The original documents are located in Box 12, folder "Equal Employment Opportunity Commission (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Some items in this folder were not digitized because it contains copyrighted materials. Please contact the Gerald R. Ford Presidential Library for access to these materials.

POWELL, JOHN

Material concerning John Powell, former Chairman of the EEOC, is filed in the safe under

"Personnel -- Powell, John"

EEOC

THE WHITE HOUSE

WASHINGTON

February 10, 1975

Dear Mr. Schubert:

Thank you very much for your memorandum about the effects of layoffs on minority and women workers.

The subject is an important one, but contrary to the BNA report, our office is not presently studying the problem. I have chided the BNA reporter about misinterpreting my remarks. He asked me questions on the subject, but I thought I had made it evident that the subject involved certain issues in which our office probably would get involved only if and when legislative recommendations came to the White House for consideration.

Whenever you might think it helpful for someone on the White House legal staff to participate in any particular way, I shall be most happy to respond.

Sincerely,

Philip Buchen

Philip W. Buchen
Counsel to the President

The Honorable Richard F. Schubert
Under Secretary
U. S. Department of Labor
Washington, D. C. 20210

cc: The Honorable John H. Powell, Jr.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

February 1, 1975

MEMORANDUM FOR PHILIP W. BUCHEN
COUNSEL TO THE PRESIDENT

Dick Schubert has provided me with a copy of his memo of January 30, 1975 informing you of efforts being undertaken by U.S. Department of Labor officials to develop alternatives designed to avoid or lessen the impact of layoffs on women and minorities without violating fair employment practice requirements. I fully concur and have initiated similar efforts here at EEOC.

Recent experience suggests, however, that despite such efforts, layoffs may continue to occur. In view of this, the efforts described in Mr. Schubert's memo should be supplemented by an examination of the feasibility of employing strategies involving the use of incentives for reducing the number of work hours rather than the number of employees. In addition, a formula should be devised for use in those instances where layoffs prove unavoidable. This formula ought to be thoughtfully tailored so as to avoid a grossly disparate impact on women and minorities.

It is important that all who have an interest in how the balance will ultimately be struck, feel that the interest of their particular group will be identified, understood and taken into account. In short, this administration's approach must be one that is both fair and has the appearance of being fair.

I would welcome the opportunity of discussing this question in more detail with you and other appropriate officials.

John H. Powell, Jr.
Chairman

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WASHINGTON, D.C. 20210

MEMORANDUM FOR

PHILIP W. BUCHEN
COUNSEL TO THE PRESIDENT

I read your comments in BNA that you are directing your staff to study the effect of layoffs on minority and women workers. You alluded to the three court cases which gave EEO considerations priority over contract seniority and thus have the effect of pitting one group of workers against another group of workers. You stated you had asked the Justice Department for ideas on how to resolve this problem.

I thought you would be interested to know that at the Department of Labor we have been studying this problem since August 1974 and have been trying to develop alternatives to layoffs whereby employers can keep more employees on the job, still cut labor costs and yet not violate the various fair employment practice laws or other statutory provisions. Solicitor William J. Kilberg, Wage Hour Administrator Betty Southard Murphy and I have been, simply stated, trying to find ways to ameliorate the economic impact -- within existing resources -- (1) through the immediate modification of certain regulations in the Wage Hour or EEO fields; (2) by making accommodations where possible within the statutory framework and (3) by, as stated above, developing alternatives to layoffs. I'm attaching hereto a three page summary published in Prentice-Hall's Report Bulletin No. 15, January 14, 1975 which will give you a couple of examples.

We have met separately with several union leaders to discuss the establishment of a small discussion group (under 25) composed of union, management and government people who would meet to see what could be done to achieve the above objective. The union officials with whom we spoke are in complete agreement with this proposal. We have also had a number of discussions with John Powell, EEOC

Chairman, who is also in agreement. Mr. Powell plans to take part in the meetings himself and has delegated his Acting Executive Director to serve as liaison to Mrs. Murphy.

Although we have no way of knowing how successful we will ultimately be, I thought you would certainly want to know what we are doing. I will be glad to meet with you to discuss this further and to give you more details.

Dick Schubert

Richard F. Schubert
Under Secretary

Attachment - Prentice-Hall Report No. 15

Personnel Management—
Policies and Practices
Report Bulletin 15

Volume XXII January 14, 1975

Englewood Cliffs *Prentice-Hall* New Jersey

Contests Spur Peak Performance Among Company First-Aiders

Every company knows how difficult it is to avoid on-the-job accidents, no matter how many precautions you take. One thing you can do to minimize the risk is to have employees trained and ready to give first aid in an emergency until professional help is on the scene. But you must make sure first-aiders' skills and team coordination are maintained at peak levels, so they'll function expertly when you're counting on them most. For a report on how one company ensures top notch performance and teamwork among first-aiders, turn to NEW IDEAS ¶258.

Labor Department Reminds Employers of Fair Employment Obligations in a "Downward Economy"

[¶15.1] In the grip of an economic slowdown, most companies make one of two choices: To retain their current workforce even though higher costs may have a severe impact on the financial well-being of the company, or—unpleasant as the prospect may be—to lay off substantial numbers of employees. But are there ways to keep employees on the job and still reduce labor costs? And if some layoffs or other cost reductions can't be avoided, how can employers make sure their policies don't violate anti-discrimination or other federal labor laws? In a recent speech before

ALSO IN THIS ISSUE

Recruiters will keep busy in 1975 ¶15.2
Unemployment insurance compensation extended ¶15.3
Computer service matches jobs with engineers ¶15.4
Check your absence rates against public health survey figures ¶15.5
Top execs' salaries, bonus arrangements surveyed ¶15.6
Higher wages in "veterans only" training program may violate Equal Pay Act ¶15.7
Survey of paid time off for religious holidays ¶15.8
Employer's compulsory maternity leave policy was sex discrimination ¶15.9
Federal bonding program reports low default rate ¶15.10
Health insurance tops youth's most wanted fringe benefit list ¶15.11
OSHA inspections find 21% in compliance ¶15.12
Coming Events ¶15.13
Annual competition keeps first aid teams on their toes ¶258

Published bi-weekly by Prentice-Hall, Inc., Sylvan Ave., Englewood Cliffs, N.J. 07632. Subscription rate $174 per year. Second Class Postage paid at Englewood, N.J.

the Council on Labor Law and Labor Relations of the Federal and New York State Bar Associations, the U.S. Labor Department Wage-Hour Administrator, Betty Southard Murphy, offered some advice.

How to avoid layoffs. Ms. Murphy stressed to Council members that more time must be spent in finding ways of resolving the layoff problem in order to keep as many workers as possible on the payroll. She gave examples of solutions approved by the Wage-Hour Division for two companies facing layoffs:

► *Intermittent, shorter work periods.* "One company had already laid off 2,000 of its 9,000 employees," Ms. Murphy said. "They wanted to try closing their plant for one week a month for three months in order to avoid more layoffs. During the plant closing all employees, from the president on down, would suffer the same proportionate reduction in salary. Nobody would be paid, including the chief executive officer." Wage-Hour examined all the facts in this particular case and gave the staggered work plan the green light.

► *Plant-wide wage reductions.* In another recent situation described by Ms. Murphy, an employer sought Wage-Hour approval for a plan to reduce certain wages plant-wide to avoid layoffs. The union had agreed to the reduction. The reduced wages would still be well above the minimum wage, but the employer was concerned about possible equal pay violations. After examining the facts, Wage-Hour approved the plan.

Conflicts with equal employment obligations. The Wage-Hour Administrator warned that the economic downturn is going to bring more Title VII charges, more age discrimination complaints and more equal pay complaints. "It's already happening," she said. There were 3,040 new age discrimination complaints filed in 1974, compared with 1,031 in 1969. The same thing is happening with equal pay complaints, she noted. In 1974, EPA complaints were filed against 2,864 companies, compared with 385 in 1969.

⋙ **WATCH OUT FOR AGE DISCRIMINATION →** According to Ms. Murphy, "The potential liabilities under the Age Discrimination in Employment Act are tremendous." Wage-Hour investigators have found that reductions in force adversely impact on older workers. The issue would be, she said, "whether these layoffs are discriminatory *per se.*" Her advice: It makes good business sense for employers to examine their employment practices, from recruitment to retirement, to see whether their often long-standing policies result in discrimination against older workers. [See ¶14.5 for a recent example.]

The Wage-Hour Administrator also pointed out three recent cases "which may be signalling a trend where plant layoffs or cost reductions conflict with an employer's fair employment obligation." She indicated that although these court decisions involve Title VII violations, the same principles could easily apply to Age Discrimination in Employment violations and Equal Pay Act violations. The cases:

► *Employees could be "bumped" to lower jobs.* A Virginia District Court ruled that employees who'd been discriminated against under Title VII were entitled, under a Court-established company-wide seniority setup, to "bump" other employees out of their jobs into lower classifications. The Court said it realized that the bumping "will undoubtedly create morale problems, if not immediate economic problems for those displaced" but found that relief was warranted because of the discrimination. (The displaced employees had their wages "red circled" until the wage level for their new jobs reached the level of their present pay.) [Patterson v. American Tobacco Co. (E.D. Va., 9-26-74) No. 104-73-R].

► *Reinstatement with back pay.* Ms. Murphy noted that the second case, involving an employer who'd illegally laid off employees, could also have "far reaching implications on ADEA and other Civil Rights statutes." A Louisiana District Court awarded these employees back pay and ruled against further layoffs at that time. The Court said that "work was to be allocated among the entire workforce until attrition took care of any excess employees." During the interval, all employees must be paid for a 40 hour week, whether they work 40 hours or not. Future layoffs, said the Court, must be allocated between employees who had been discriminated against and those who had not "in accordance with their respective percentage of the workforce at the time the layoffs are made." [Watkins v. Steel Workers Local 2369 (E.D. La. 1974) 369 F. Supp. 1221].

