Leadership Conference Education Fund

2027 Massachusetts Avenue, N.W. ■ Washington, D.C. 20036 ■ (202) 667-6243

Volume 6, Number 5 Winter 1993

LCEF IS MOVING: As of February 1, 1993 our address is 1629 K Street, NW, Suite 1010, Washington, D.C. 20006. Our new phone number is (202) 466-3434.

INSIDE

Civil Rights Monitor

LEGISLATIVE UPDATES

Despite some disappointments, the 102nd Congress overall compiled a good civil rights record. Like the previous five Congresses, a strong bipartisan majority rejected the Reagan-Bush legal philosophy and passed a number of important civil rights measures. The two major bills enacted into law were the Civil Rights Act of 1991 and the Voting Rights Language Assistance Act of 1992.

Civil Rights Act of 1991, P.L. 102-66

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991, culminating a two and a half year campaign by civil rights advocates to reverse a number of Supreme Court decisions and to provide a damages remedy for Title VII. The bill passed the House on November 7, 1991, by a vote of 381-38, and the Senate on October 30, 1991, by a vote of 93-5.

In 1990, a similar bill had passed the House on August 3 by a vote of 271-154 and the Senate on July 18 by a vote of 65-34. A conference committee adopted a compromise package that proponents had hoped would avert a veto. The conference committee bill passed the Senate on October 16 by a vote of 62-34 and it passed the House on October 17 by a vote of 273-154. President Bush vetoed the bill on October 22 and on October 24, 1990 the Senate failed by one vote (66-34) to override the veto.

The Civil Rights Act of 1991 amends Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, sex, national origin, or religion, and the 1866 Civil Rights Law (section 1981 of the U.S. Code) which prohibits intentional race discrimination in the making and enforcing of contracts. The bill overturns Supreme Court decisions on employment law that severely restricted rights and remedies under equal employment opportunity law established over the past twenty-seven years to protect the rights of minorities and women.

Voting Rights Language Assistance Act of 1992, P.L. 102-344

On August 26, 1992, President Bush signed into law a measure extending and strengthening a bilingual provision of the Voting Rights Act. The House passed the Voting Rights Language Assistance Act of 1992, HR 4312, on July 24 by a vote of 237-125. The Senate passed a companion bill, the Voting Rights Act Language Assistance Amendments Act of 1992, S 2236, on August 7 by a vote of 74-21.

The law extends, and amends, section 203 of the Voting Rights Act (VRA) until 2007 when the other provisions of the VRA are scheduled to expire. Section 203 is one of the VRA's bilingual provisions that require covered jurisdictions to provide bilingual election materials and voting assistance. The law also contains additional alternative triggers for coverage:

- a numerical threshold of 10,000 limited English-proficient persons of a protected single language minority in a covered jurisdiction will trigger coverage in addition to the five percent trigger that has been contained in section 203.

- a provision to ensure that Native Americans living on reservations that cross county or state lines will be entitled to bilingual assistance when five percent of the reservation voting-age population of a single language minority is limited-English-proficient. The new provision adds an alternative to the present coverage which applies only in those counties where five percent of the voting age population consists of limited-English proficient Native Americans of a single language minority.

Civil Liberties Act Amendments of 1992

Another measure enacted into law, the Civil Liberties Act Amendments of 1992, authorizes an additional $320 million to fulfill the commitment of the Civil Liberties Act of 1988 which officially apologizes for the internment of Japanese Americans during World War II and provides reparations to the surviving internees.

The bill passed the House on September 14, 1992, the Senate on September 16, and the President signed it into law on September 27.

Two measures were passed by the Congress but vetoed by President Bush, the Family and Medical Leave Act

and the National Motor Voter Registration bill. The vetoes were sustained. Both measures are expected to be reintroduced, passed and signed into law early in the 103rd Congress.

Family and Medical Leave Act

The Family and Medical Leave Act conference report was passed by the Senate by voice vote on August 11, 1992, and by the House by a vote of 241-161 on September 10, 1992. Slightly different versions of the bill had passed the Senate on October 2, 1991 by a vote of 65-31 and the House on November 13, 1991 by a vote of 253-177.

