

LEADERSHIP CONFERENCE EDUCATION FUND

CIVIL RIGHTS MONITOR

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IN BRIEF...

The December issue of the CIVIL RIGHTS MONITOR provides an update on the Department of Justice's efforts to gut Executive Order 11246 on affirmative action (pages 1-3). Three affirmative action employment cases before the Supreme Court are reviewed (pages 3-7). The Department of Education's proposed regulations on bilingual education programs are discussed by Joseph M. Trevino, Executive Director, League of United Latin American Citizens, on page 8. Efforts are underway by the Equal Employment Opportunity Commission to revise the Uniform Guidelines on Employee Selection Procedures, see pages 9-11. The continuing impact of the Grove City decision is reported on page 11. Karen Keegan, Women's Legal Fellow, outlines the impact of the House passed tax bill on women (page 12). Brief summaries are provided on the Education Department's voucher education proposal; the Handicapped Children's Protection Act; and a district court ruling finding that city officials helped maintain a segregated school system by locating all public housing in minority neighborhoods (see pages 13-14). Interested persons are urged to express their views on a number of items presented in the MONITOR. If additional information is needed, please contact the FUND at 2027 Massachusetts Ave., N.W., Wash. D.C. 20036, (202) 667-6243.

UPDATE ON DEPARTMENT OF JUSTICE'S EFFORTS TO GUT THE EXECUTIVE ORDER

In the October CIVIL RIGHTS MONITOR, we reported on the Department of Justice's efforts to revise Executive Order 11246 on affirmative action which requires the tens of thousands of employers awarded federal contracts to take positive steps, including establishing goals and timetables, to include qualified minorities and women in their workforce. The proposed revision of the Executive Order, supported by Attorney General Edwin Meese, eliminates goals and timetables as a requirement. While the Meese draft says that businesses can adopt goals and timetables voluntarily, the revised order would not provide a legal basis for the use of such goals, and thus would expose employers who used them to lawsuits.

Failing in his efforts to get Secretary of Labor William Brock to endorse the proposed revision, Attorney General Edwin Meese convened the Domestic Policy Council on October 22, 1985 to consider the proposal. To the delight and surprise of many civil rights advocates, the Attorney General was unable to persuade the Domestic Policy Council to support his revision of the Executive Order. Instead, the Council voted to send the President three options: the Meese proposal, and two alternatives.

The second option, supported by Secretary of Labor William Brock, would make no change in the body of the Executive Order, but revise the regulations to emphasize the current prohibition against quotas.

The third option would revise the Executive Order to include the prohibition against quotas which is currently contained in the regulations.

Supporters of the Attorney General's position include Assistant Attorney General for Civil Rights Wm. Bradford Reynolds, Secretary of Education William Bennett, Chair of the Equal Employment Opportunity Commission Clarence Thomas, Energy Secretary John S. Herrington, and Clarence M. Pendleton, Jr., Chair of the U.S. Commission on Civil Rights. It is notable that the Commission

has not officially taken a position on this issue although the Chairman has aggressively voiced support for the proposed revision.

Supporters of Brock's position include Secretary of State George P. Shultz, Treasury Secretary James A. Baker III, Housing and Urban Development Secretary Samuel R. Pierce, Jr., Transportation Secretary Elizabeth Hanford Dole, former Secretary of Health and Human Services Margaret Heckler, and Secretary of Commerce Malcolm Baldrige.

Recent Developments

While waiting for the President to decide among the options, proponents and opponents of the present Executive Order have been busy attempting to get their message across. As of December, 250 members of Congress, including 69 Senators (23 Republicans), had contacted President Reagan urging him to leave the Executive Order alone. Senate Majority Leader Robert Dole (R-Kan) stated publicly: "My view is he shouldn't change the executive order." This view was supported by House Minority Leader Robert Michel (R-ILL) who said "I know that, when it works...you don't fix it, and I happen to think what's been happening has been all right, as far as I'm concerned."

Business leaders have also expressed strong support for the Order. On November 7, 1985 in testimony before the House Subcommittee on Civil and Constitutional Rights, Ralph Davidson, Chairman of Time, Inc. stated:

We at Time Inc. believe in Executive Order 11246 for two basic reasons. First, we recognize that the use of public funds and contracts are important tools for reaching goals beneficial to our entire society. Throughout this Nation's history our government has used public investments to help bring jobs and opportunity to all our people, wherever they live, whatever their race or religion or ethnic origins. Affirmative Action, we believe is an intelligent part of that commitment. Second, as a matter of practical experience, we believe that the executive order works.

John F. Akers, Chief Executive Officer of IBM recently issued a report on his company's affirmative action programs with statistics to show that the company's percentage of minority employees increased more than ten times between 1962 and 1984, from 1.5 (1,250) to 15.3 (35,000) percent. Similar percentages for women employees are 12.7 (10,000) and 27.4 (63,400) respectively. Further, in 1984 of the approximately 6,100 college students hired by IBM, 21 percent were minorities and 36 percent were female. In 1984, women constituted 14 percent and minorities 10 percent of the IBM managers employed in the U.S. Corresponding percentages for IBM professionals were 19 and 13 percent respectively (see Equal Opportunity, Affirmative Action and Community Programs in IBM (1985)). Similar reports have been issued by numerous companies including Schering-Plough, Philip Morris, Exxon, AT&T, Westinghouse and Chemical Bank.