► *Equal employment agreement wins first round over seniority rights.* The third case, according to Ms. Murphy, "shows the dilemma an employer faces in a tight economy when it has an affirmative action agreement with a federal agency and a collective bargaining contract." A federal district court in New Jersey ruled that the company's agreement with the Equal Employment Opportunity Commission to increase its percentages of minority and female workers would be violated if the employer followed the seniority provisions of the labor contract when laying off workers for economic reasons. The Court said the EEOC agreement prevails over contract seniority provisions. The union is appealing, arguing that a company-wide seniority system is bona fide even if it has an adverse effect on employees who might have been previously discriminated against [Jersey Central Power & Light Co. v. IBEW Local 327 (D. N.J., 9-15-74), No. 74-1083].

➠ **MANAGEMENT v. GOVERNMENT PREROGATIVES** → Employment and personnel decisions are management prerogatives, Ms. Murphy noted, but when these are based on "artificial barriers," federal anti-discrimination laws "circumscribe such decisions." But the law is not inflexible: While the Administrator reminded Council members of the Wage-Hour Division's function as an enforcement agency, she stressed that the Division would look "very, very seriously" at the possibility of lawful accommodation with employers to avoid layoffs in a downward economy, and would welcome employer suggestions on viable alternatives.

More on the Age Discrimination Law is at ¶2131 et seq. Information on the Civil Rights Law is at ¶2111 et seq. Details on the Equal Pay Act are at ¶17,309. Also see ¶2305; 5601 et seq.

THE WHITE HOUSE
WASHINGTON

EEOC File

February 12, 1975

TO: PHILIP BUCHEN

FROM: STAN SCOTT SS

For Your Information

For Phil
SS.

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC 20405

FEB 11 1975

Honorable John H. Powell, Jr.
Chairman, Equal Employment
Opportunity Commission
Washington, DC 20506

Dear Mr. Chairman:

It has been brought to my attention that the Equal Employment Opportunity Commission (EEOC) very recently distributed a limited number of copies of a purportedly historical pamphlet of its activities since the passage of the Civil Rights Act of 1964, entitled "The First Decade."

The concept and purpose of developing and issuing the document appear to me to be commendable and very useful to those who, like I, are deeply concerned in making equality of opportunity a reality in America.

However, I am deeply concerned, and must take the strongest exceptions to what I consider the reprehensible and untrue statements included in Chapter Five, concerning the actions General Services Administration (GSA) took prior to the signing of the consent decree on January 18, 1973 by American Telephone and Telegraph Company (AT&T), the EEOC and the Department of Labor.

On September 19, 1972, the General Services Administration, acting through its Director of Civil Rights, Mr. E. E. Mitchell, with my concurrence, entered into an agreement with AT&T which put into effect a model Affirmative Action Plan (AAP), a model Upgrade and Transfer Plan and a model Qualifications and Job Briefs Handbook.

There were specific points of criticism leveled against GSA in regards to the legality of the signing and the merits and sufficiency of the AT&T Agreement and model AAP.

On September 29, 1972, a Task Force was appointed to review for legal and procedural deficiencies, the nature and circumstances of the affirmative action plan agreement executed on September 19, 1972, between GSA and AT&T. In October 1972, a task force report was submitted to the White House. In summary, the Task Force concluded that the GSA/AT&T agreement was in conformance with applicable law and procedures, and did make significant progress toward the goal of equal employment opportunity.

Mr. William J. Kilberg, at the time Associate Solicitor for Labor Relations and Civil Rights, made the following statement during the press briefing regarding the signing of the consent decree between AT&T, the EEOC and the Department of Labor, on January 18, 1973:

> "I think it should be mentioned that the General Services Administration had undergone negotiations with the Bell company for some one year before the Department of Labor and the Office of Federal Contract Compliance became involved. And we owe a great debt of gratitude to the General Services Administration for the year of investigation and hard work that they did and hard negotiation which they did with the company. We use the opportunity of their work, the opportunity to build upon their work, in an effort to try to coordinate activities that we were aware were ongoing."

These extracted statements of Mr. Kilberg are significantly different from the allegations attributed "to an EEOC lawyer" on page 28, Chapter Five, of "The First Decade."

GSA has in the past, is doing so now, and will continue in the future to cooperate with the EEOC, as well as any other organization working toward the goal of true equal opportunity. I strongly maintain, however, that the distribution of "The First Decade," as currently written, is unjustly critical of, and also impugns, the integrity of a sister government agency. This could be very damaging to the whole government-wide effort.

I therefore desire, that since the document contains erroneous statements that malign not only GSA but also a major corporation, that all copies distributed to date be recovered, and rewritten, and factual copies issued to replace same.

Sincerely,

Arthur F. Sampson
Administrator

cc: Hon. Stanley S. Scott - White House ✓

THE WHITE HOUSE

WASHINGTON

March 17, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN

SUBJECT: Equal Employment Opportunity Commission (EEOC)

1. Background: Conditions of mismanagement and dissension within the EEOC and its staff have led your staff to recommend to you that changes be made in the composition of the Commission (now consisting of four members, including Chairman John Powell, with one Democrat vacancy) and in the position of General Counsel (now held by William Carey).

The statute (42 U.S.C.A. §2000e et. seq.) provides:

> "Members of the Commission shall be appointed by the President by and wi th the advice and consent of the Senate for a term of five years . . . The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman."
>
> "There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years."

Chairman Powell's term on the Commission started 15 months ago, and it does not expire until 1978. Counsel Carey took office in early 1973, and his 4-year term does not expire until 1979.

The statute makes no provision for removal from office of any of the Presidential appointees. However, the President has been held in the courts to have unlimited authority to remove any appointed official within the Executive branch. This principle was last restated

by the Supreme Court in a decision of 1926, and by a Circuit Court of Appeals in 1940. Yet this principle has been departed from in Supreme Court decisions of 1935 and 1958, which involved appointees to an independent regulatory agency or to one having adjudicatory powers.

It is the opinion of the Department of Justice that EEOC is not an independent regulatory agency or one having adjudicatory powers. Its functions are primarily to investigate and conciliate complaints of discrimination, although it is also entitled when it finds probable cause to bring court actions to have complaints adjudicated. Therefore, it is the further view of DOJ that you have removal power over the persons in question, based on the present state of the case law, but they do believe there is risk that litigation of the issue may in today's climate bring a contrary holding. Only on your authority to designate another member of the Commission as Chairman would there be no risk of litigation, because this designation is not for any specified term.

Although the statute is silent even on removal for cause, it could be argued that a better case for removal authority could be made if you acted to remove for cause. However, the DOJ raises a note of caution that a court may still require administrative due process before upholding removal for cause and could review the adequacy of the administrative finding of cause warranting removal.

On the question of whether an appointee who claims he has been unlawfully removed may get preliminary injunctive relief, the answer in the past would have been he could not because of his adequate remedy at law for damages. But as you know courts are currently giving unprecedented early injunctive relief, and the DOJ is concerned on this issue.

2. Positions taken by the appointees.

With much help from Dick Cheney and Bill Walker, I have sought the immediate resignations of Powell as both Chairman and Commissioner and by Carey as General Counsel. Carey says he will resign but only after Powell resigns and his resignation is announced. He contends that otherwise he can only be removed for cause. Powell indicates he may resign as Chairman on

Wednesday, because he knows you can readily remove him from that office, but he would only resign as a Commission member if and when he found another acceptable opportunity. He too thinks he is protected from removal except for cause.

3. Options

a) Send removal letter immediately explaining the concerns which have led to your actions but not predicating the removal on any administratively determined cause.

Pro argument:

-- A resolution quickly of two major personnel problems which if coupled with top-notch replacements could lead to a much improved functioning of the Commission and a reduction in its vast case backlog.

Con arguments:

-- Risk of litigation.

-- Public reaction from those who would regard the steps as precipitous and unfair.

-- Congressional offense at your defying the statutory terms of the appointees.

b) Removal only after administrative hearings and findings of adequate casue.

Pro arguments:

-- Avoids risk of losing litigation on due process issue.

-- Better public and Congressional reaction.

Con arguments:

-- Delay and more turmoil before hearings can be completed.

-- Uncertainty over appropriate mechanism for hearings and findings when the arguments and evidence are likely to be extensive and confusing.

c) Removal of Powell as Chairman, interim designation of another member as acting Chairman, and naming of new Republican, when the next position for such an appointee opens in May 1975, who would be truly qualified to be designated as Chairman.

Pro argument:

-- Avoids risk of litigation and most risk of adverse public and Congressional reaction.

-- Would still permit trying to get resignations by persuasion.

Con argument:

-- Leaves prime sources of trouble in position to continue making difficulties.

4. Decision

Approve option "a" _____.

Approve option "b" _____.

Approve option "c" _____.

See me to discuss _____.

FOR IMMEDIATE RELEASE MARCH 19, 1975

Office of the White House Press Secretary

EXCHANGE OF LETTERS
BETWEEN THE PRESIDENT
AND
THE HONORABLE WILLIAM A. CAREY
GENERAL COUNSEL
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

March 19, 1975

Dear Mr. Carey:

It is with sincere gratitude for your devoted service to our Nation that I accept your resignation as General Counsel of the Equal Employment Opportunity Commission, effective on this date, as you requested.

For nearly three years, you have directed the office of the General Counsel with energy, skill and a strong sense of purpose. Under your leadership, landmark decisions have been reached which have broadened the economic opportunities of all Americans and have effectively enlisted the positive assistance of employers in identifying and correcting discriminatory employment systems. Your personal contributions in this regard have been significant, and you have my heartfelt gratitude.

Now as you depart, I hope you will always look back with a special sense of satisfaction on your years with the Equal Employment Opportunity Commission. You have established a record of accomplishment in which you can take pride, and you leave with my best wishes for every success and happiness in the years ahead.

Sincerely,

GERALD R. FORD

March 17, 1975

My dear Mr. President:

I hereby offer my resignation as General Counsel of the Equal Employment Opportunity Commission effective upon delivery of this letter to you.

more

It has been a privilege for me to serve in this capacity and to develop the legal staff of the Commission to its present size and to its present outstanding capabilities. At this time I have completed the responsibilities for recruiting a much enlarged staff of lawyers and establishing the policies and procedures to carry out the enforcement powers of the Commission on a broad scale.

The reason I am resigning now, and without delay, is to encourage immediate steps on the part of the Administration which will strengthen the composition of the Commission and increase the effectiveness of its work.

I wish to express my faith in the future of the Equal Employment Opportunity Commission because of your strong desire to advance the purposes for which it was created.

