showing of a statistical disparity in the employer's work force. The Court ruled that the plaintiff must isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities.

The Court held that if a prima facie case of disparate impact with respect to an employment practice is established, the employer then bears the burden of producing evidence of a business justification for the employment practice. The Court emphasized, however, that the burden of proving that a specific employment practice caused discrimination remains with the plaintiff. The Court further noted that there is no requirement that the challenged practice be essential or indispensable to the employer's business for it to pass muster.

Finally, the Court concluded that a plaintiff may still prevail where an employer carries its burden of persuasion on the question of business justification, if the plaintiff can persuade the fact finder that there are other equally effective tests or selection devices, without a similarly undesirable racial effect, which would serve the employer's legitimate hiring interests. The Court indicated that factors such as the cost of other burdens of the proposed alternative selection devices are relevant in determining whether a test or selection device is equally effective.

* No page numbers, Supreme Court Volumes not yet published.

Clara Watson v. Fort Worth Bank and Trust, 487 U.S.___, 102 LEd 2d 827, (1988)*

Facts:

Petitioner, a black employee of respondent bank, was denied four promotions within the bank based on the subjective judgment of white supervisors who were acquainted with petitioner and the nature of the job being applied for. She brought suit under Title VII of the Civil Rights Act of 1964, as amended, alleging that the bank had unlawfully discriminated against blacks in hiring, compensation, initial placement, promotions, terminations, and other terms and conditions of employment.

Decision:

The Court concluded that subjective or discretionary employment practices may be analyzed under the disparate impact approach, not solely under the disparate treatment approach which had previously been used to analyze such cases and which requires a plaintiff to prove that the defendant had a discriminatory intent or motive.

The Court further set out the following standards of proof as applicable in such "disparate impact" cases:

a. The plaintiff must identify the employment practice allegedly responsible for the statistical disparity.

b. The plaintiff must offer statistical evidence sufficient to show that the practice challenged has caused the exclusion on the basis of membership in a protected class.

c. In defense, the defendant must present evidence that the challenged practice is based on legitimate business reasons manifestly related to the employment in question.

d. The plaintiff must then show that an alternative exists, which would equally serve the employer's legitimate business interests without an adverse effect on the protected class.

The Court's opinion emphasized that the ultimate burden of proof rests with the individual alleging discrimination.

* No page numbers, Supreme Court Volumes not yet published.

Disparate Treatment

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

Facts:

Respondent Green, a black employee of McDonnell Douglas Corp., was laid off in the course of a general reduction in McDonnell Douglas' work force. Green, a long-time activist in the civil rights movement, engaged in deliberate, unlawful activity against McDonnell Douglas as part of a protest that his discharge and the hiring practices of McDonnell Douglas were racially motivated. Subsequently, McDonnell Douglas publicly advertised for persons of Green's trade and Green applied for reemployment. His application was denied and the stated reason was Green's participation in the unlawful activity. Green brought suit against McDonnell Douglas alleging that they refused to rehire him because of his race and color and his persistent involvement in the civil rights movement. He claimed this was in violation of Sections 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964 which, respectively, prohibit racial discrimination in any employment decision and forbid discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

Decision:

The Court set forth a model for establishing a prima facie case of disparate treatment. The complainant in a Title VII trial has the burden of establishing a prima facie case by showing:

1. that he/she belongs to a racial minority;
2. that he/she applied and was qualified for a job for which the employer was seeking applicants;
3. that despite his/her qualifications, he/she was rejected and,
4. that, after the rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.

Green met this burden.

The burden then shifts to the employer to articulate some legitimate non-discriminatory reason for the rejection. In this case, the Court held that the reasons set forth by McDonnell Douglas met this burden.

Finally, a complainant must be given the opportunity to show that the reasons stated by the employer are merely a pretext for discrimination. Evidence which may be relevant here includes the employer's general policy and practice with respect to minority employment and/or evidence that white employees similarly situated were treated differently. The Court held that Green had not been given the opportunity to present evidence that the reasons stated by McDonnell Douglas for their refusal to rehire him were merely a coverup for a racially discriminatory decision and therefore sent the case back down for further proceedings.

Brenda Patterson v. McLean Credit Union, 491 U.S.___, 105 LEd 2d 132, (1989)*

Facts:

Upon being laid off by respondent credit union, petitioner, a black woman, brought an action pursuant to the Civil Rights Act of 1866, (42 USC 1981) alleging that respondent had harassed her, failed to promote her to an intermediate accounting clerk position, and discharged her because of her race.