The National Association of Manufacturers (13,500 companies) in its continuing support for the Executive Order in a November 27, 1985 letter to the President urged him not to revise the Order. "NAM believes the current Executive Order provides the framework for an effective affirmative action policy. Since it was signed into law, dramatic progress has been achieved in incorporating talented minorities and women into our workforce...[T]he business community is concerned that the elimination of goals and timetables could result in confusing compliance standards on federal, state, and municipal levels and a proliferation of reverse discrimination suits." Indeed, ironically the abandonment of goals and timetables could lead to more judicially imposed quotas.

Hyman Bookbinder, American Jewish Committee Washington Representative, in a memorandum to Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, reported an overwhelming consensus on the part of the Jewish community in opposition to the proposed revision of the Executive Order. The Memorandum states that the Executive Committee of the National Jewish Community Relations Advisory Council (coordinating body for 11 National and more than 100 local Jewish organizations) voted to oppose the proposed revision with only two negative votes

cast.

Further, a September 1985 Harris Poll reported that a record 75-21 percent of the American people are in favor of federal affirmative action programs for minorities and women provided there are no rigid quotas." Notably, the Department of Labor regulations to carry out the Executive Order provide for contractors to develop measurable goals and timetables and to make a good faith attempt to meet these targets, and specifically state that "goals may not be rigid and inflexible quotas..."

On November 5, 1985, U.S. Chamber of Commerce President Richard L. Leshner called a press conference to announce the Chamber's participation in the "Color-Blind Coalition Against Quotas." The Coalition consists of approximately 15 organizations including the Anti-Defamation League, Associated Builders and Contractors, Inc., and the American Subcontractors Association. Leshner said "the impetus for the formation of this coalition was the recent adverse publicity about the long-needed revisions to Executive Order 11246...The attempts to establish quotas, whether explicit or under the euphemism of numerical goals and timetables, reflects a reversal of the civil rights revolution...The U.S. Chamber applauds the proposal to revise Executive Order 11246 to clarify that quotas and other discriminatory devices are not acceptable." Significantly, the New York Chamber of Commerce, the oldest chamber in the U.S. and one of the largest, in opposition to the position of the U.S. Chamber, issued a statement opposing the proposal to alter the Executive Order.

What You Can Do?

It is extraordinary that supporters of the Executive Order have been able to stave off the Meese initiative for five months. But the battle is not over yet. If when you receive the MONITOR, a decision is still pending, write or call the President to express your support for the Executive Order (202/456-1414). Also, contact Secretary of Labor William Brock who has been putting up a valiant fight to save the Executive Order, and express your support for his efforts (202/523-8271). If the decision is made to retain the Executive Order, thank yous to supporters would be very appropriate. If the decision is made to eliminate goals and timetables, the heart and soul of the Executive Order, a bipartisan coalition of Representatives and Senators will introduce legislation, which has already been drafted, to codify the existing Executive Order. While supporters of the Executive Order do not want to pursue a legislative course of action, they view this as the only option if the order is gutted. For further updates, contact Karen McGill Arrington at the FUND, (202)667-6243.

SUPREME COURT TO ADDRESS AFFIRMATIVE ACTION ISSUES

Three cases which address affirmative action employment issues are before the Supreme Court: Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 105 S.Ct. 2015 (1985) (No. 84-1340); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), cert. granted, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985) (No. 84-1999); and Local 638 v. Equal Employment Opportunity Commission, 753 F.2d 1172 (2nd. cir. 1985), cert. granted, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985) (No. 84-1656). In all three cases the Department of Justice has taken a position opposing the minority employees. By the end of this term, the Supreme Court will have addressed many of the legal questions surrounding affirmative action plans.

WYGANT

Oral argument in the Wygant case was held on November 6, 1985, and an opinion is expected by July 1986. The issues before the court are whether a judicial finding of discrimination is a prerequisite for the adoption of a voluntary affirmative action plan, and whether the particular plan in this case is constitutionally permissible. In dispute is a formula contained in the bargaining contract between the Jackson, Michigan Teachers Association and the School Board on how teachers are to be laid off during economically stringent times. The formula provides for the use of seniority in layoffs "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of layoff." This formula was added to protect the recent gains made by the school board in hiring minority teachers. The

plaintiffs, nineteen white teachers, argue that "a union cannot lawfully negotiate a voluntary affirmative action plan which gives preferential treatment to minorities where there has been no judicial finding of past employer discrimination." The U.S. District Court for the Eastern District of Michigan, on September 7, 1982, held:

...Plaintiffs' contention that the affirmative action plan at issue here cannot stand because there has been no prior judicial determination, that defendants engaged in racial discrimination, is without merit...The objective of this affirmative action plan to remedy past "substantial" and "chronic underrepresentation" of minority teachers...is plainly constitutional...[T]he layoff provision is...a temporary measure,...does not require the retention of unqualified teachers,...does not oust white teachers and replace them with new minority hires, nor does it absolutely bar laid off white teachers from ever again working for the Jackson School District...and plan...was voluntarily adopted by the membership of the JEA...

On October 25, 1984 the United States Court of Appeals, for the Sixth Circuit affirmed the opinion of the district court and the plaintiffs appealed.