Sincerely,

William A. Carey
General Counsel

# # # #

EEOC

THE WHITE HOUSE

WASHINGTON

March 27, 1975

Dear Mr. Brown:

Thank you very much for your letter commending Dr. Marjorie H. Parker for appointment to the Equal Employment Opportunity Commission.

I note you also sent the same letter to Mr. William Walker whose primary responsibility is to consider recommendations of this type and I am sure he will give your letter careful consideration.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Mr. Leonard S. Brown, Jr.
1515 Ogden Street, N. W. #203
Washington, D. C. 20010

1515 Ogden Street, N. W., #203
Washington, D. C. 20010

March 24, 1975

Philip W. Buchen, JD
Counsel To The President
The White House
Washington, D. C. 20500

Mr. William Walker
Chief of Personnel
The White House
Washington, D. C. 20500

Gentlemen:

I am writing for the purpose of recommending to you the name of Dr. Marjorie H. Parker, 3115 Fessenden Street, N. W., Washington, D. C. 20008, to be a member and/or Chairman of the Equal Employment Opportunity Commission (EEOC).

Dr. Parker has freshly, or recently, completed a tour of tenure on the immediate past Presidentially-appointed City Council of the District of Columbia. Dr. Parker's qualifications, and equally well her commitment to equal and "human rights" for all Americans regardless of sex, religion, color, national origin, or station in life, are encompassed in the District of Columbia's Regulation No. 73-22 ("A Regulation Governing Human Rights - Title 34").

Dr. Parker's commitment to human, equal rights and equal employment is not only illustrated, or demonstrated, if you will, in the introduction of this regulation while she sat on the D. C. City Council, but also by her piloting the regulation through the "legislative process," to be signed into local law by Mayor Walter E. Washington on November 16, 1973.

Regulation No. 73-22 of the District of Columbia, as a so-called human, civil rights act, is altogether modern, far-reaching, all-embracing, and broadly-sweeping. Sociologically speaking—and I am somewhat of a social scientist (a sociologist, social worker, political scientist, historian, theologian-philosopher, psychologist, economist, writer, and lawyer to boot), Washington, D. C., a mixed, Southern community with a "dash" here-and-there of the MidWest and industrial North endemic milieu, was already "ready" prepared for the forthcoming regulation in its acceptance, acquiesce, and implementation. Dr. Parker's District of Columbia Regulation No. 73-22 serves as a local prototype for national, statewide, and municipal human rights organic acts guaranteeing to ALL AMERICANS their national

born human rights--to be free of all biases, prejudices, and discriminations of all kinds in our native, free, and endemic democracy.

Dr. Parker is the wife of the Honorable Barrington D. Parker, United States District Judge, United States District Court, Washington, D. C. She has been, and is, relevant to her own sex, to us so-called "male 'chauvinists,'" to her own black race, to her own profession, to her alma mater, to the nation as a whole, and to her own community.

In this light, moreover, as an alumnus of Howard University, I am also nominating and recommending the name of Dr. Parker before the Howard University Board of Trustees and its School of Law Dean Charles T. Duncan, JD, to be considered for the receipt of the awarding of the honorary degree of Doctor of Laws (LL.D.) at the University's commencement exercises this year to be held in May.

The raison d'etre for the consideration of Dr. Parker to be a member and/or Chairman of the EEOC and for the conferring upon her of the honorary degree of Doctor of Laws is further buttressed by her appearance on the dramitis personae of several local human rights organization when they feated her since the introduction and enactment into law of Regulation No. 73-22 of the District of Columbia.

Thanking you very kindly for your consideration of Dr. Marjorie H. Parker for the position of member and/or Chairman of the Equal Employment Opportunity Commission, and for your response, I am

Sincerely yours,

Leonard S. Brown, Jr.

cc: Dr. Marjorie H. Parker
Dean Charles T. Duncan
Dr. James E. Cheek
Board of Trustees, Howard UNIVERSITY

EEOC

March 28, 1975
2305 Vista Huerta
Newport Beach, Ca. 92660

Mr. Philip Buchen
Counselor to the President
THE WHITE HOUSE
Washington, D. C. 20500

Dear Mr. Buchen:

I am deeply concerned over the unjust "resignation" under duress of Mr. John Powell, as Commissioner of the Equal Employment Opportunity Commission. As a life-long dedicated Republican, I should make you aware of the disappointment now felt by innumerable citizens with whom I am in constant communication.

I am well acquainted with Mr. Powell's qualifications and proficiency as an Attorney, but more important, I know him to be an agressive and strict enforcer of the law.

Knowing him as a fair and just man, I want to voice the strongest protest to you and the President. His "resignation" is a great loss to the Spanish Speaking Community.

Lastly, I would not have lost the respect that I had for the President, if I weren't certain that Mr. Powell's distinguished reputation had been tarnished and impunged by the "resignation".

Most sincerely,

Jose Maria Burruel

JOSE MARIA BURRUEL, Ph. D.

JMB:dmc

P.S. I will pray to God that the next Appointee is not INTIMIDATED into inaction by the President!

EEOC Holcomb
Luther

SHELL OIL COMPANY
ONE SHELL PLAZA
P.O. BOX 2463
HOUSTON, TEXAS 77001

March 31, 1975

The Honorable Philip W. Buchen
The White House
Washington, D. C.

Dear Mr. Buchen:

I wish to express my sincere appreciation for the manner in which the Administration handled the recent crisis at the Equal Employment Opportunity Commission. It was an exceedingly difficult situation and a most sensitive area.

My credentials for writing this letter are that I served as Vice Chairman at EEOC for nine years and three months. I am not a candidate for any position, but out of my experiences I would be willing to share with you or someone you would like to designate some suggestions for the future of EEOC.

I am in Washington quite frequently, but I will be glad to come at a time mutually acceptable to each of our schedules. Individuals that you would know that are acquainted with me are Senator John Tower, and likewise, Peter Roussel who is in the office of Mr. Rumsfeld.

I was tremendously impressed with the televised speech of President Ford on Saturday evening, March 29th. Both the content and the delivery were superb.

With sincere appreciation for your service to our nation and with every good wish.

Respectfully yours,

Luther Holcomb

Luther Holcomb

THE WHITE HOUSE

WASHINGTON

April 2, 1975

MEMORANDUM FOR: MRS. ETHEL BENT WALSH
ACTING CHAIRMAN

The attached correspondence has been acknowledged. It is referred to you for further appropriate handling.

Thank you.

P.W.B.

Philip W. Buchen
Counsel to the President

March 31, 1975

Dear Mr. Dorman:

Thank you for your letter of March 19, concerning the Equal Employment Opportunity Commission.

It is my policy not to discuss matters involved in a case which is presently pending before a Federal court. Therefore, I am unable to comment on the issues raised by your dispute with the Commission. However, you may be assured that your general comments about the Commission's operation will be reviewed by the appropriate persons.

Sincerely,

Philip W. Buchen
Counsel to the President

Mr. Alfonso K. Dorman
1725 Harvard Street, NW.
Washington, D.C. 20009

PWB:JTF:ets

EEOC

THE WHITE HOUSE

WASHINGTON

April 2, 1975

Dear Mr. Holcomb:

Many thanks for your very complimentary letter of March 31, 1975.

I appreciate your interest in having given this Administration the benefit of your long and distinguished experience as Vice Chairman at the Equal Employment Opportunity Commission.

At present I am not particularly involved in the EEOC organizational problems, but I suggest that you call Mr. William Walker at the White House in advance of your coming to Washington, so that he or someone in his office of Presidential Personnel could arrange a conference to meet with you.

Thank you also for your praise of the President's speech on March 29.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Mr. Luther Holcomb
Shell Oil Company
One Shell Plaza
P.O. Box 2463
Houston, Texas 77001

EEOC

THE WHITE HOUSE

WASHINGTON

April 4, 1975

Dear Dr. Burruel:

Your letter expressing concern about developments in the composition of the Equal Employment Opportunity Commission has been received.

In contrast to your letter, I have received other comments from persons equally devoted to Mr. Powell and the work of the EEOC which commend the steps which were taken.

Also, Mr. Powell and I have discussed at length, on most friendly terms, the management problems at the EEOC, and I can assure you that he does not share your concerns and does not believe that his reputation has been tarnished.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Jose Maria Burruel, Ph.D.
2305 Vista Huerta
Newport Beach, California 92660

EEOC

THE WHITE HOUSE

WASHINGTON

April 2, 1975

Dear Ms. Decrow:

On behalf of the President, I would like to acknowledge receipt of your telegram of March 19 concerning nominations to the Equal Employment Opportunity Commission.

Your interest in these appointments is most welcome and you may be assured that any appointee to the Commission will be deeply committed to ending all forms of outlawed discrimination.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Ms. Karen Decrow
President
National Organization for Women
116 Benedict Avenue
Syracuse, New York 13210

Monday 4/7/75

Meeting
4/21/75

4:30 Bob Shaw called to say that Karen Decrow, President of the National Organization for Women, will be in Washington the afternoon of April 21st.

She would like to have an appointment.

Mr. Shaw is asking if you will want to be included in the meeting.

No

CEOC

3/20/75

For Jay to see
our suggested
Leon reply
Copy has been
sent to Walker.

Kent
3/21

WHD026 WAB136(1549)(2-033204E078)PD 03/19/75 1549
ICS IPMMTZZ CSP
2024839062 TDMT WASHINGTON DC 122 03-19 0349P EST
PMS PHILIP W BUCHEN COUNSEL TO THE PRESIDENT, DLR
WHITE HOUSE
WASHINGTON DC
THE NATIONAL ORGANIZATION FOR WOMEN (NOW) IS DEEPLY CONCERNED THAT THE PRESIDENTAPPOINT TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) PERSONS WITH DEMONSTRATED ABILITY AND COMMITMENT TO FEMINIST AND OTHER CIVIL RIGHTS CAUSES. PAST APPOINTMENTS AND THOSE CURRENTLY BEING CONSIDERED DO NOT INDICATE THAT THE PRESIDENT IS ADHERING TO THESE CRITERIA. AS AN ORGANIZATION WHICH PLAYED A MAJOR ROLL IN THE PASSAGE OF THE 1972 EQUAL EMPLOYMENT OPPORTUNITY ACT, AND AS THE LARGEST FEMINIST ORGANIZATION IN THE NATION, NOW UNQUESTIONABLY SHOULD BE CONSULTED IN ANY CONSIDERATION OF EEOC APPOINTMENTS, INCLUDING COMMISSIONERS AND THE AGENCY'S GENERAL COUNSEL. THEREFORE, I REQUEST A MEETING WITH YOU IN THE IMMEDIATE FUTURE TO DISCUSS THE CURRENT VACANCIES AT THE EEOC.
KAREN DECROW PRESIDENT NATIONAL ORGANIZATION FOR WOMEN 116 BENEDICT AVENUE SYRACUSE NY 13210
NNNN

EEOC

THE WHITE HOUSE

WASHINGTON

April 8, 1975

MEMORANDUM FOR: WILLIAM WALKER

FROM: PHILIP BUCHEN P.W.B.