Decision:

The Court declined to overrule an earlier decision, in Runyon v. McCrary, 427 U.S. 160 (1976), thereby reaffirming that Section 1981 prohibits discrimination in the making and enforcement of private contracts.

However, the Court held that Section 1981 is restricted in its application to the making and enforcement of contracts alone, and that is does not extend to conduct by an employer after the contractual relationship has been established. Thus, it would not serve as a basis for lawsuits involving imposition of discriminatory working conditions which are actionable under Title VII. The Court noted that damages under Title VII are limited to compensation for lost wages, but that other compensatory and punitive damages are available under 42 USC 1981. In this particular case, the Court concluded that petitioner's racial harassment claim was not actionable under Section 1981.

However, the Court indicated that petitioner's claim that respondent failed to promote her because of her race may be actionable under Section 1981, if the promotion gives rise to an opportunity for a new and distinct relation between the employer and the employee.

Reverse Discrimination and Affirmative Action

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

Facts:

The Medical School of the University of California at Davis instituted a special admissions program designed to assure the admission of a specified number of students from certain minority groups. The special program consisted of a separate admissions system operating in coordination with the regular admissions process.

Allan Bakke, a white male, applied to the Medical School in 1973 and 1974. His application was considered and rejected under the regular admissions process. In both years, applicants were admitted under the special program with grade point averages, MCAT scores and benchmark scores significantly lower than Bakke's. Bakke filed suit alleging that the Medical School's special admissions program operated to exclude him from the school on the basis of his race in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, the California Constitution and Title VI of the Civil Rights Act of 1964.

* No page numbers, Supreme Court Volumes not yet published.

Decision:

The Court held that classifications based on race and racial background, such as the special admissions program, are inherently suspect and thus call for the most exacting judicial scrutiny. Such classifications must be shown to be precisely tailored to serve a compelling governmental interest. In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that the use of the classification is "necessary" to the accomplishment of its purpose or the safeguarding of its interests.

The Court noted that it had never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals. It noted that in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations where racial preferences have been fashioned as remedies for those constitutional or statutory violations resulting in identifiable, race-based injuries to the individuals held entitled to the preference.

Although the Court found the attainment of a diverse student body to be a constitutionally permissible goal for an institution of higher education, it held that the assignment of a fixed number of places to a minority group not to be a necessary means toward that end.

The Court determined that the Medical School had failed to carry its burden of demonstrating that the classification was necessary to promote a substantial state interest.

United Steel Workers of America v. Weber, 443 U.S. 193 (1979)

Facts:

Kaiser Aluminum and the United Steel Workers entered into a collective bargaining agreement which included a voluntary affirmative action program that reserved fifty percent (50%) of the openings in an on-the-job training program for blacks. The voluntary program was to continue until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force. The program was designed to teach unskilled production workers the skills necessary to become craft workers. Weber, a rejected white applicant who had more seniority than the most junior black selected into the program, brought suit alleging that the filling of the positions pursuant to the affirmative action program resulted in junior black employees having preference over more senior white employees. He claimed this practice discriminated against him and other similarly situated white employees. He said it was in violation of Sections 703(a) and (d) of Title VII of the Civil Rights Act of 1964, which make it unlawful to discriminate because of race in hiring and in the selection of apprentices for training programs.

Decision:

The Court held that the prohibition against racial discrimination found in Section 703 must be read against the background of the legislative history of Title VII and the historical context from which it arose. Congress' goal was to open employment opportunities for minorities, especially blacks. It would thus be inconsistent with the legislative purpose to

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The Court noted that it had never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals. It noted that in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations where racial preferences have been fashioned as remedies for those constitutional or statutory violations resulting in identifiable, race-based injuries to the individuals held entitled to the preference.

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Decision:

The Court held that the prohibition against racial discrimination found in Section 703 must be read against the background of the legislative history of Title VII and the historical context from which it arose. Congress' goal was to open employment opportunities for minorities, especially blacks. It would thus be inconsistent with the legislative purpose to

interpret Title VII to prohibit private voluntary race conscious affirmative action programs designed to correct racial imbalances.