Background

As District Judge Charles Joiner stated in his opinion, "the roots of this case reach nearly thirty years into the past." Before 1953, the Jackson, Michigan school district employed no black teachers. In 1953, the first black teacher hired was one of 61 new hires for the 1953-54 school year. By 1961, minority teachers comprised 1.8 percent of the faculty, 10 of the 515 teachers. In 1969, when black students comprised 15.2 percent of the student population, black teachers were only 3.9 percent of the faculty. Accordingly, the Superintendent's Ad Hoc Committee recommended that each elementary school (22) have at least two minority teachers, within one year. To implement the recommendation, the district would have had to hire 40 new minority teachers that first year. The committee's recommendation was rejected. The problem was studied by a Citizens School's Advisory Committee and a Professional Council of school administrators and representatives of the Jackson Education Association (the collective bargaining unit) over the next two years. By 1971, the student body was 15.9 percent minority while the faculty was approximately 8.5 percent minority.

The relevant contract was ratified in late Fall 1972, and layoffs in the Spring of 1973 followed the contract provisions, maintaining the percentage of minority teachers employed at that time. However, in Spring 1974 the Board did not follow the formula in its layoffs, and minority teachers sued in federal court. The district judge "retained the civil rights claims but remanded the breach of contract claims to the Jackson County Circuit Court which found that the disputed contract provision did not violate Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment. The Board's adherence to the contract in subsequent layoffs led to the present lawsuit.

The Opinion

The Appellate Court found that "...the plaintiffs' contention that the affirmative action plan at issue here cannot stand because there has been no prior judicial determination that the defendants engaged in racial discrimination is without merit," and denied plaintiffs' motion for summary judgment. The court relied on the Supreme Court's decision in United Steelworkers of America v. Weber, 443 U.S. 198 (1979) which held that "Title VII does not prohibit a private employer from voluntarily adopting an affirmative action plan 'to eliminate conspicuous racial imbalance in traditionally segregated job categories'." Further, the opinion cited Detroit Police Officers' Association v. Young, 608 F. 2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981), in which the Sixth Circuit relied on Weber to find that the internal determination of racial disparities justified the voluntary plan, even though there had been no prior judicial determination of race discrimination.

Secondly, the court addressed the constitutionality of the disputed provisions of the contract. Again citing Weber and Young, the court stated: "there must be some evidence that minority teachers have not enjoyed the same representation on the faculty of the Jackson Public schools as have

white teachers," the violation must meet the standard of "conspicuous racial imbalance in traditionally segregated job categories." Further, it was found appropriate, in assessing the extent of the violation, to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than the percentage of minorities in the relevant labor market, because teachers are role-models for their students and societal discrimination has often denied minority students of role models. Applying these standards, the court found that minority teachers were "substantially" and "chronically" underrepresented, and thus the fourteenth amendment would permit voluntary adoption of an affirmative action plan to protect minority teachers from the effects of layoffs.

While the court recognized that at least one innocent white teacher may have suffered from the plan, it relied on the Supreme Court's holding in Fullilove v. Klutznick, 448 U.S. 448 (1980) to establish that "when effectuating a limited and properly-tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible."

One possibility is that the Supreme Court will send the case back for further examination of evidence of employment discrimination by the school board. While in oral argument the attorney for the school board stated that Jackson, Michigan was a segregated system, which voluntarily desegregated after Brown II, this evidence is not part of the record.

In the other two cases, which have been consolidated for argument, liability for prior discrimination has been clearly documented. In question are the provisions of the affirmative action plans adopted to remedy the discrimination.

VANGUARDS

In Vanguards of Cleveland, an association of black and Hispanic firefighters (Vanguards) sued the city over alleged discrimination in the promotion of minority firefighters. The local union intervened opposing the position of the Vanguards. On January 31, 1983, District Court Judge Thomas D. Lambros (Northern District of Ohio) accepted a consent decree proposed by the city and the Vanguards which included goals for the promotion of minority firefighters. The court found "...a historical pattern of racial discrimination in promotions in the City of Cleveland Fire Department...and adopted the consent decree as a fair, reasonable, and adequate resolution of the claims raised in this action."

The local union appealed and on January 23, 1985 the U.S. Court of Appeals for the Sixth Circuit affirmed the district court decision. The union appealed to the Supreme Court and certiorari was granted.

Background

On October 23, 1980 the Vanguards sued the city under the 13th and 14th Amendments, and Title VII of the Civil Rights Act of 1964 alleging discrimination in hiring and in the promotion process. Specifically, the complaint alleged that the city had maintained its discriminatory promotions policy by: (1) using unfair written tests and seniority points; (2) manipulating retirement dates; and (3) failing to hold an examination for promotions since April 1975. The complaint said that only 4.5 percent of the firefighters who had attained the rank of Lieutenant or above were minorities, while in 1980 the City of Cleveland was 46.9 percent minority.