SUBJECT: EEOC Candidate

Attached is a letter sent jointly to Bill Seidman and me from Robert G. Howlett who is a friend of ours.

He recommends Alfred Cowles for appointment to the EEOC. If you need further information on this prospective candidate, I shall be glad to obtain it.

Attachment

cc: William Seidman

THE WHITE HOUSE

WASHINGTON

April 8, 1975

Dear Bob:

Thank you very much for the two letters, and I, too, am sorry that we missed seeing you when Bill and I were in Grand Rapids last weekend for the Republican Party reception.

Had I known you were going to teach a course in the school where my son Roderick is enrolled, I would have encouraged him to enroll in the course.

On your recommendation of Al Cowles to the EEOC, I have sent a copy of your letter to William Walker, Office of Presidential Personnel, and I know he will give it careful consideration.

Sincerely,

Philip W. Buchen
Counsel to the President

Mr. Robert G. Howlett
Schmidt, Heaney, Howlett & Van't Hof
Attorneys at Law
700 Frey Building
Union Bank Plaza
Grand Rapids, Michigan 49502

EEOC

THE WHITE HOUSE

WASHINGTON

April 9, 1975

Dear Ms. Scott:

Thank you very much for your letter concerning the position of General Counsel for the Equal Employment Opportunity Commission.

I am immediately forwarding your recommendation to the Office of Presidential Personnel.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Ms. Jean L. Scott
2880 Eliot Circle
Apt. 208
Westminster, Colorado 80030

2880 Eliot Circle, Apt. 208
Westminster, Colorado 80030
April 6, 1975

Mr. Phillip Buchen
Presidential Counselor
The White House
Washington, D.C.

Dear Mr. Buchen:

I understand that you might have something to do with the selection of a new Chairman and General Counsel of the Equal Employment Opportunity Commission. If you don't, please refer this letter to whomever is doing the selecting.

I might be speaking out of turn since I am a "lowly" GS-9, but I have a recommendation to make for the Office of General Counsel. Having worked at both the Commission and the Department of Justice, I have an idea of the job that needs to be done. I think that David Rose, Chief of the Employment Section, Civil Rights Division, Department of Justice, is the person that can best do the job. He is an eminently fair and reasonable man, a dedicated public servant, and an experienced lawyer and administrator. He attracts competent people to work for him. I believe his appointment would be in the best interest of the Commission and of the public.

Thank you for your time.

Sincerely,

Jean L Scott

Jean L. Scott
Research Analyst
Equal Employment Opportunity
Commission

EEOC

THE WHITE HOUSE

WASHINGTON

April 17, 1975

MEMORANDUM FOR: PHILIP BUCHEN

FROM: WILLIAM N. WALKER

SUBJECT: EEOC Candidates

We appreciate your sending us candidates for EEOC as they have come to your attention.

As you know, the Democrat Commissioner slot has been decided and is ready for announcement; the candidate for Chairman has been approved and is in clearance; and the candidate for General Counsel is in clearance and is in the process of being sent to the President for approval.

We spoke with Alfred Blumrosen who was interested in the General Counsel position. We explained the status of the present vacancies including the fact that the General Counsel position appeared to be sewn up. We did promise that should our present candidate fall through, we would be glad to see that he is considered.

If you could get us a resume on Al Cowles who was recommended to you by Robert G. Howlett, we will be glad to see that he is considered for other appropriate positions as they arise.

Thank you for the referrals.

4/22

THE WHITE HOUSE
WASHINGTON

Mr Morgan (EEOC)
believes Mr Buchen
should see the
attached before his
lunch w/ John Powell

Director of
~~Chairman~~
a National Programs
Division
(Alice Holmes at HEW)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Ford EEOC file. R

April 21, 1975

Philip W. Buchen, Esq.
Counsel to the President
The White House
Washington, D.C. 20500

Dear Phil:

As agreed in our discussion last Friday, I am enclosing the following information:

1) Proposed Guidelines on Work Allocation currently under consideration by this Commission.

2) The motion by Commissioner Lewis requesting consideration of these guidelines by the Equal Employment Opportunity Coordinating Council.

3) The list of the current members serving on the Coordinating Council.

4) A copy of Section 715 of the Equal Employment Opportunity Act of 1972, which establishes and sets forth the purposes of the Equal Employment Opportunity Coordinating Council.

5) A copy of the April 15, 1975 edition of the Daily Labor Report, reporting on this Commission's action on the proposed work allocation/layoff guidelines.

6) Copies of recent letters and telegrams received by this Commission on the proposed layoff guidelines.

7) New York Times article of January 29, 1975 by Ernest Holsendolph on the layoff guidelines issue.

8) A copy of the memorandum of March 6, 1975 by William A. Carey to me regarding recent cases involving layoffs and seniority.

As I indicated on Friday, I am concerned that an official component of the Executive Branch address itself to the issue of seniority rights versus equal employment opportunity rights.

It should be noted that any guidelines issued by this Commission do not have the force of law inherent in regulations issued by other independent agencies, but rather are only entitled to "deference," as set forth by the U.S. Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Guidelines similar to those currently under discussion within this Commission were adopted last December by the New York City Commission on Human Rights.

The U.S. Supreme Court has recently scheduled to hear arguments during its next term on the appeal of Franks v. Bowman Transportation Co., 495 F. 2nd 398 (Docket No. 74-728) dealing in part with this issue.

Presently there are some discussions on Capitol Hill, particularly within the House Subcommittee on Equal Opportunities, as to whether or not Congressional hearings should be held on this subject.

In light of all the interest as well as the necessity and timeliness for formal consideration and recommendation, I trust this Commission will be free to come forth shortly with an appropriate remedy.

Respectfully,

Edgar Morgan
Director
Office of Congressional Affairs

Enclosures

CHAPTER XIV - EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

PART 1608 - GUIDELINES ON WORK ALLOCATION

The Equal Employment Opportunity Commission, by vote taken at a duly constituted meeting, has adopted guidelines interpreting Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000e et seq., (Supp. II, 1972)), to provide guidance to employers who may be required to lower labor costs through reductions in work opportunities. Female and minority workers often bear a disproportionate brunt of reductions in such opportunities.

The Commission believes that Title VII prohibits allocating a reduced amount of work in a way which would have a disproportionate impact on women or minorities, unless required by business necessity. The employer must use any method of work reallocation which would have the least such disproportionate impact. Where layoffs are nonetheless necessary, layoffs under a seniority system having such a disproportionate impact will be considered to violate Title VII unless the system is a bona fide one; i.e., one which does not displace a disproportionate number of female or minority group employees as a result of the employer's past discriminatory hiring, recruiting, or other employment practices. The guidelines prohibit labor organizations from causing employers to take actions which are inconsistent with the guidelines.

Accordingly, Part 1608 of Title 29 of the Code of Federal Regulations is hereby issued, effective 1975, to read as follows:

Part 1608 - Guidelines on Work Allocation

Sec.

1608.1. Introduction.
1608.2 Statement of purpose.
1608.3 Disproportionate impact and alternative methods of reducing labor costs.
1608.4 Layoffs.
1608.5 Responsibilities of labor organizations.

AUTHORITY: Secs. 713(a), (b) of the Civil Rights Act of 1964, 78 Stat. 265, 42 U.S.C. 200e-13(a), (b) (Supp.II, 1972).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1608 - GUIDELINES ON WORK ALLOCATION

1608.1 INTRODUCTION

By virtue of the authority vested in it by §713(a) and (b) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-12(a) and (b), 78 Stat. 265 ("Title VII"), and its authority to adopt and issue interpretations of Title VII, the Equal Employment Opportunity Commission hereby issues Title 29, CHAPTER XIV, Part 1608, of the Code of Federal Regulations: These Guidelines are applicable to all employers and labor organizations as defined in §701(b) and (d) of Title VII, 42 U.S.C. §2000e-(b) and (d).

Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable.

1608.2 STATEMENT OF PURPOSE

(a) These Guidelines are issued pursuant to the Equal Employment Opportunity Commission's Congressional mandate, embodied in Title VII, to eliminate employment discrimination. In furtherance of this mandate, the Commission has an obligation to provide guidance to employers who may be required to lower costs through reductions in work opportunities.

(b) A usual method of accomplishing such reductions has been to lay off employees without considering alternative methods of lessening labor costs. Female and minority employees often bear a disproportionate brunt of such work reductions because such reductions are directly related to length in service. But female and minority employees often have been

deprived of the opportunity to compete for length in service because of their employers' prior discriminatory employment practices.

1608.3 DISPROPORTIONATE IMPACT AND ALTERNATIVE METHODS OF REDUCING LABOR COSTS

Whenever an employer adopts a procedure for allocating a reduced amount of work, it is required by Title VII to consider and adopt cost-reducing measures which will not have a disproportionate impact on women or minorities unless required by business necessity: that is, unless the procedure used is essential to the safe and efficient operation of the employer's business and no reasonable alternative procedure is available. To avoid such disproportionate impact an employer must use any method which will have the least disproportionate impact on women and minorities: e.g., work-sharing, elimination of over-time, voluntary early retirement, reduction in hours, or rotating layoffs.