The Court found the Kaiser-USWA affirmative action plan to be permissible in that the plan:

1. was designed to break down old patterns of racial segregation and hierarchy,
2. did not unnecessarily trammel the interests of white employees, and
3. was a temporary measure and it was not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

Wendy Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)

Facts:

A provision in the collective bargaining agreement between the Jackson Board of Education and a teachers union provided that in the event of layoffs, teachers with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. As a result of this provision, non-minority teachers were laid off, while minority teachers with less seniority were retained.

The displaced nonminority teachers brought suit alleging violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Title VII of the Civil Rights Act of 1964, as amended, 42 USC 1983 and other Federal and State statutes.

Decision:

Eight of the nine Justices rejected the U. S. Justice Department's theory that affirmative action is permitted only as recompense for identified individual victims of specific acts of discrimination. The majority struck down the collectively negotiated agreement at issue, under which newly hired minority teachers were given preferential protection in layoffs. The Opinion of the Court (representing the views of three Justices) indicated that the articulated basis for affirmative action in this case--the need for role models--was insufficiently compelling, and, as well that: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." These Justices held that the school district's layoff plan was an unconstitutional means to accomplish even a compelling purpose, as there were less intrusive alternatives available. A fourth Justice filed a cryptic opinion concurring in the result. A fifth Justice concurred in the result but left open the question of whether such layoff plans could be a permissible means of effecting affirmative action. Her view was that this particular layoff plan was impermissible, agreeing with the Opinion of the Court that the hiring plan it complemented was based on improper considerations.

However, while the result was negative, there was nearly unanimous agreement (eight out of nine Justices) over the legitimacy of race-conscious affirmative action, if narrowly tailored. There was recognition that innocent parties may be required to share the burden of overcoming the effects of past discrimination. Hiring goals were mentioned favorably

as a less intrusive means of remedying discrimination. They would be appropriate, the Court noted, where actual discrimination could be demonstrated by a comparison of the racial composition of the governmental work force to the availability of qualified persons in the appropriate labor market.

Finally, the propriety of government's curing discrimination through voluntary action was reaffirmed.

Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501 (1986)

Facts:

Local 93, a union representing a majority of Cleveland's firefighters, challenged a Consent Decree entered into by the City of Cleveland and the Vanguards, an organization of black and Hispanic firefighters employed by the city, to resolve an action brought by the Vanguards pursuant to Title VII of the Civil Rights Act of 1964. The Consent Decree provided for the use of race-conscious relief and other affirmative action in the promotion of firefighters. The Union contended that the Consent Decree violated Section 706(g) of Title VII which provides that "no order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee...if such individual was refused admission, suspended or expelled, or was refused employment or advancement...for any reason other than discrimination on account of race, religion, sex or national origin in violation of" 42 USC 2000e-3(a). The union argued that Section 706(g) precludes a court from awarding relief under Title VII that may benefit individuals who were not actual victims of the employer's discrimination.

Decision:

The Court held that Section 706(g) does not apply to relief awarded in a consent decree. The Court recognized the voluntary nature of a consent decree as its most fundamental characteristic and concluded that voluntary adoption in a consent decree of race-conscious objectives that may benefit non-victims does not violate the congressional objectives of Section 706(g).

Local 23 of the Sheet Metal Workers' International Association, et al. v. EEOC, 478 U.S. 421 (1986)

Facts:

Following a trial in U.S. District Court, the union was found to have violated Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law by discriminating against non-white workers in recruitment, training and selection to the union. The District Court entered an order and judgment enjoining petitioners from discriminating against non-whites and enjoining the specific discriminatory practices engaged in by the union and imposed a remedial racial goal in conjunction with an admission preference for non-whites.

The union challenged the order of the court arguing that it could not impose race- conscious relief that may benefit individuals who are not identified victims of unlawful discrimination.

Decision:

The Court held that under Title VII, courts could order affirmative race-conscious relief "where an employer or labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." The U. S. Solicitor General's and the union's position that court ordered relief under Title VII must be limited to actual identified victims of discrimination was rejected. The Court did indicate that race-conscious relief is not always proper and that courts must honor Congress' concern when passing Title VII, "that race-conscious remedies not be invoked simply to create a racially balanced work force."