The union intervened in 1981 asserting that "promotions based upon any criteria other than competence, such as a racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force." A proposed consent decree negotiated by the city and the Vanguards was submitted to the court, providing, in part, that "all minority members who passed the November 1981 examinations for the ranks of Assistant Chief of Fire, Battalion Chief and Captain of Fire shall be appointed." Further, for the 66 promotions to Lieutenant a minority was to be appointed for each non-minority appointee, a minority and a non-minority appointment being coupled. Seniority within grade would

be determined by the date of appointment, and by the respective rankings on the eligible list from which promotions were made. For those persons coupled for appointment, seniority would be based upon the order of their appointment from the eligible list, regardless of their actual rankings.

Following certification of the 1984 eligible promotional lists, minority promotion goals were to be 20 percent for Assistant Chief, 10 percent for Battalion Chief and for Captain, and 23 percent for Lieutenant. In 1985 the goals were to be 25 percent for Lieutenant and 20 percent for the ranks above Lieutenant. These percentages were subject to modification if there were not enough eligible minority candidates. On January 31, 1983, the court adopted the proposed consent decree, and the union appealed.

The Opinion

The appellate court decision addressed whether the affirmative action plan was reasonably related to the "objective of remedying prior discrimination" and whether it was "fair and reasonable to nonminorities who may be affected by it." The April 22, 1985 opinion notes that the union does not contest the district court's finding of racial discrimination and thus the existence of a substantial state interest in remedying the violation. Rather, the local union contends that the plan is unreasonable because it penalizes innocent non-minority firefighters. The appellate court found that the statistical evidence provided, as well as the city's admission of past discrimination, "established a substantial state interest in some remedial action." Further, the court found that "the modest goals set forth in the plan represent a permissible and effective means for the City to achieve its constitutionally permissible ends within the foreseeable future."

LOCAL 638

The third case, Local 638, involves an appeal by a sheet metal workers' union, its apprenticeship committee, and the contractors' association, from several district court orders which imposed both compensatory and coercive fines, and adopted an amended affirmative action plan. On January 16, 1985 the United States Court of Appeals for the Second Circuit affirmed in part and reversed and remanded in part the district court's ruling. The union appealed, and certiorari was granted.

Background

Action in this case dates back to 1971 when the U.S. Department of Justice filed suit against Local 28, a union of sheet metal workers in the New York Metropolitan area, and the Joint Apprenticeship Committee (JAC) alleging a pattern and practice of discrimination against nonwhites in violation of Title VII of the Civil Rights Act of 1964. The U.S. Equal Employment Opportunity Commission replaced DOJ as plaintiff. A three week trial in 1975 established that Local 28 and the JAC had purposefully discriminated against nonwhites by effectively obstructing "every route that nonwhites might use to gain admission to the union." The court found:

1. a majority of the union's members were admitted through apprenticeship, but entry of nonwhites had been blocked through use of invalid entrance exams, requiring a high school diploma, and inquiry into applicants' arrest records,
2. the union refused to keep records on the applicants' race and national origin although required to do so by EEOC regulations,
3. the union had used invalid journeymen's examinations,
4. the union refused to accept nonwhite transfers from sister locals while issuing temporary work permits primarily to white workers, and
5. the union selectively organized only those shops having a high percentage of white employees.

In July 1975 the district court entered an order and judgment which, in part, appointed an administrator to propose and implement an affirmative action plan and established a nonwhite union membership goal of 29 percent by July 1, 1981. On appeal, the Second Circuit affirmed the

judge's findings but reversed two provisions of the order and affirmative action plan. A revised affirmative action plan was subsequently adopted by the district judge and affirmed by the Court of Appeals.

On April 16, 1982, the city and state filed suit seeking to have the Local, JAC, and contractors' association held in contempt for failing to comply with the order and the revised affirmative action plan. Plaintiffs alleged that the Local had not achieved the 29 percent membership goal because it had failed to take steps required by the district court's orders. In August 1982, District Judge Werker held the defendants in civil contempt finding that the defendants had failed to comply with the revised affirmative action plan "almost from its date of entry." At the time of the hearing, Local 28's nonwhite membership was 10.8 percent. The judge imposed a \$150,000 fine to be placed in a training fund to increase nonwhite membership in the apprenticeship program and, ultimately, in Local 28. In April 1983, the city brought a second contempt proceeding, and the district judge held the Local and JAC in contempt for the additional violations. In September 1983, the judge entered two additional orders establishing an Employment, Training, Education and Recruitment Fund and an amended affirmative action plan. The Fund was to consist of the \$150,000 imposed in the first contempt proceeding, and additional fines pursuant to the second contempt proceeding "of .02 per hour for each journeyman and apprentice hour worked." The Local and JAC were required to pay the administrative expenses.

The Amended Affirmative Action Plan, in part, required that the records of the Local be computerized and monitored by an independent advisor; that one nonwhite apprentice be indentured for every white apprentice; that one apprentice be employed for every four journeymen; that the apprenticeship aptitude examination be eliminated and replaced by a three member selection board; and that a new nonwhite membership goal of 29.23 percent be instituted, to be achieved by July 31, 1987. The city cross-appealed, asserting that the 29.23 percent goal should be higher.