1608.4 LAYOFFS

In those cases in which an employer has previously adopted a seniority system requiring layoffs to be based on plant-wide or company-wide seniority, and the devices used by an employer in the manner prescribed by §1608.3 do not sufficiently cut labor costs, making a layoff absolutely necessary, layoffs which have a disproportionate effect on women or minorities will be considered to violate §703(a) of Title VII unless the layoffs are based on a bona fide seniority system. For purposes of these Guidelines a bona fide seniority system is one which

does not displace a disproportionate number of female or minority group employees from the workforce as a result of the employer's past discriminatory hiring, recruitment, or other employment practices. If the seniority system is not bona fide as thus defined, the provisions of §1608.3 will apply.

1608.5 RESPONSIBILITIES OF LABOR ORGANIZATIONS

As set forth in §703(c) (3) of Title VII, 42 U.S.C. §2000-2(c), no labor organization shall cause an employer to take any action inconsistent with these Guidelines.

April 15, 1975

Commissioner Lewis made the following motion:

> That the Commission, consistent with the requests of certain members of the Equal Employment Opportunity Coordinating Council, defer action on the proposed Work Allocation Guidelines until such time as the Coordinating Council can be convened to discuss the substance of the Guidelines. I further move that the Commission request the Coordinating Council to meet at the earliest possible date to discuss this matter.

The motion was seconded by Acting Chairman Walsh, and was approved by a vote of 3 to 0.

Voting in the affirmative: Chairman (Acting) Walsh, Commissioner Lewis, Commissioner Telles.

Abstaining: Commissioner Powell.

OK CRW
OK
OK

Coordinating Council

Department of Justice	Harold R. Tyler * Deputy Attorney General
Department of Labor	Richard F. Schubert Under Secretary of Labor (Resigned)
Civil Service Commission	Robert E. Hampton Chairman
Commission on Civil Rights	John A. Buggs Staff Director
Equal Employment Opportunity Commission	Ethel Bent Walsh Chairman (Acting)

* Chairman

functions under this Act shall be punished by imprisonment for any term of years or for life.

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of

the legislative and judicial bra
positions in the competitive serv
be made free from any discrimi
or national origin.

(b) Except as otherwise prov
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Librarian of Congress.

(c) Within thirty days of re
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department, agency, or unit on
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BNA

DLR No. 73

Daily Labor Report

APRIL 15, 1975 • TUESDAY WASHINGTON, D.C.

Today's Summary and Analysis

EEOC DEFERS ACTION ON LAYOFF GUIDES

EEOC decides to defer action on the layoff guidelines they are considering issuing until the Equal Employment Opportunity Coordinating Council convenes "at the earliest possible time" to discuss them. After meeting for most of the day in executive session, the commissioners -- Acting Chairman Ethel Bent Walsh, Colston A. Lewis, Raymond L. Telles, and John H. Powell, Jr. -- vote 3-0 to postpone their decision. Powell, who resigned as chairman on March 19 under White House pressure, abstains from voting. He wants the guidelines issued immediately.

This marks the second time the commissioners have voted to defer action on the guidelines that would prohibit layoffs that have a disproportionate impact on minority and women workers. On March 25, they agreed to wait until April 15 to vote so that other federal civil rights enforcement agencies would have a chance to review and comment on them. One source says "everybody opposed them," including the Labor and Justice Departments, Civil Service Commission, Civil Rights Commission, AFL-CIO, and U.S. Chamber of Commerce. He sums up the status of the proposed guidelines by saying "they took a bath." - - - page A - 20

BACK PAY, JOB TESTS AIRED BEFORE COURT

The U.S. Supreme Court hears oral argument on an employer's use of job tests that have not been validated, and on the right to back pay relief under Title VII of the 1964 Civil Rights Act. Attorneys for Albemarle Paper Company, Roanoke Rapids, N.C., and Halifax Local No. 425 of the United Papermakers urge the Court to reverse the Fourth Circuit's adoption of a flat rule requiring a district court to award back pay in race discrimination suits whenever injunctive relief is entered.

Warren Woods, attorney for Local 425, asserts that Section 706(g) of the Act gives district courts the discretion to award appropriate relief "with or without back pay." The district court had refused to grant back pay to a class of black employees.

Francis V. Lowden, Jr., attorney for Albemarle Paper Company, maintains that EEOC's standards for validating employment tests are "irrational" and "unworkable." He asserts that the trial court was justified in refusing to order the abolition of the employer's use of the Wonderlic tests and the revised Beta Examination.

J. Levonne Chambers, attorney for the class of plaintiffs, contends that the record is "abundantly clear" that blacks were excluded from skilled lines of progression at the plant because of the testing criteria used by the company. Chambers concludes that the tests used by the company tested the "person in the abstract" rather than the person's ability to perform the job.

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This would be a way of publicizing the program. The subcommittee struck out the provision for reimbursing employers for their expenses in publicizing it and decided to leave the information responsibility on HEW alone, in the hope that it could get free TV and radio "public service" time for that purpose.

The subcommittee also decided to add a requirement in the Medicaid section as well as in the insurance section that an unemployed worker who can should get coverage through an employed spouse, if possible, rather than under the law.

- 0 -

EEOC DEFERS ACTION ON PROPOSED LAYOFF GUIDELINES UNTIL INTER-GOV'T COUNCIL MEETS TO DISCUSS THEM

The commissioners of EEOC vote to defer action on the layoff guidelines they are considering issuing until the Equal Employment Opportunity Coordinating Council convenes "at the earliest possible time" to discuss them, according to Ronnie Blumenthal, special assistant to Acting EEOC Chairman Ethel Bent Walsh.

The commissioners met in executive session "for most of the day," she said, but added that "there were other things on the agenda." Because the meeting was in executive session, no staff members were allowed to be present. Besides the four commissioners -- Walsh, Colston A. Lewis, Raymond L. Telles, and John H. Powell, Jr. -- Acting General Counsel Julia Cooper also was involved in the lengthy discussion on the controversial proposed layoff guidelines.

The vote to defer action was 3-0. Powell, who resigned as EEOC chairman on March 19 under pressure from the White House (1975 DLR 54: A-21) and agreed to step down as a commissioner on April 30, abstained from voting. He wants the guidelines issued immediately.

The commissioners decided on March 25 to vote on April 15 on whether to issue the guidelines that would prohibit layoffs that have a disproportionate impact on minority and women workers. They were set to vote on the guidelines on March 25, but voted to postpone a decision until after the other federal civil rights enforcement agencies had a chance to review and comment on them.

An EEOC source says the Justice Department's written comments on the proposed guidelines advised that they should not be issued. The Justice Department reportedly said the issue of laying off recently hired minority and women workers under a seniority system should be interpreted by the courts, not by EEOC.

The Labor Department also is known to oppose EEOC's proposed guidelines, agreeing with the Justice Department that the courts should decide the layoff issue.

A draft of the proposed guidelines dated March 14 says layoffs under a seniority system will be in violation of federal law unless the system is bona fide (1975 DLR 58: A-14). The guidelines define a bona fide seniority system as "one which does not displace a disproportionate number of female or minority group employees from the work force as a result of the employer's past discriminatory hiring, recruitment, or other employment practices."

The Equal Employment Opportunity Coordinating Council is composed of agency heads or deputies of Labor, Justice, EEOC, the Civil Service Commission, and the Civil Rights Commission.

-- End of Section A --

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UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

Honorable Ethel Bent Walsh
Chairman (Acting)
Equal Employment Opportunity
Commission
Washington, D.C. 20426

Dear Chairman Walsh:

At their meeting of yesterday, (April 14, 1975), the members of the U.S. Commission on Civil Rights considered the proposed Guidelines on Work Allocation Procedures prepared by the Equal Employment Opportunity Commission. The Commissioners agreed that promulgation of such Guidelines would be an appropriate action by EEOC. In their view, the rights of minority group members and women are seriously jeopardized in periods of employment contraction.

With respect to the specific Guidelines proposed by EEOC, the Commissioners indicated their view that the requirements of fairness in labor force adjustments should be imposed on employee organizations as well as employers.

In addition, the Commissioners have determined that the protection of the rights of minority group persons and women during periods of work force contractions is an issue of such significance that they wish to consider the matter more fully and will do so in the near future.

In the absence from Washington of Chairman Flemming and John A. Buggs, Staff Director, pursuant to their instructions, I am transmitting to you the views of the Commission.

Sincerely,

Lawrence B. Glick

LAWRENCE B. GLICK
Acting General Counsel

cc: Honorable Colston A. Lewis
Honorable John H. Powell
Honorable Raymond Telles
Ms. Julia C. Cooper, Acting General Counsel

#1109 RB

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

RECEIVED
OFFICE OF THE VICE CHAIRMAN

APR 9 1975

'75 APR 9 PM 5:00

Honorable Ethel Bent Walsh
Chairman (Acting)
Equal Employment Opportunity
Commission
2401 E Street, N.W.
Washington, D.C. 20506

Attention: Ms. Julia C. Cooper
Acting General Counsel

Dear Ms. Walsh:

Your letter of March 28, 1975 to the Attorney General calling for comments on proposed "guidelines on work allocation procedures" has been referred to this Division for response.

In our judgment, issuance of the guidelines at this time is inappropriate. The purpose of guidelines is to provide authoritative interpretations of the Act for the guidance of employers, labor organizations, and the classes protected by Title VII. While guidelines under Title VII are of course entitled to deference (see, Griggs v. Duke Power Co., 401 U.S. 424, 434), they do not have the force and effect of law, and will not be followed by the courts where they are inconsistent with Congressional intent. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94.

As we understand the proposed guidelines, they would treat seniority systems as bona fide only where they do not displace a disproportionate number of female or minority group employees from the workforce as a result of the employer's past discriminatory hiring, recruitment or other employment practices. This position,

which has been asserted by the Commission recently in several cases, has been rejected by the appellate courts as being inconsistent with the language of Section 703(h) of the Act and inconsistent with the intent of Congress. Waters v. Wisconsin Steel, 502 F.2d 1309 (7th Cir. 1974); Jersey Central Light and Power v. Electrical Workers Locals, 508 F.2d 687 EPD ¶9923 (3rd Cir., 1975). Those appellate decisions are further supported by the language of earlier decisions of the Court of Appeals for the 5th Circuit. See, e.g., United States v. Local 189 Papermakers, 980, 416 F.2d 980, 994-995 (5th Cir., 1969), cert. denied 397 U.S. 919. We are not aware of any appellate authority supporting the position adopted by the proposed guidelines.