Johnson v. Transportation Agency, Santa Clara County, California, et al., 480 US 616 (1987)

Facts:

The Transportation Agency of Santa Clara County, California voluntarily adopted an affirmative action plan, which provided that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly under-represented, the agency was authorized to consider as one factor the sex of a qualified applicant. The plan was intended to achieve a statistically measurable yearly improvement in the hiring of women and minorities in job classifications where they are underrepresented. The long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force.

In selecting applicants for the promotional position of road dispatcher, the agency, pursuant to this plan, passed over petitioner, a male employee who had more experience and had received a higher score during the rating process, and promoted a female applicant.

Petitioner challenged the promotion alleging that the Agency impermissibly took into account the sex of the applicant in violation of Title VII of the Civil Rights Act of 1964, as amended.

Decision:

The opinion of Justice Brennan, joined by Marshall, Blackmun, Powell and Stevens upheld the promotion, finding that the plan was lawfully designed to cure "manifest imbalance" reflecting under- representation of women and others in "traditionally segregated job categories." The Court reaffirmed earlier holdings that such underrepresentation is to be determined by comparison of the availability of women and minorities in the relevant labor market with their representation in particular positions in the employer's work force.

The decision reiterated the Court's view that taking race into account as one of several factors in the hiring decision is consistent with the Civil Rights Act's objectives, and placed the burden on those challenging an affirmative action plan to prove its invalidity. Moreover, the Court held that the plan did not "unnecessarily trammel" the interests of employees not covered by it, as their discharge was not required nor was their advancement absolutely barred. Justice O'Connor concurred, but expressed the view that the statistical disparity

underlying an affirmative action plan must be sufficient to make out a prima facie case of race or sex discrimination, although actual discrimination need not be proved.

John W. Martin, et al. v. Robert K. Wilks, et al., 490 U.S. 104 LEd 2d 835, (1989)

Facts:

The Wilks respondents, a group of white firefighters, brought suit against the City of Birmingham, Alabama and the Jefferson County Personnel Board alleging that they were being denied promotions in favor of less qualified black firefighters in violation of Title VII of the Civil Rights Act of 1964, as amended. They argued that the promotion decisions were being made on the basis of consent decrees entered into between certain black employees and the City and the Board, in a previous Title VII action to which the respondents were not parties.

Decision:

In a 5-4 decision the Court rejected the doctrine of impermissible collateral attack, which immunizes parties to a consent decree from charges of discrimination by non-parties for actions taken pursuant to the decree. The Court ruled that a person cannot be bound by a judgment in a litigation in which he or she is not designated as a party, or has not been made a party by service of process. The Court held that a voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly settle, voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement.

Further, rejecting petitioners' arguments that a different result should be reached because the need to join affected parties would be burdensome and ultimately discouraging to civil rights litigation because of the possibility for inconsistent judgments, the Court noted that plaintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating and joining those who would be adversely affected if plaintiffs prevail.

City of Richmond v. J.A. Croson Company, 488 U.S.___, 102 LEd 2d 854, (1989)*

Facts:

The City of Richmond, Virginia adopted a business utilization "set aside" plan by ordinance which required non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises, defined as an enterprise at least 51 percent owned and operated by United States citizens who were blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts. Respondent, J.A. Croson Company, the sole bidder on a city contract, submitted a proposal that did not include sufficient minority subcontracting to satisfy the ordinance and requested a waiver of the set aside requirement. The city denied the request for a waiver and rebid the project. Respondent brought suit against the city

* No page numbers, Supreme Court Volumes not yet published.

alleging that the ordinance was unconstitutional under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

Decision:

The Court, reaffirming its decision in Wygant, held that classifications based on race and/or gender are suspect, and therefore, subject to heightened judicial scrutiny. The Court further reaffirmed that such classifications must be based on more that "societal discrimination"; they must be based on a judicial or administrative finding of prior discrimination.

The Court held that there was no evidence before the Richmond City Council to support a finding of identifed discrimination in the City of Richmond construction industry so as to demonstrate a compelling interest in the adoption of a "remedial" plan.

The Court criticized the city for adducing, as evidence of disparate treatment, a comparison of the percentage of contracts awarded by the city to minorities with the percentage of minorities in the local population. The Court noted that while statistical comparisons of the racial composition of an employer's workforce and the general population may be probative of racial discrimination in entry level positions, where, as here, special qualifications are necessary, the relevant statistical pool "must be the number of minorities qualified to undertake the particular task." The Court also faulted the affirmative action eligiblity of "Spanish-speaking, Oriental, Eskimo and Aleut persons" from anywhere in the country, finding a total absence of any evidence that such persons had suffered discrimination in Richmond.