The Opinion

The Court of Appeals affirmed the district court's civil contempt ruling against the Local, and the Joint Apprenticeship Committee on four of the five bases: adoption of a policy of underutilization of the apprenticeship program to the detriment of nonwhites; refusal to conduct a publicity campaign to increase nonwhite awareness of employment opportunities in the union; issuance of unauthorized work permits to white workers from sister locals; and failure to maintain and submit records and reports required by the affirmative action plan and the 1975 order and judgment. The decision rejected defendants' contention that the nonminority membership goal of 29.23 percent was a permanent quota. The court stated "this circuit has a well-established two-pronged test for the validity of a temporary, race-conscious affirmative action remedy such as a membership goal: There must be a 'clear cut pattern of long-continued and egregious racial discrimination' ... [and] the effect of reverse discrimination must not be identifiable...concentrated upon a relatively small, ascertainable group of non-minority persons." The court found that the amended affirmative action plan met these criteria.

The appellate court did strike the provision providing for one nonwhite apprentice for every white apprentice stating that "such race-conscious ratios are extreme remedies that must be used sparingly and 'carefully tailored to fit the violations found' " and used only when "no other method was available for affording appropriate relief." The court found that alternative methods were available since defendants had "voluntarily indentured 45 percent nonwhites in the apprenticeship classes since January 1981. If this practice were abandoned, the appellate court reasoned, the district court could modify the order. Moreover, the selection board would monitor the process and ensure that an appropriate number of nonwhites was selected.

Oral arguments in the Vanguards and Local 638 will be heard February 25, 1986 in the afternoon. Barry Goldstein, Assistant Counsel for the NAACP Legal Defense and Educational Fund, stated that "The three affirmative action cases before the Supreme Court together raise practically all the issues concerning the legality and constitutionality of affirmative action to remedy employment

discrimination. It is likely that the Supreme Court decisions in these cases will determine whether affirmative action can continue as an effective remedy for discrimination."

SECRETARY OF EDUCATION BENNETT PROPOSES NEW BILINGUAL EDUCATION REGULATIONS

Secretary of Education William J. Bennett has proposed new bilingual education regulations which would allow school districts to decrease or terminate native-language instruction in their federally-funded programs for limited English proficient (LEP) children. The Secretary's objective in proposing the new regulations, was to inform the districts that "they have considerable discretion under the statute to determine the extent of native-language instruction required in a transitional bilingual-education project." The proposed regulations interpret and implement Title VII (The Bilingual Education Act) as amended last year and, when adopted in final form, will apply to applications submitted and grants awarded beginning in fiscal year 1986. Additional objectives of the Secretary's regulatory package, published in the Federal Register, November 22, are to:

1. expand parental involvement in the educational decisions relating to their children;
2. increase emphasis on building local capacity to operate programs of instruction for the limited English proficient
3. ensure that limited English proficient children obtain proficiency in English as quickly as possible so that they can effectively participate in the regular educational program.

The regulations fulfill a pledge by Mr. Bennett in late September to modify the federal role in bilingual education policy in order to give school districts more "flexibility" in teaching LEP students. In his September speech, the Secretary suggested that maintaining a sense of cultural pride in bilingual programs had come at the expense of learning English, and that "after seventeen years of federal involvement, and after \$1.7 billion of federal funding, we have no evidence that the children whom we sought to help...have benefitted."

Coinciding with the release of the Secretary's regulatory package, was the issuance by Education Department Assistant Secretary for Civil Rights Harry M. Singleton of a memorandum directing all regional civil rights offices to identify the more than 400 school districts presently implementing "Lau Plans" and to invite them to renegotiate or modify long-standing agreements governing programs or procedures for LEP students. The plans were adopted after the Supreme Court's 1974 Lau decision upheld the authority of the Department to require school districts to take steps to help students overcome language barriers.

The League of United Latin American Citizens (LULAC) and other Hispanic organizations concerned with providing quality education for LEP children and adults are opposed to the new regulations, asserting that they appear to stress a rapid acquisition of English at the expense of other subjects. They maintain that the primary objective of transitional bilingual education is gradually to phase LEP children into all-English curriculums while allowing them to compete academically, through native-language instruction, with their English-speaking classmates. Currently, about 80 percent of all students who benefit from bilingual education assistance are Hispanic.

The contention by the Secretary that there is no evidence proving the success of bilingual programs is disputed by several longitudinal studies of children in bilingual programs. These studies report across-the-board improvement in both English language skills and in other subjects.

Interested persons are invited to submit comments and recommendations regarding these proposed regulations to: Carol Pendas Whitten, Director of the Office of Bilingual Education and Minority Languages Affairs (OBEMLA), Education Department, Rm. 421, Reporters Building, Washington, D.C. 20202. For more information about LULAC's concerns, please contact Joseph M. Trevino, Executive Director, LULAC, 400 First Street, N.W., Suite 721, Washington, D.C. 20001, (202) 628-8516.

EEOC'S EMPLOYMENT STANDARDS UNDER ATTACK

In August 1985, Clarence Thomas, Chair of the Equal Employment Opportunity Commission, caused tremors in the civil rights community by indicating plans to revise the Uniform Guidelines on Employee Selection Procedures (UGESP). The guidelines, which many regard as the heart of the fair employment program, were adopted in 1978 by the EEOC, the former Civil Service Commission (Office of Personnel Management), the Department of Justice, the Department of Labor (Office of Federal Contract Compliance Programs), and the Department of Treasury (Office of Revenue Sharing) (see Executive Office of the President, Office of Management and Budget, Regulatory Program of the United States Government (August 8, 1985)). Thomas contends the UGESPs are based on the premise that (1) but for unlawful discrimination, variations would not exist in the rates of hire or promotion of persons of different races, sexes, or national origins, and (2) blacks, Hispanics, other minorities and women are inherently inferior and thus should not be held to the same standards as others. He asserts that the UGESPs' reliance upon statistics in determining discrimination has "no relationship to the plain meaning of the term 'discrimination'."