We do not understand what useful purpose would be served by the issuance of the proposed guidelines under these circumstances. Because they adopt a position which thus far has been rejected by the courts, they do not provide accurate guidance for employers, labor organizations and the protected classes. They are likely to cause unnecessary dispute and disagreement, as well as to arouse expectations which are not likely to be fulfilled.

The issuance of guidelines in such circumstances is also likely to affect adversely the litigating posture not only of the Commission, but also of this Department and the enforcement program of the Department of Labor under the Executive Order. There does appear to be authority for the proposition that seniority systems which are protected by 703(h) as being bona fide, may nevertheless be altered pursuant to the authority of the court under Section 706(g), after a finding of other violations of the Act. See the brief in United States and EEOC as amici curiae in Franks v. Bowman, S.C. No. 74-728. Issuance of the proposed guidelines may result, however, in rejection by the courts not only of the position asserted therein, but also in the rejection of the position taken in Franks v. Bowman.

There is another, independent reason for not issuing the guidelines at this time. Section 715 of the Act, which established the Equal Employment Opportunity

Coordinating Council, was designed among other things to eliminate inconsistency among the departments and agencies of the Federal Government responsible for the enforcement of equal employment opportunity legislation, orders and policies. As we understand it, the proposed guidelines adopt a position contrary to that of at least one of the other agencies having enforcement responsibility. There has as yet been no opportunity for the Council to discuss the proposed guidelines on their merits and to consider the positions of the various agencies and to determine whether it is possible to develop a consistent Government position on this important issue. We would accordingly recommend that issuance of the proposed guidelines be deferred at least until such time as the Council has had an opportunity to consider and discuss the merits of the proposed guidelines, their effect, and any alternatives to them which may exist.

We have discussed the proposed guidelines with Deputy Attorney General Tyler, and he has indicated his agreement with our view that the proposed issuance of the guidelines is an issue appropriate for consideration by the Equal Employment Opportunity Coordinating Council, and his intent to call a Council meeting in the near future to discuss that issue. We assume that you will defer issuance of any proposed guidelines at least until the Council has had opportunity to consider this matter. Please advise us if this assumption is incorrect.

Accordingly, we would oppose issuance of the proposed guidelines at this time.

J. Stanley Pottinger

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

#1088

YOUR REFERENCE

APR 8 1975

Honorable Ethel Bent Walsh
Acting Chairman
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Chairman Walsh:

Thank you for the opportunity to review the proposed EEOC Guidelines on Work Allocation.

While I appreciate the opportunity to review the proposed guidelines prior to their final adoption and publication in the Federal Register, I believe their substance is of such great potential impact for industry and government that the EEO Coordinating Council should meet and the members have an opportunity to discuss their views on the proposed guidelines with you. This would seem to me to carry out the intent of the law in establishing the Council as a coordinating mechanism.

It appears to us that impact of these guidelines on State and local personnel practices places them clearly within the coverage of OMB Circular A-85. The circular, entitled, "Consultation of Heads of State and Local Governments in Development of Federal Regulations," sets forth required notice procedures including circularization by the Advisory Commission on Intergovernmental Relations at least 45 days before the intended date of promulgation and in advance of publication in the Federal Register. Also, under Section 2000e-12 (which is EEOC's authority to issue regulations) even procedural regulations issued under the Civil Rights Act must be in conformity with the standards and limitations of the Administration Procedures Act.

Further, the significance of these guidelines is such that I believe the convening of a public hearing on this matter would clearly be in the public interest.

The proposed guidelines would have a major impact on State and local government personnel administration, which is an area of considerable interest to the Civil Service Commission under the Intergovernmental Personnel Act. The proposed guidelines would clearly alter or require renegotiation of most labor-management relations contracts in both the public and private sector since

the guidelines could only be met by establishing separate, parallel systems of seniority for each race, sex, and nationality.

It would seem from the holding in Jersey Central Power and Light vs. IBEW Local Unions that the legislative history of Title VII indicates that a "bona fide" seniority system, in spite of its tendency to perpetuate the effects of past discrimination, cannot be challenged. The court's definition of a "bona fide" seniority system is substantially different from the definition set out in your proposed guidelines. The court declared: "Congress intended to bar proof of the 'perpetuating' effect of a plant-wide seniority system as it regarded such systems as 'bona fide.' Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions and permitting them despite the perpetuating effect that they might have." In light of the Supreme Court's decision to review another case involving seniority systems, Franks vs. Bowman, an attempt by a Federal agency to hastily publish Guidelines on so crucial an issue without consulting all affected parties might be interpreted by the Court as an attempt to influence the decision in Franks. Such an appearance of impropriety can be avoided through appropriate notice and public hearing.

Finally, I have considerable substantive concern relating to the proposed guidelines. Section 1608.3 appears to embody the kind of cosmic search for alternatives which members of the EEO Coordinating Council have objected to in testing guidelines and have agreed should be deleted from proposed uniform selection guidelines. Moreover, the meaning of the expression, "essential to the safe and efficient operation of the employer's business" is not clear to me. What if the procedure increases productivity? Would that fall within the quoted phrase? On a literal reading it would not appear to, but surely it should be permitted. I use this as but one illustration.

Moreover, 1608.3 casts a burden on the employer to "avoid such disproportionate impact" apparently even at the expense of good business practice or binding labor agreements. Further under 1608.3 and 1608.4, read together, an employer must apparently look to lay-off as a last resort only. This may be sound policy but it is hardly proper for the Federal Government to make such management decisions for State and local authorities or private employers. In this regard I am concerned that the national impact of 1608.4 will be to require an employer to give preferential treatment to some employees based on race, sex, or other impermissible characteristics. This is of course inconsistent with our Agreement of March 21, 1973, and contrary to the policy set forth by the President in his statement to department and agency heads of March 6, 1975.

In summary, we believe the Guideline on Work Allocation should not be issued in its present form. We believe it is violative of Title VII, that it imposes management determinations which are outside the province of the Federal Government and that it calls for policies inconsistent with the President's statement of March 6, 1975. The matter should have full discussion by the Coordinating Council and the views of groups affected should be obtained through a public hearing.

Sincerely yours,

Robert Hampton

Robert E. Hampton
Chairman

#1137

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

RECEIVED
OFC. OF THE VICE CHAIRMAN
'75 APR 11 AM 11:12

APR 9 1975

Ms. Ethel Bent Walsh
Chairman (Acting), Equal
Employment Opportunity Commission
Washington, D. C. 20506

Dear Chairman Walsh:

Secretary Dunlop has asked me to respond to your letter of March 28, 1975, which enclosed a copy of the Equal Employment Opportunity Commission's proposed Guidelines on Work Allocation Procedures, and which invited this Department, as a member of the Equal Employment Opportunity Coordinating Council, to comment on the proposal prior to its final adoption by the Commission and its publication in the Federal Register.

As we understand them, the Guidelines would constitute the Commission's official interpretation of Title VII (of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e) relative to the growing conflict between seniority rights achieved by organized workers and newly gained rights of minorities and women achieved under equal employment opportunity programs during the last decade or so.

Generally speaking, the proposal interprets Title VII to require (1) the allocation of reduced employment opportunities in a manner so that mounting unemployment does not impact disproportionately on minority and female employees and (2) to preclude layoffs, based on seniority, which have a disproportionate effect on women or minorities.

To achieve the first result section 1608.3 interprets Title VII to mean that an employer which reduces the amount of available work is required to adopt measures which will not have a disproportionate impact on women or minorities. Work sharing, elimination of overtime, voluntary early retirement, reduction in hours, and rotating layoffs are suggested as

legitimate measures which may be used to allocate available work opportunities.

A literal reading of sections 1608.3 and 1608.4 suggests that an employer which uses the last-hired, first-fired system may move to layoffs only after it has implemented the allocation principles mentioned in section 1608.3. If the layoffs resulted in a disproportionate effect on minorities or women they would be in violation of Title VII unless the seniority system pursuant to which they were made is bona fide. A bona fide seniority system is defined, however, as "one which does not displace a disproportionate number of female or minority group employees from the workforce as a result of the employer's past discriminatory hiring, recruitment, or other employment practices." If the seniority system is not bona fide, the provisions of section 1608.3 apply.

You perhaps are aware that this Department has taken the position that the seniority system is not inherently discriminatory, and that layoffs based on reverse order of seniority are generally permissible. However, we favor granting constructive seniority, to individuals who can demonstrate that their prior attempts to secure employment with a specific employer were rejected either for sex or racial reasons. This position was rejected, however, by the Fifth Circuit in Franks v. Bowman Transportation Company, 495 F.2d 398 (1974). In addition, the broader issue (i.e. discrimination based solely on disparate impact, which the proposed Guidelines address) has been rejected by each of the appellate courts to review it. See e.g., Waters v. Wisconsin Steel Works, 8 FEP Cases 577 (C.A. 7, 1974) and Jersey Central Power & Light Co. v. IBEW Local 327, 9 FEP Cases 117 (C.A. 3, 1975). Also, the Fourth Circuit recently decided to stay the execution of a district court ruling which ordered two American Tobacco Company branches to institute an immediate "bumping" system in which any black or female worker could bid for almost any plant job and displace workers with less company seniority. Patterson v. American Tobacco Company, No. 75-8050 (C.A. 4, February 10, 1975).

While we favor reversal of the Bowman case, we do not believe the time is appropriate for the issuance of guidelines either on the broader issue as argued in the Waters and Jersey Central cases or on the more limited issue as argued in the Bowman case. We believe it is inappropriate to issue the Guidelines at this time because such interpretations should be applied on a uniform basis throughout the country. But employers in the Third, Fifth, and Seventh Circuits, where the cases mentioned above presently are controlling, obviously would have no obligation to follow the Guidelines. To issue the Guidelines with no application in such a large geographical area would be, in our judgment, unfair to the large number of employers who would be required to follow the guidelines in the other circuits. Moreover, there is confusion and, perhaps, contradiction among the Federal agencies on this issue and others, thus underlining the importance of bringing such matters to the Equal Employment Opportunity Coordinating Council before any agency acts unilaterally. In addition, on the seniority issue, there are differences in the nature and application of seniority systems among the various sectors of the economy and between and within industries. This further suggests the need for inter-agency reflection and discussion on this issue.