Further, the Court found that it was almost impossible to assess whether the plan was narrowly tailored to remedy prior discrimination since it was not linked to identified discrimination in any way. However, the Court noted that there appeared to have been no consideration of race neutral means to increase minority participation in city contracting and that the 30 percent quota could not be said to be narrowly tailored to any goal except racial balancing.

Age Discrimination and the Bona Fide Occupational Qualification ("BFOQ") Defense

Usery v. Tamiami Trail Tours, Inc., 531 F2d 224, 12 FEP 1233 (5th Cir. 1976)

Facts:

Tamiami Trail Tours, Inc., an interstate and intrastate motor common carrier of passengers and baggage, had a policy of refusing to consider applications of individuals between the ages of 40 and 65 for initial employment as intercity bus drivers. When challenged, Tamiami claimed that the age requirement was a bona fide occupational qualification, an affirmative defense under Section 4(f)(1) of the Age Discrimination in Employment Act of 1967.

Decision:

The Court reaffirmed that in order to successfully assert the BFOQ defense the employer

had the burden of proving that it had a factual basis for believing, that all or substantially all members of the class excluded by the qualification would be unable to perform safely and efficiently the duties of the job involved. If it cannot show this, an employer may apply a reasonable general rule if it can demonstrate that it is impossible or highly impractical to deal with people on an individual basis, that is, there is no practical way to differentiate the qualified from the unqualified applicants in the class.

The second element of the employer's defense is "to show that the qualification is 'reasonably necessary' to the operation of the business"; that the "essence" of the business would be undermined by hiring individuals in the excluded group.

Discrimination on the Basis of a Handicap

Southeastern Community College v. Davis, 442 U.S. 397 (1979)

Facts:

Francis B. Davis, a licensed practical nurse with a serious hearing disability, was denied admission to the nursing program of Southeastern Community College to study to become a registered nurse. The College receives federal funds. Ms. Davis' application was rejected because the college believed that her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients.

Ms. Davis filed suit against the college alleging a violation of Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against "an otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap."

Decision:

The Court held that Section 504, by its terms, prohibits assumption of an inability to function in a particular context on the basis of an individual's handicap. An otherwise qualified handicapped person is one who is able to meet all of a program's requirements, including legitimate necessary physical requirements, in spite of his or her handicap.

The Court further held that Section 504 does not impose an affirmative action obligation on State agencies; Section 504 imposes no requirement on educational institutions to lower or to effect substantial modifications of standards to accommodate a handicapped person. The Court noted, however, that situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

Discrimination on the Basis of Sex

General Electric Co. v. Gilbert, 429 U.S. 125 (1976)

Facts:

General Electric provided a disability plan for all employees which excluded pregnancy disabilities from its coverage. A group of past and present female employees filed suit alleging that the exclusion constituted sex discrimination under Title VII of the Civil Rights Act of 1964.

Decision:

The Court found the plan to be non-discriminatory in that there was no risk from which women were protected and men were not, and no risk from which men were protected and women were not. There was no proof that the plan was worth more to men than women; gender-based discrimination does not result simply because an employer's disability plan is less than all-inclusive, that is, that it does not include compensation for the additional risk, unique to women, of pregnancy related disabilities.

Note:

In response to the Court's decisions in Gilbert and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), in 1978 Congress enacted Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended, (the Pregnancy Discrimination Act, 42 USC Section 2000e-(k), which provides that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated 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,..."

California Federal Savings and Loan Association, et al. v. Mark Guerra, et al., 479 U.S. 272 (1978)

Facts:

A receptionist employed by petitioner California Federal Saving and Loan Association (Cal Fed) took a pregnancy disability leave in January 1982. She attempted to return to work in April of that year, but was advised that her job had been filled and that there were no receptionist or similar positions available. Cal Fed had a facially neutral leave policy that permits employees who have completed three months of service to take unpaid leaves of absence for a variety of reasons, including disability and pregnancy. Cal Fed reserved the right to terminate an employee if a similar position is not available upon their return from a leave of absence.