Background

The Equal Employment Opportunity Commission was established by the Civil Rights Act of 1964 to enforce Title VII which prohibits employment discrimination. EEOC has the power to investigate charges of discrimination, to attempt resolution through conciliation, and to file and pursue lawsuits when conciliation fails.

While Title VII does not specifically forbid employers from using tests or any other selection device, it does require that such tests be professionally developed and not be used to discriminate. Section 703(h) of the Act reads in part:

...nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

EEOC, over the years, has developed a set of guidelines to interpret Title VII and to let employers know what the law requires of them. In 1966, EEOC first issued guidelines to interpret the testing provisions of Title VII. They stated in part that the Commission interpreted "professionally developed ability test" to mean:

A test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs...

In 1970, EEOC issued another set of testing guidelines to cover all objective selection criteria, and in 1978, EEOC and the other federal agencies with some responsibility for enforcement of the equal employment laws, issued the current Uniform Guidelines on Employee Selection Procedures to provide a unified position on the proper use of tests and other selection or promotion procedures. The basic principal of the UGESPs provides:

the use of any selection procedure which has an adverse impact on the hiring, promotion or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines.

Additionally, the UGESPs provide technical guidance on what constitutes "adverse impact" and how selection procedures should be "validated." This principle is firmly supported by Supreme Court decisions which have held that the EEOC's guidelines are entitled to "great deference" in determining

whether selection procedures comply with Title VII.

In 1971, in Griggs v. Duke Power Company, 401 U.S. 425, the court found that the Company's high school diploma requirement and the tests used for promotion purposes, while not adopted with the intent to discriminate did not "bear a demonstrable relationship to successful performance of the job for which [they were] used." The unanimous decision, written by Chief Justice Warren Burger, stated:

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas, or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality.

In Albemarle Paper Co. v Moody, 422 U.S. 405 (1972) the court ruled, again unanimously that:

The message of these Guidelines is the same as that of the Griggs case -- that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated"...

The UGESP serve several important functions:

1. They set forth the state of the law and incorporate judicial interpretations, and they have been given deference by the courts.
2. They contain statements of administrative policy with regard to EEOC's processing of individual and class charges involving the use of tests and other selection procedures, thus placing limits on what the Commission will consider as evidence of a Title VII violation.
3. They incorporate and restate professional standards with regard to the sufficiency of evidence concerning the job relatedness of tests and other selection procedures. (see Clay Smith, Jr., "The EEOC's Standards for Employment Testing," The National Law Journal (Sept. 16, 1985)).

Response to the Proposed Revision

Concern has been expressed from many corners: the business community, congressional leaders, the American Psychological Association, and civil rights advocates. In testimony before the House Subcommittee on Employment Opportunities (Oct. 2, 1985), William L. Robinson, Director of the Lawyers' Committee for Civil Rights Under Law, stated that "Chairman Thomas' own statements describing the review [of the guidelines] are so extreme that they make clear his intent to try to overrule Griggs and Albemarle Paper by Commission vote." Alfred W. Blumrosen, Professor of Law at Rutgers Law School and a renowned expert in the field, refuted Thomas' assertion that the guidelines are based on faulty premises. In response to the contention that the guidelines assume that but for discrimination, no variations would exist in the rates of hire or promotion of people of different races, sexes and national origins, Professor Blumrosen asserted that the "Guidelines do not direct that jobs be distributed...in proportion to the race, national origin or sex of the population." Differences in rates of hire or promotion provide "a starting point for analysis of whether the tests or procedures are job related." If the employer can validate the test as "job related," it meets the "business necessity" standard and "is lawful despite any "adverse impact" on minorities or women." Further, since 1935 the Supreme Court has made it clear that statistical evidence can be used to prove discrimination (Norris v. Alabama, 294 U.S. 587 (1935)).

In response to the Thomas assertion that the guidelines assume an inherent inferiority on the part of minorities and women, supporters of the guidelines state there is no such assumption. Rather

the guidelines recognize that a "condition of inequality has been imposed on minorities and women through a history of slavery, subordination, and discrimination." The guidelines seek to prevent "the maintenance of that subordination under the guise of 'neutrality' absent business necessity" (Blumrosen testimony).

What Impact Would The Proposed Revision Have

The result, according to the Lawyers' Committee for Civil Rights, would be to create confusion over what standards employers should use in complying with Title VII. "Voluntary compliance would come to a halt, and the judicial and administrative enforcement of Title VII would cease for all practical purposes while plaintiffs and defendants litigated...the question of whether the EEOC's new standards -- handed down twenty years after the effective date of Title VII and in conflict with the prior regulations contemporaneous with the statute -- should be given any weight". While civil rights advocates believe the principles embodied in the present UGESP, and supported by Griggs and Abemarle would be upheld in the courts, it would take years for the uncertainty to be resolved. Once again this administration is pushing its extreme anti-civil rights policies, in the absence of pressure from any constituency -- employers, unions, women, minorities -- to change a policy, which was slowly and painstakingly developed, and which is working.