On September 22, 1992, President Bush vetoed the legislation. The Senate overrode the veto on September 24 by a vote of 68-31, but the House failed to override on September 30 by a vote of 258-169, 27 votes short of the two-thirds needed to override.

The bill would have provided workers twelve weeks of unpaid, job-guaranteed leave in the case of a newborn or newly-adopted child, a seriously ill child, parent or spouse, or a serious personal illness. It covered employers with 50 or more employees, and employees must have worked for the employer for one year and 1250 hours to be eligible.

National Motor Voter Registration Bill

On September 22, 1992, the Senate failed by a vote of 62-38 to override President Bush's July 2, 1992 veto of the Motor Voter bill. The bill passed the House on June 16, 1992 by a vote of 268-153 and the Senate on May 20, 1992, by a vote of 61-38.

The bill would have allowed people to register when they apply for or renew their drivers' license or when they apply for public services such as welfare and unemployment compensation or marriage licenses or hunting permits. Twenty-seven states already have in place a system of motor-voter registration.

Congress considered but did not pass an array of other measures, that will be reintroduced in the 103rd Congress.

Two measures were introduced in the 102nd Congress to amend the Civil Rights Act of 1991, the Equal Remedies Act and the Justice for Wards Cove Workers Act. Neither measure received floor action in the 102nd Congress and both will be reintroduced in the 103rd Congress. In order to gain the support of enough members of Congress to override a threatened presidential veto of the Civil Rights Act of 1991, civil rights advocates in Congress last year agreed to several compromises including an exemption for the long running *Wards Cove* case, and a cap on damages for intentional discrimination under Title VII and the American with Disabilities Act. These bills seek to eliminate the cap and the exemption.

Equal Remedies Act

The bill would remove the cap on monetary damages available under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act which as a practical matter applies only to women, persons with disabilities, and certain religious groups who are victims of intentional discrimination because racial minorities and members of certain religious groups may obtain damages under section 1981 which does not limit the amount. The bill was approved by the Senate Labor and Human Resources Committee by voice vote on March 11, 1992.

Justice for Wards Cove Workers Act

The bill would eliminate an exemption in the 1991 Act which prevents application to the *Wards Cove* case of the broader fair employment protections provided by the Act. In the Senate, the bill was reported out of the Labor and Human Resources Committee. In the House it was reported out of the Subcommittee on Civil and Constitutional Rights.

Other measures that the 1991-92 Congress considered were:

The New Columbia Statehood Act

The bill which would have granted full statehood to the District of Columbia was introduced by Con-

gresswoman Eleanor Holmes Norton (D-DC). The House District of Columbia Committee reported the bill on September 25, 1992 by a vote of 7 to 4. No further action was taken.

Voting Rights Extension Act of 1992

The bill would have clarified certain aspects of the coverage of the VRA and provide for the recovery of additional litigation expenses by litigants. The bill seeks to overturn the Supreme Court's 6-3 decision in *Presley v. Etowah County Commission* that section 5 of the Voting Rights Act does not require covered jurisdictions to submit changes in the decision-making authority or allocation of power among state and local officials to the Department of Justice or to the U.S. District Court for the District of Columbia for preclearance.

The bill would overturn as well *Rojas v. Victoria Independent School District* which also involved a change in the procedure or authority of a governing body following the election of a minority member. After the election of the first Latina member of the school board, the board voted to change the procedural rules to give the chair discretion to require two rather than one vote in order to place an item on the agenda for discussion.

The House Subcommittee on Civil and Constitutional Rights reported the bill on May 7, 1992 but no further action was taken.

Balanced Budget Amendment

The Leadership Conference on Civil Rights joined with an array of organizations to oppose an amendment to the Constitution to require a national balanced budget. On June 11, 1992, the House defeated the amendment by a vote of 280-153. A constitutional amendment must be passed by a two-thirds majority in both Houses, and then ratified by three-fourths of the states. The amendment will likely be reintroduced in the 103rd Congress.