The receptionist filed a complaint with California's Department of Fair Employment and Housing, which issued an administrative accusation against Cal Fed, charging it with

violating a California statute that:

1. required employers to provide female employees unpaid pregnancy disability leave of up to 4 months and
2. was authoritatively construed by the Fair Employment and Housing Commission as requiring reinstatement of employees returning from such pregnancy leave unless the job previously held was no longer available due to business necessity.

Cal Fed brought this action challenging the California statute on the basis that it is inconsistent with and pre-empted by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.

The Pregnancy Discrimination Act added pregnancy to the definition of sex discrimination prohibited by Title VII.

Decision:

The Court held that the California statute is not pre- empted by Title VII, as amended by the Pregnancy Discrimination Act; it agreed with the conclusion of the Court of Appeals that Congress intended the Pregnancy Discrimination Act to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."

The Court found that Title VII, as amended by the Pregnancy Discrimination Act, and the California statute are not inconsistent, that they share a common goal, "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of ... employees over other employees."

Further, the Court determined that the California statute did not require the doing of an act which is unlawful under Title VII. "The statute does not compel California employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers."

City of Los Angeles v. Manhart, 435 U.S. 702 (1978)

Facts:

The Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees. This was based on a determination by the department, after a study of mortality tables, that its female employees would live a few years longer than its male employees. The longer life expectancy resulted in a greater pension cost for the average retired female. Respondent brought this suit on behalf of women employed or formerly employed by the Department alleging a violation of Title VII of the Civil Rights Act of 1964, as amended.

Decision:

The Court held that the basic policy of Title VII requires the focus to be on fairness to individuals, rather than classes: Title VII makes it unlawful "to discriminate against any individual..." (emphasis added), precluding treatment of individuals as simply components of a racial, religious, sexual or national class.

Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)

Facts:

The State of Arizona offered its employees the opportunity to enroll in a deferred compensation plan. All of the companies selected to offer investment opportunities to the employees used sex based mortality tables to calculate monthly retirement benefits to be paid to employees whereby a man would receive larger monthly payments than a woman who deferred the same amount of compensation and retired at the same age because women live longer on the average than men. The tables did not incorporate such other longevity factors as weight, smoking habits, medical or family history or alcohol consumption. An investor in the plan brought suit alleging it was in violation of Title VII of the Civil Rights Act of 1964, as amended.

Decision:

Use of such tables was held by the Court to constitute discrimination on the basis of sex in violation of Title VII.

Price Waterhouse v. Ann B. Hopkins, 490 U.S.___, 104 LEd 2d 268, (1989)*

Facts:

Respondent Hopkins, a senior manager in an office of Price Waterhouse, a nationwide professional accounting partnership, was proposed by the partners in her office for partnership. The decision on her candidacy was postponed and the following year she was not reproposed for partnership. Respondent brought suit against Price Waterhouse under Title VII of the Civil Rights Act of 1964, as amended, alleging that the firm had discriminated against her on the basis of gender in its decisions regarding partnership.

The District Court found that Price Waterhouse had unlawfully discriminated against respondent on the basis of gender by consciously giving credence and effect to partners' comments about respondent's aggressive behavior that resulted from gender stereotyping. Further, although the Court found that Price Waterhouse legitimately and fairly emphasized interpersonal skills in its partnership decisions and that the firm had not fabricated its complaints about respondent's interpersonal skills as a pretext for discrimination, the Court held that Price Waterhouse had not carried the heavy burden of proving, by clear and convincing evidence, that it would have placed respondent's candidacy on hold, absent the discrimination.

The Court of Appeals affirmed the decision of the District Court, but held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant may avoid liability by clear and convincing evidence that it would have made the same decision in the absence of discrimination.

* No page numbers, Supreme Court Volumes not yet published.

The Supreme Court granted review of the case for the limited purpose of resolving a conflict concerning the respective burdens of proof of a plaintiff and a defendant in a suit under Title VII, when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives.

Decision:

The Court found that Title VII meant to condemn not only those decisions based solely on illegitimate factors but also those employment decisions based on a mixture of legitimate and illegitimate considerations. The Court held that in all circumstances, except when gender is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business or enterprise, a person's gender may not be considered in making decisions that affect her. However, finding that another important aspect of Title VII is its preservation of an employer's freedom of choice, the Court concluded that an employer will not be liable if it can prove by a preponderance of the evidence that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. Once a plaintiff shows that the employer actually relied on her gender in making its decision, the employer must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Florida, et al. v. Long, 487 U.S.___, 101 LEd 2d 206, (1988)*

Facts:

Petitioners, a class of retired male Florida state employees who retired prior to Florida's adoption of unisex actuarial tables for all employees in the Florida Retirement System retiring after August 1, 1983, brought suit alleging that Florida had violated Title VII of the Civil Rights Act of 1964 by operating pension plans that discriminated on the basis of sex.