Chairman Thomas' schedule calls for a proposed revision to be presented for a Commission vote in February 1986. Civil rights groups are concerned that the process of review has taken on a secrecy in contrast to the process by which the current Guidelines were developed. That process included circulating a draft proposal, publishing a "revised draft proposal" for public comment, and holding public hearings. Accordingly, civil rights groups have urged the House Subcommittee on Employment Opportunities to monitor EEOC's efforts to revise the Guidelines to ensure that concerned groups and individuals have an opportunity to express their views. If you would like to make your views known, Clarence Thomas, Chair can be contacted at EEOC, 2401 E Street, N.W., Washington, D.C. 20507, (202)634-6700. Comments can also be shared with the House Subcommittee on Employment Opportunities, 518 Annex 1, Washington, D.C. 20515, Attn. Eric Jensen, Staff Director (202) 226-7594.

THE CONTINUING IMPACT OF GROVE CITY

The Grove City decision, ___ U.S. ___, 104 S. Ct. 1211 (1984), which found that the anti-discrimination prohibitions of four civil rights statutes extend only to the specific program or activity receiving the funds, and not to the entire institution or entity receiving the funds continues to limit severely the ability of the Federal Government to prevent discrimination (for further discussion, see August 1985 issue of the CIVIL RIGHTS MONITOR). Examples follow.

In Pickens County, South Carolina junior and senior high school students may choose between co-educational or same-sex physical education classes. However, if too few students sign up for the same sex classes, students who chose co-ed classes are assigned on the basis of their sex to segregated Physical Education classes. The Office for Civil Rights (Department of Education) found that this practice discriminated against boys and girls, in violation of Title IX (sex discrimination). The school district claimed that OCR did not have jurisdiction because none of the \$2 million in federal funds received by the school district were used for physical education. An Administrative Law Judge and the Civil Rights Reviewing Authority agreed with the school district, and OCR did not appeal the decision. The case is closed and the district continues to operate its physical education program in a discriminatory manner.

In United States Department of Transportation v. Paralyzed Veterans of America, 742 F.2d 694 (D.C. Cir. 1985), cert. granted, 54 U.S.L.W. 3270 (U.S. Oct. 21, 1985) (No. 85-289), the Supreme Court will consider whether federal assistance to airlines stops at the door of the airplane, and correspondingly, whether the coverage of Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled persons, also stops there. The Department of Justice,

citing the Grove City decision, asserts that 504 coverage applies only inside airport buildings which receive direct Federal subsidies. A three-judge panel of the United States Court of Appeals ruled that coverage extends to "commercial air travel" because it benefits substantively from federal aid to airports, as well as from air traffic control. The panel held that all commercial air transportation was a federally assisted program or activity. Advocates for the handicapped state that upholding the appellate decision will "bar such practices by some airlines as requiring the blind to sit on blankets in case they are incontinent."

The Civil Rights Restoration Act of 1985 (H.R. 700/S. 431) which would restore full coverage to the civil rights statutes continues to be stalled in the House. The delay is due to amendments which would repeal long-standing Title IX regulations protecting students and employees against discrimination in education programs if they choose to have an abortion, and would broaden a Title IX "religious tenets" exemption to be invoked by institutions that are religiously "affiliated" not just those that are religiously controlled. The Leadership Conference on Civil Rights continues to hold firm on its position that the bill should simply restore the civil rights statutes, and any amendments that change substantive law are unacceptable.

WOMEN AND TAXES: HOUSE BILL MAY EASE THE BURDEN

Tax reform legislation approved by the House on December 17 has received the support of the Coalition on Women and Taxes because of the relief it would bring to the working poor, many of whom are women, and because it would spread the tax burden more fairly.

Most significantly, the bill would direct more than \$30 billion dollars in tax savings over the next five years to those with incomes under \$20,000. As a result, 6.3 million households would have their federal income tax liability completely eliminated. Because women and their children comprise three fourths of the country's poor, they in particular stand to gain by the cuts. The reduction in the tax burden is desperately needed by those households below the poverty line, whose federal income taxes have risen 204 percent from 1979 to 1983, after adjustment for inflation. The House bill reduces this low income tax burden by nearly doubling the personal exemption, by enlarging the standard deduction, by enlarging the Earned Income Tax Credit, and by indexing all of these for inflation. According to Robert Greenstein, Director of the Center on Budget and Policy Priorities, "This tax reform bill is more important for low and moderate income families than any piece of legislation in over a decade."

A particularly important feature of the House passed bill from the women's perspective is its reduction in inequality for single heads of households most of whom are women. Under current law, a single parent with three children pays more federal income tax than does a married couple with two children and the same income. This disparity occurs because the standard deduction for a single parent household is considerably lower than that for a married couple. The bill would greatly reduce this discrepancy by setting the standard deduction for heads of household at \$4,200 compared to \$4,800 for married couples.

In a major departure from tax proposals by the Reagan Administration, the dependent care tax credit is retained rather than changed to a less valuable deduction. Employer-provided dependent care assistance up to \$5,000 would also be exempted from taxation. Almost 52% of mothers with children under the age of six work outside the home, and the dependent care tax credit is the largest source of federal financial support for dependent care. For 1983, 6.5 million tax returns claimed the credit, with an average reduction in taxes of \$322.