Sincerely,

William J. Kilberg
Solicitor of Labor

WESTERN UNION

Telegram

1975 APR -4 PM 7:58

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PMS MS ETHEL BENT WALSH, CHIRPERSON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASH DC 20005

6347040

da 820 P 6

RECEIVED
OFFICE OF THE VICE CHAIRMAN
'75 APR 7 AM 11:01

SINCE WE URGED YOU TO ADOPT APPROPRIATE GUIDELINES TO ENCOURAGE WORK SHARING AND OTHER AMELIORATIVE MEASURES WE APPROVE YOUR DESIRE TO CREATE SUCH GUIDELINES. HOWEVER, IN VIEW OF THEDANGER OF POLARIZATION ON THIS EXTREMELY COMPLICATED ISSUE, WE URGE YOU TO MEET WITH TEPRESENTATIVES OF LABOR, MANANGMENT AND THE CIVIL RIGHTS COMMUNITY BEFORE ADOPTING FINAL GUIDELINES.

VERNON E. JORDAN, JR BERTRAM H. GOLD

SF-1201 (R5-69)

Western Union Telegram

EXEC DIR EXEC VICE PRES
NATIONAL URBAN LEAGUE AMERICAN JEWISH COMM

NNNN

SF-1201 (R5-69)

Chamber of Commerce of the United States
NATIONAL ECONOMIC DEVELOPMENT GROUP
1615 H STREET, N.W.
WASHINGTON, D.C.
202·659-6120

March 14, 1975

Mr. John H. Powell, Jr.
Chairman, Equal Employment
Opportunity Commission
2401 E Street N.W.
Washington, D. C.

Re: Guidelines/Policy for layoffs having a disparate effect on minorities and/or females

Dear John:

Persistent reports from within and without the Commission lead me to believe that EEOC is seriously considering issuing either guidelines or a policy position on the subject of layoffs which have a disparate effect on minorities and/or female employees.

The Chamber's position is that the legislative history of Title VII of the Civil Rights Act supports the upholding of bona fide seniority systems even where operation of such a system(based on the length of service,not on race or sex) results in the layoff of greater numbers of minorities or females, particularly where the individuals affected were not themselves the victims of discriminatory hiring practices. Several U.S. Circuit Courts of Appeals have upheld the implementation of seniority provisions in such cases, and it would not be fair for the Commission to issue requirements to employers contrary to those decisions, since employers would not then know which principle to follow.

The Chamber of Commerce of the United States is concerned that EEOC might issue such guidelines or policy without a full public airing of the vital and complex human issues involved in this matter. Therefore, we respectfully request that prior to issuing any layoff guidelines or policies, the Commission publish the proposal in the Federal Register with sufficient time to allow all those interested to comment, and that public hearings be held on this important and sensitive issue. In addition, since such matters are also of interest to the Department of Labor as well as the Department of Justice, both of which have civil rights responsibilities, we suggest that the Equal Employment Coordinating Council would be an appropriate body to hold such hearings and to resolve these questions.

It is in the best interests of all Americans that this matter be carefully considered by both government civil rights agencies and the public before a course of action is decided upon.

Very truly yours,

G. Brockwel Heylin

G. Brockwel Heylin
Labor Relations Attorney
(202) 659-6103

cc: Commissioner Colston Lewis
Commissioner Ethel Bent Walsh
Commissioner Raymond L. Telles
Senator Harrison A. Williams
Representative Carl D. Perkins
Mr. Stan Scott, Counsellor to the
President for Minority Affairs

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

LEONARD WOODCOCK, PRESIDENT — EMIL MAZEY, SECRETARY-TREASUR

VICE-PRESIDENTS

PAT GREATHOUSE • KEN BANNON • NELSON JACK EDWARDS • DOUGLAS A. FRASER • OLGA MADAR • DENNIS McDERMOTT • IRVING BLUES

STEPHEN I. SCHLOSSBERG
GENERAL COUNSEL—WASHINGTON
1125 15TH STREET, N. W.
WASHINGTON, D. C. 20005
PHONE: (202) 296-7484

JOHN A. FILLION
GENERAL COUNSEL—DETR

April 7, 1975

Ethel Walsh
Acting Chairperson
EEOC
2401 E St., N.W.
Washington, D.C.

Dear Madam:

It has come to our attention that the Commission might issue "guidelines" for layoffs.

This letter is to urge you not to do so at this time. The matter of layoffs is a painful and sensitive fact of present industrial life. Any attempt to guide companies and unions should be done only after the most careful legal, technical and practical study.

It would seem to us that the EEOC would be well advised to wait until a new permanent Chairperson and a new Commission Member are appointed, before issuing "guidelines" on this delicate subject.

In any event, even after the most careful internal study, no "guidelines" should issue until after public hearings have been held so that the Commission can get the views of those affected. The UAW hereby requests such a hearing.

Sincerely,

Stephen I. Schlossberg
General Counsel, UAW

John A. Fillion
General Counsel, UAW

cc

Chamber of Commerce of the United States of America

Washington

April 10, 1975

Honorable Carl D. Perkins
Chairman, U.S. House of Representatives
Committee on Education and Labor
2181 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Perkins:

On March 14, 1975, we asked John Powell, then Chairman of the Equal Employment Opportunity Commission to delay the issuing of guidelines on layoffs until there had been careful consideration given to the feasibility and propriety of this proposal. A copy of that request is enclosed.

We also asked that before any guidelines were to be issued that there be a public hearing held by the EEO Coordinating Council.

Those requests have not been acknowledged by the Commission and I would appreciate your advice and interest prior to April 15, the date on which the Commission has announced their intention to vote on whether these guidelines will be issued.

Very truly yours,

Richard B. Berman
Director of Labor Law

cc: Mr. John Buchanan
Mr. Augustus Hawkins
Mr. Albert Quie
Acting Chairman, EEOC, Ethel Bent Walsh

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

EXECUTIVE COUNCIL

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AL H. CHESSER
MURRAY H. FINLEY
SOL STETIN
GLENN E. WATTS

815 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

(202) 637-5000

April 11, 1975

Mrs. Ethel Bent Walsh
Acting Chairperson
Equal Employment Opportunity
Commission
2401 E Street, N.W.
Room 5214
Washington, D.C. 20506

Dear Mrs. Walsh:

It is our understanding that next week the Commission will consider whether to issue guidelines concerning Title VII's impact on the rules governing layoffs set by employers or through collective bargaining.

The question of who shall be furloughed is a sensitive one at any time; and, as the AFL-CIO is well aware, in today's economy that question poses particularly acute problems for individual workers, their unions, employers and the society as a whole. Particularly for that reason, we believe that the Commission should not issue guidelines at this time.

The focus of attention in this area has been layoffs by seniority. This is not the proper occasion to correct the errors of those who argue that there are superior alternatives to seniority in some ultimate sense. For, the Commission is empowered to enforce Title VII, not to make social policy. And, in conformity with the clear Congressional intent the two United States courts of Appeals that have addressed this matter (which is presently pending in a third) have both concluded that the use of date-of-hire seniority is lawful under Title VII. It is therefore unlikely that at this time Commission guidelines would further illuminate the law. We submit that given the multitudes of substantial legal issues the Commission has before it, and the crushing backlog with which it must contend, there is no warrant for diverting scarce resources to a subject which admits of only one legal answer, and which, in any event, is being fully litigated in the courts.

Additionally, as we noted at the outset, the rules governing lay-offs are a matter of vital natural concern. If, despite the existing precedents the Commission should determine that it wishes to address Title VII's impact on those rules, it should do so in a manner fitting to the practical importance of the task undertaken. At the minimum this requires that the full compliment of Commissioners permitted by law rather than a bare quorum consider this matter, and that any resulting decision be issued only after the commission has invited and received comments from all interested parties and afforded those parties an opportunity to appear and testify at a public hearing. These are the minimum requisites necessary to assure that the ruling that emerges is worthy of respect.

Sincerely yours,

William E. Pollard

William E. Pollard
Director
AFL-CIO Department of Civil Rights

WEP/ppo
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DICKSTEIN, SHAPIRO & MORIN

THE OCTAGON BUILDING
1735 NEW YORK AVENUE, N. W.
WASHINGTON, D. C. 20006
202 785-9700

NEW YORK OFFICE
745 FIFTH AVENUE
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CHARLES H. MORIN
DAVID I. SHAPIRO
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WILLIAM J. O'HARA*
ARTHUR J. GALLIGAN
JUDAH BEST
HENRY C. CASHEN II
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FREDERICK M. LOWTHER
ROBERT J. HIGGINS
SEYMOUR GLANZER
M. J. MINTZ
IRA H. POLON
KENNETH L. ADAMS
ALAN B. PICK
IRA R. MITZNER
WILLIAM SILVERMAN
RICHARD P. FERRIN
GEORGE T. BOGGS
JOEL B. KLEINMAN
*(NOT ADM. IN D.C.)

April 14, 1975

Honorable Ethel Walsh
Acting Chairperson
EEOC
2401 E Street, N.W.
Washington, D. C.

Dear Madam:

We have read reports that the Commission is considering the issuance of guidelines regarding the legality under Title VII of standards established by employers or by collective bargaining agreements for reductions in force or layoffs. We write this letter to urge that no such guidelines be issued at this time. We do so for two reasons. First, because the Commission has not solicited or received the views of interested employers and labor organizations; and second, because the question is of such importanct that any action on the subject should be taken by a commission of five members rather than a bare quorum as presently exists. The latter point requires no elaboration, but a few additional observations on the first may be appropriate.

The standards for determining which employees will be laid off in a reduction in force differ widely. Neither the narrow practicalities for the most economically successful operation nor considerations of fairness and morale can be properly evaluated except in the context of the particular industry or plant, or perhaps even smaller unit, involved. Before issuing guidelines the Commission should surely attempt to learn as much as possible of the complexities of the problem and the practical ramifications of the guidelines. To do otherwise would be to operate in a vacuum and to treat those whom it regulates as adversaries whose views simply do not matter. If industry and unions are to be "guided" in their actions, then they

must have confidence that the guidelines are based on an understanding of industrial realities. Indeed, if the Commission disables itself from learning about the industrial realities, it can contribute little if anything, since the meaning of the Act as such is in the province of courts, some of whom have already ruled. Finally, a failure to solicit and consider the views of the private parties affected would be inconsistent with the letter and spirit of the Administrative Procedure Act.