Decision:

The Court decided that recalculation of pension payments to correct previous unlawful gender bias need not be retroactive to 1978, when the Court first decided in City of Los Angeles v. Manhart that pension contributions must be collected on a non-discriminatory basis. The plaintiffs had argued that, although the Court had not addressed the benefits issue until 1983, the earlier decision on contributions had put employers on notice that all aspects of pension plans must be handled on a unisex basis.

* No page numbers, Supreme Court Volumes not yet published.

Sexual Harassment

Meritor Savings Bank, FSB v. Michelle Vinson, 477 U.S. 57 (1986)

Facts:

Michelle Vinson, a former employee of Meritor Savings Bank, brought an action against the bank alleging that during the four years she had been employed there she had "constantly been subjected to sexual harassment" by Sidney Taylor, a vice president of the bank and manager of one of its branch offices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Decision:

The Court held unanimously that Title VII's prohibition against sex discrimination is violated by sexual harassment even when the victim does not incur tangible loss of an economic character. Title VII guarantees employees "the right to work in an environment free from discriminatory intimidation, ridicule and insult" and is violated where it is demonstrated "that discrimination based on sex has created a hostile or abusive work environment."

The Court also rejected the defense that "voluntary" sex- related conduct cannot constitute sexual harassment; affirming that the crucial element of a sexual harassment claim is that the advances were "unwelcome." The decision indicates that, in determining that criterion, evidence of a complainant's provocative speech or dress is relevant.

While deciding that the lower court had erred in concluding that employers are automatically liable for sexual harassment engaged in by supervisors, the court indicated that lack of notice of the conduct would not necessarily insulate the employer. Legal principles relating to "agency" should be followed in that regard.

Major State Court Cases

William L. McGowan, and the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO v. Karen S. Burstein, et al., 71 NY2d 729 (1988)

Facts:

Plaintiffs, the Civil Service Employees Association, instituted an action against the New York State Department of Civil Service challenging the department's zone scoring of written tests. In zone scoring, different "raw" test scores, corresponding to the number of correct answers, are assigned the same final test score. Candidates with the same zone score are considered equally eligible for appointment. Plaintiffs claimed that zone scoring per se violates Article V, Section 6 of the New York State Constitution which requires that, as far as practicable, the merit and fitness of candidates for appointments and promotions in the civil service must be ascertained by examination which, as far as practicable, must be competitive. They allege that the use of zone scoring destroys the competitiveness of the examination process.

Decision:

The State Court of Appeals, reversing an order of the Appellate Division, Third Department, granted summary judgment to the state defendants, upholding the constitutionality of the department's use of zone scoring.

The Court held that "competitiveness is not a constitutional end in itself" but rather that "merit selection is the overarching constitutional goal and command." The Court recognized the desirability of an examination based, objective selection system; but also recognized the need in properly justified cases to consider traits not measured in a written examination and to discount factors that are unrelated to a candidate's fitness for a position, "not only because fitness is the object of the merit system, but also because such factors may discriminate among equally qualified candidates along ethnic, racial or sexual lines," in violation of the State Human Rights Law and the Federal Civil Rights Act of 1964.

Tonee Chilles, et al. v. Karen S. Burstein, et al., 137 AD2d 81 (Third Department, 1988)

Facts:

The plaintiffs, candidates in a civil service examination for the position of Treatment Team Leader, challenged the constitutionality of the Department of Civil Service's use of zone scoring on the written test portion of that examination. They also challenged the use of a nomination procedure to select candidates who were successful on the written test to take the oral portion of the examination.

Plaintiffs argued that both zone scoring and the nomination procedure violated Article V, Section 6 of the New York State Constitution. They argued that their use was discriminatory under the State Human Rights Law, insofar as the department instructed local supervisors to make nominations on the basis of "affirmative action" considerations.

Decision:

The Appellate Division, Third Department, affirmed the lower court decision which held that the particular examination, to the extent it used zone scoring and the nomination procedure in conjunction, violated the constitutional merit and fitness requirements.