While the House passed bill is considerably better for women than current law, the Coalition on Women and Taxes will seek further improvements in the Senate. For instance, the bill brings greater tax relief to one-earner than to two-earner married couples because the two-earner deduction under current law is eliminated. Even though all categories of tax payers will pay less in taxes, the so-called marriage penalty will continue to exist under the Committee bill. Under the marriage

penalty, two earner couples pay more federal income tax than two single taxpayers with comparable incomes. Women's groups will propose further reforms in this area on the Senate side.

Other concerns for women in the proposed bill include the fact that the dependent care and elderly and disabled tax credits are not indexed for inflation, and the fact that one-earner couples will not have the opportunity to establish individual retirement accounts equal to those of two-earner couples.

NOTE: This article was prepared with the use of data from the Coalition on Women and Taxes and the Coalition on Block Grants and Human Needs. Co-Chairs of the Coalition on Women and Taxes are Nancy Duffy Campbell at (202)328-5160 and Maxine Forman at (202)898-1588. Susan Pels is the contact for the Coalition on Block Grants and Human Needs, at (202)342-0726.

FOR YOUR INFORMATION...

Secretary of Education William J. Bennett has sent to Congress The Equity and Choice Act of 1985 (TEACH) which would allow parents of children currently enrolled in Chapter I programs to receive a voucher of approximately \$600 to use to enroll their children in an educational program of their choice, public or private. Chapter I, formerly Title I, provides monies to local school districts to meet the needs of educationally deprived children in school attendance areas with high concentrations of low-income children.

In 1983, the Department proposed a similar voucher plan, and opponents of the plan questioned why the Federal Government would want to alter "one of the Nation's most successful educational programs." It was asserted that the plan would provide "a legal means for parents living in urban areas to avoid court ordered desegregation." Further, such a system "would create inequities through the myth of parental choice. Choice for the disadvantaged is limited through selective admissions of non-public schools, varying tuition costs, geographical location, and lack of information" (Testimony before the House Subcommittee on Elementary, Secondary, and Vocational Education as reported in the U.S. Commission on Civil Rights, Statement on the Fiscal Year 1984 Education Budget (July 1983)). These observations apply equally to the current voucher proposal.

The Handicapped Children's Protection Act (H.R. 1523/S. 415) has passed both the House and Senate. The bill, a major civil rights victory, would amend the Education for All Handicapped Children Act (P.L. 94-142) to provide for the payment of legal fees for parties who successfully sue under the Act. P.L. 94-142 provides funds to assist states and local agencies in educating handicapped children. Parents must be allowed to assist in the development of an Individual Education Plan (IEP) for their children and are entitled to a hearing by the state education agency in the event they find the IEP inappropriate. If dissatisfied with the hearing decision, they can file suit in state or federal district court.

The bill was introduced in response to the Supreme Court's decision in Smith v. Robinson, which established that while P.L. 94-142 should be the primary legal device for enforcing handicap rights in education, it does not authorize payment of legal fees. Two amendments, unacceptable to the disability community, have been attached to the bill. The Senate bill contains an amendment which provides that any organization which receives federal, state or local monies can be reimbursed only for the actual cost of bringing the litigation and not for attorneys fees, at the prevailing market rate. The "cost based provision" would penalize poor families who generally have access only to public-interest and legal services lawyers, because school districts would have much less incentive to settle with these lawyers, than with private attorneys. Operating under such a provision, poor people's lawyers would have limited resources with which to represent their clients. This amendment is also seen as an attempt to limit the civil rights activities of legal service type organizations. In the House, the "sunset" amendment would restrict attorneys fees for the administrative process to four years. This could result in school districts delaying cases until after the four year period. Civil rights groups are pushing for the Senate conferees to recede to the House on the "cost based

fees" amendment, and House conferees to recede to the Senate on the "sunset" provision.

In United States v. Yonkers Board of Education, [1985] FAIR HOUSING-FAIR LENDING (P-H) ¶15,523 (S.D.N.Y. Nov. 20, 1985), U.S. District Judge Leonard B. Sand found Yonkers, NY city officials liable for school segregation because they had systematically located all subsidized housing in minority neighborhoods. The 600 page opinion documents the location of thirty-six subsidized housing projects, out of thirty-eight, in the Southwest section of the city. The other two projects, a family unit and a senior citizens unit, were located in East Yonkers. Of the city's 6,800 units of subsidized housing, 6,644 (97.7 percent) are in the Southwest where the City's 18.8 percent minority population are concentrated. In 1980, Southwest Yonkers accounted for 37.5 percent of the total population, but 80.7 percent of the city's minority population. The school system reflects the housing patterns, and in 1980 nineteen of the 25 elementary schools were either 80 percent white or 80 percent minority. Two high schools enrolled only 8 percent of the minority students, with the three other high schools enrolling 92 percent of the minority students. Civil rights attorneys hailed the decision as a "potent legal weapon for private plaintiffs to challenge patterns of housing and school segregation in other cities...."

LEADERSHIP CONFERENCE ON CIVIL RIGHTS

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