Accordingly, for these reasons, the Commission should not issue guidelines now, and if it chooses to do so at all, should first publish proposed guidelines in the Federal Register and then give a full and fair opportunity for comment to all interested parties.

Very truly yours,

Robert J. Higgins

MGMWSHT HSA
1-029378C104 04/14/75
TLX ORESCON NYK
001 NEW YORK NY APRIL 14
ZIP 20506

western union Mailgram

UNITED STATES U.S.MAIL

RECEIVED
OFFICE OF THE VICE CHAIRMAN

'75 APR 15 AM 9:38

#1195

ACPING CHAIRPERSON ETHEL BENT WALSH
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E STREET, NW
WASHINGTON, DC 20506

DEAR MS. WALSH:

41 MAJOR CORPORATIONS' REPRESENTATIVES, MEETING IN SPECIAL SESSIONS OF THE ORC EQUAL OPPORTUNITY GROUPS AND THE ORC EQUAL OPPORTUNITY LEGAL GROUP APRIL 10TH AND 11TH, CONCURRED IN THESE POINTS REGARDING EEOC'S DRAFT OF GUIDELINES ON WORK ALLOCATION:

1. BECAUSE THEY ARE IN FACT NEW RULES, NOT INTERPRETATIONS, THE ISSUANCE O F THESE GUIDELINES SHOULD FOLLOW THE ADMINISTRATIVE PROCEDURES ACT AND BE SUBJECTED TO PUBLIC REVIEW AND COMMENT BEFORE ADOPTION.

2. SINCE THE LIFO QUESTION AND THE EEOC POSITION ARE ALREADY IN THE COURTS (JERSEY CENTRAL, WATERS, BOWMAN, ET AL.), ADOPTION NOW WOULD BE ESPECIALLY UNTIMELY.

3. GUIDELINES' REDEFINUTION OF "BONA FIDE SENIORITY SYSTEMS" IS PATENTLY CONTRARY TO CONGRESSIONAL INTENT AND TO RECENT DECISIONS OF THREE COURTS OF APPEAL., US HHS CMUCH SHUHSD IN JERSEY CENTRAL, "AE BELIEVE THAT CONGRESS INTENDED W PLANT-WIDE SENIORITY SYSTEM, FACIALLY NEUTRAL BUT HAVING A DISPROPORTIONATE IMPACT ON FEMALE AND MINORITY GROUP WORKERS, TO BE A BONA FIDE SENIORITY SYSTEM WITHIN THE MEANING OF S703(H) OF THE ACT."

4. GUIDELINES ARE QUOTA ORIENTED.

5. GUIDELINES CONFLICT WITH NLRA AND A BASIC, TIME-PROVED FORMULA OF LABOR-MANAGEMENT RELATIONS.

6. GUIDELINES INVITE ALL EMPLOYERS TO REPEAT JERSEY CENTRAL APPROACH OF GOING DIRECTLY TO COURT RATHER THAN UTILIZING EEOC PROCEDURES.

7. GUIDELINES CONFLICT WITH MANY STATE REGULATIONS AND ARE UNCLEAR IN MEANINGS OF "VOLUNTARY," "DISPROPORTIONATE," "ROTATIONAL" AND ELSEWHERE.

8. ALTERNATIVES TO LIFO WOULD COST MORE, HAVE INFLATIONARY ECONOMIC IMPACT AND BE DESTRUCTIVE TO COMPETITION WITH FOREIGN

PRODUCTS BOTH DOMESTICALLY AND ABROAD.

9. OTHER PROBLEMS EXIST, TOO MANY FOR INCLUSION IN MAILGRAM.

FOR THE ORC EQUAL OPPORTUNITY GROUPS AND THE
ORC EQUAL OPPORTUNITY LEGAL GROUP,

WILLIAM G. SHEPHERD
EQUAL OPPORTUNITY INTERCHANGE COORDINATOR

15:31 EST

MGMWSHT HSA

MGMWSHT HSA
1-015991A104 04/14/75
TLX OTISEL NYK
01 NEWYORK NY APRIL 14
ZIP 20506

western union Mailgram

UNITED STATES U.S.MAIL SERVICE

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OFFICE OF THE VICE CHAIRMAN

THIS MAILGRAM WAS TRANSMITTED ELECTRONICALLY TO THE POST OFFICE NEAR YOU FOR DELIVERY

'75 APR 15 AM 9:38

#119

JOHN H POWELL, JR. CHAIRMAN
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1800 G. STREET, N.W.
WASHINGTON, D.C. 20506

ISSUANCE OF GUIDELINES ON WORK ALLOCATION, PART 1608, CHAPTER XIV,
TITLE 29, WILL RAISE MAJOR QUESTIONS AS TO IMPLEMENTATION, SEVERAL COURT ACTIONS, INCLUDING JERSEY CENTRAL, WATKINS, ETC, CONTEST VALIDITY OF GUIDELINE PREMISES; ISSUANCE NOW WOULD BE UNTIMELY.

GUIDELINES, IN EFFECT, CREATE QUOTA SYSTEM, STRONG PROBABILITY OF CONFLICT WITH NLRA, GUIDELINES DEFINITION OF BONA FIDE SENIORITY SYSTEM WILL BE IN CONFLICT WITH THAT OF EXISTING, LAWFUL SENIORITY SYSTEMS. "ROTATION LAY-OFFS," SUGGESTED AS A METHOD HAVING LEAST DISPROPORTIONATE IMPACT IN REDUCING LABOR COSTS, CAN CONFLICT WITH STATE LAWS REGARDING UNEMPLOYMENT BENEFITS ELIGIBILITY. RESPECTFULLY SUGGEST ISSUANCE OF GUIDELINES BE POSTPONED PENDING FURTHER STUDY.

HARRY J. CROSSON, JR. OTIS ELEVATOR CO 750-3RD AVE NEWYORK NY 10017
TELEX 126500

12:37 EST

MGMWSHT HSA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

March 6, 1975

Memorandum

To: Edward Morgan
Director, Office of Congressional Affairs

From: William A. Carey WAC
General Counsel

Subject: Recent Cases Involving Layoffs and Seniority

Recent Title VII court decisions may be placed in two groups. The first group includes those which consider challenges to plant or company-wide seniority systems when the use of such systems causes the layoffs of a disproportionate number of females, blacks, or other minorities. A second--smaller--group consists of those cases in which plaintiffs do not challenge the seniority systems as such but, rather, assert claims to seniority equivalent to that which they would have earned had they not been the direct victims of their employers' discriminatory hiring practices.

a. The first group of cases includes the following:

Jersey Central Power and Light Co. v. IBEW, __F.2d__, 9 FEP Cases 117, 9 EPD ¶9923 (3rd Cir. 1975);

Waters v. Wisconsin Steel Corp., 502 F.2d 1309 (7th Cir. 1974);

Watkins v. Steelworkers, 369 F. Supp. 1221 (E.D. La. 1974), appeal pending No. 74-2604 (5th Cir.)

Loy v. City of Cleveland, __F. Supp.__, 8 FEP Cases 614, dismissed as moot at 8 FEP Cases 617 (N.D. Ohio 1974);

Delay v. Carling Brewing Co., __F. Supp. __, 9 EPD ¶9877 (N.D. Ga. 1974);

Bales v. General Motors Corp., __F. Supp.__, 9 FEP Cases 234 (N.D. Cal. 1974).

These courts have divided on the issue of whether layoffs based on plant or company seniority violate Title VII if they have a disproportionate impact on females or members of minority groups. In general, the Waters and Jersey Central courts have held that a "last-in, first-out" system may be used by an employer irrespective of its impact, whereas the Watkins, Loy, and Delay courts have held that if the system has a disproportionate impact on minorities as a result of past hiring discrimination, the system violates Title VII if used for layoffs and recall. The difference in approach turns on a reading of §703(h) of Title VII, 42 U.S.C. §2000e-2(h), which permits the use of bona fide seniority systems even when their effect is discriminatory. Waters and Jersey Central conclude that a plant or company seniority system is per se bona fide; Watkins, Loy and Delay reject this talismanic approach and focus, instead, on the history of the system at issue. (The Bales court has not yet decided the question). We have participated in the Jersey Central and Watkins appeals and have generally supported the Watkins view. We currently have a petition for rehearing pending in the Jersey Central case.

b. The second group of cases at present consists only of Franks v. Bowman Transportation Co., 495 F.2d 398, (5th Cir. 1974) and Meadows v. Ford Motor Co., __F.2d __, 9 FEP Cases 180, 9 EPD ¶9907 (6th Cir. 1975). In Franks, the court held that applicants who were discriminatorily denied employment in the past were entitled to a court order requiring the employer to hire them but were not entitled to seniority for the period between their discriminatory rejection and subsequent court-ordered hiring. The court held that to confer such seniority would provide the rejected applicants with "super-seniority" or fictional seniority. The Meadows court rejected this approach. While it acknowledged that giving seniority to applicants who had been unlawfully rejected for employment could pose practical problems, it found no legal impediment in Title VII to an award of at least some seniority for the period of discriminatory exclusion. We have advocated the Meadows position and have joined with the Solicitor General in supporting a petition for certiorari in Franks.

Issue and Debate

Layoff and the Civil Rights of Minorities

By ERNEST HOLSENDOLPH
Special to The New York Times

WASHINGTON, Jan. 28—In times of recession, when

was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor-

The New Jersey utility had been operating under an agreement with the Equal Employment Opportunity Com-

"Although unions can develop their own local options," Mr. Pollard said, "we feel a commitment to protect

Last Hired, and Usually the First Let Go

By CHARLAYNE HUNTER

Charlotte Brown, a 24-year-old black woman, was hired last January by Twentieth Cen-

chair the conference—others are 'leery" because they see the problem as a very prickly one.

"It's so potentially extremely

ployers consider cost savings "by other cuts and economies, such as reduced work weeks, shift changes, payless work days, payless holidays and cuts