The Appellate Division found that the wide size of the zones had a substantial blurring effect on the relative merit of candidates and that the nomination procedure further diluted the purposes behind the merit and fitness requirement of Article V, Section 6. Further, the Court indicated its view that the Department had failed to substantiate its claim that affirmative action purposes were achieved.

Rex Paving Corp. v. Franklin White, et al., 139 AD 2d 176 (Third Department, 1988)

Facts:

Plaintiff, a corporation which supplies materials and services as both a contractor and a subcontractor for public improvement projects, sought a judgment declaring that affirmative action programs implemented by the State's Office of General Services and the Department of Transportation in favor of disadvantaged business enterprises (DBE) were unlawful because, among other things, they were implemented without legislative authority and they deny plaintiff its rights to equal protection under the New York State Constitution.

Decision:

While noting that it is well established that the Executive may not mandate an affirmative action program absent a specific legislative grant of authority, the Court found that the necessary authorization existed here.

The Court, in addressing the equal protection issue, determined that since the programs establish remedial racial classification, they must be subjected to strict judicial scrutiny. The Court then applied the two-part analysis, delineated in Wygant: whether the racial classification is justified by a compelling governmental interest; and if so, whether the challenged state action is "narrowly tailored" to achieve that goal.

While recognizing that the State has a vital interest in addressing the underrepresentation of women and minorities in the construction industry, the Court found that a generalized concern for remedying "societal discrimination not traceable to the State's own action 'is not a sufficient justification'". Affirmative action programs must be premised on "convincing evidence that remedial action is warranted." However, the Court interpreted Wygant as not requiring the State to establish actual instances of prior unlawful discrimination. Rather, statistical evidence of a disparity between participation of DBE's in public contracts and the percentage of qualified DBE's in the relevant labor market would be sufficient.

Finally, the Court found that the programs were "narrowly tailored" in that they did not establish a mandatory set-aside, but required contractors to use "good faith" in reaching goals which varied depending on demographics, etc. As the programs were further subject to annual review, the lack of a specific duration limit was found not to be fatal.

Gerald J. Hase, Jr. v. New York State Civil Service Department, ___AD2d ___(Third Department, 1989)*

Facts:

Plaintiff, a white male on civil service eligible lists for Legal Assistant I and II and Beverage Control Investigator Trainee and Beverage Control Investigator Trainee (Spanish Speaking) challenged, as discriminatory, certain hiring actions taken with respect to such lists. Plaintiff alleged that the actions were taken pursuant to Governor Cuomo's Executive Order No. 6, which established an affirmative action program for State agencies, and he alleged that that program is contrary to the State constitutional requirement that appointment to the State Civil Service be based on merit and fitness.

The Supreme Court judge converted the proceeding to an action seeking a judgment declaring that Executive Order No. 6 violates the State constitutional merit and fitness requirement.

Decision:

The Appellate Division affirmed the State constitutionality of Governor Cuomo's Executive Order No. 6 which establishes an affirmative action program for the executive branch, under the supervision of the Department of Civil Service.

The Court held that the aim of Executive Order No. 6 was to "enlarge the pool of persons eligible for employment", finding that the Order does not refer to quotas or mandate hiring preferences. Thus, the Court held, Executive Order No. 6 is legislatively authorized pursuant to the State's Human Rights Law.

* Decision not yet Published.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
POLICY BULLETIN #88-03

0400 Affirmative Action / 1000 Recruitment

August 11, 1988

REIMBURSEMENT OF MOVING EXPENSES FOR PROTECTED CLASS EMPLOYEES

In view of the State's commitment to Affirmative Action, and based on recent legal opinion, and in consultation with the NYS Division of the Budget, the Department of Civil Service is announcing a new policy relating to the reimbursement of moving expenses for candidates receiving an original appointment (pursuant to State Finance Law §204).

POLICY

In addition to the traditional requests in which we determine that there is a shortage of qualified candidates, we will now also consider agency requests for reimbursement for the moving expenses of protected class candidates where either of the following criteria are met:

- There is a shortage of qualified protected class candidates, or
- There is a shortage of protected class incumbents in the title and agency

PROCEDURES

Requests must be submitted in writing to your Staffing Services Section. Requests must contain information about the number of protected class candidates available, and/or the number of protected class incumbents in the title as compared to the number of white males in the title.