Helms Anti-Affirmative Action Amendments

The Senate by 2-1 margins, twice blocked attempts by Senator Jesse Helms (R-NC) to ban affirmative action remedies. Democratic and Republican Senators made the point that while they opposed quotas because they are illegal and unfair (except under the rarest judicial circumstances), they supported affirmative action remedies, including goals and timetables, that are lawful and effective.

Principal disappointments for the civil rights community in the 102nd Congress were the confirmation of Clarence Thomas to the Supreme Court and Edwin Carnes to the Eleventh Circuit Court of Appeals.

SUPREME COURT GRANTS REVIEW OF JACKSONVILLE, FLORIDA MINORITY CONTRACT PROGRAM

On October 5, 1992, the Supreme Court granted review of the decision of the U.S. Court of Appeals for the Eleventh Circuit in *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*, No. 91-1721. The Eleventh Circuit ruled that the Northeastern Florida Chapter of the Associated General Contractors of America (AGC) lacked standing to challenge Jacksonville, Florida's Minority Business Enterprise program because it had not established that but for the city's minority contract program any member of that organization would have been the successful bidder for a government contract. The question presented for review is:

> "Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are precluded from bidding on certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the set-aside provisions?"

Background

The city minority contract program requires that 10 percent of the amount budgeted for city contracts be

awarded to minority contractors. The city defines a minority business as one that is at least 51 percent owned by minorities or women. Minorities are defined in the ordinance as black, spanish-speaking American, Oriental, Indian, Eskimo, Aleut, and Handicapped persons. The AGC asserts that during the five years the program was in effect city contracts awarded to minorities totaled $14,625,000.

The city states in its brief before the Court in opposition to the petition for review that the program was established to address past inequities in the awarding of city contracts and that minority firms "have been disadvantaged in their participation in the general welfare of the City and City expenditures." The city also says that the program does not mandate a percentage but in fact provides that "mathematical certainty is not required in reaching the goals." The program can also be waived by the chief purchasing officer if minority businesses are not available to do the job or because of the cost to the city. The program was to run for five years from October 1, 1988 with the City Council authorized to "reenact the ordinance if the disparity in minority business participation has not been remedied."

On April 4, 1989, AGC filed suit and sought a temporary restraining order and preliminary injunction.

On May 31, 1990, the district court granted the plaintiff's motion for summary judgment, finding that the City's program failed to meet the standards set by the Supreme Court in *City of Richmond v. Croson*, 488 U.S. 469 (1989). The city appealed and the 11th Circuit ordered the case dismissed for lack of standing, finding that the AGC had failed to show that "but for the [MBE] program, any AGC member would have bid successfully for any of the contracts." The appeals court did not rule on the merits of the case.

Croson

On January 23, 1989, the Supreme Court in a 6-3 decision ruled that the Richmond, Virginia minority set-aside contract program was unconstitutional. The Court held that state and local laws enacted to address discrimination against minorities must be judged by the same constitutional standard as laws enacted to favor whites over minorities. This standard, known as the "strict scrutiny" test and based on the equal protection clause of the 14th amendment, requires that official actions of a race conscious nature be narrowly tailored to address a compelling state interest.

Historically, the strict scrutiny standard has been a very difficult standard to meet when applied to public acts of discrimination against minorities. Only one governmental action has ever passed the test. In *Korematsu v. U.S.*, 323 U.S. 215 (1944), the Court upheld as constitutional the Federal Government's internment of Japanese-Americans during World War II. This decision is viewed today as *shameful* by many Americans. The *Croson* decision was based upon the particular facts in the Richmond case and reaffirmed affirmative action remedies grounded on a solid evidentiary base and tailored narrowly to the problem.

AGC's Argument

The AGC asserts that the Supreme Court should grant review of the case because of a conflict among the lower courts about the issue of standing. The petition notes that of the approximately 22 cases since *Croson* that involve minority preferences or set-asides of government contracts, fourteen (63 percent) have addressed the issue of standing. The 11th Circuit and five lower courts have "established requirements for standing that make it extremely difficult, if not impossible, for a non-minority contractor to obtain strict scrutiny of a race-conscious program. Those standards conflict with both the law of other federal courts and the precedent of this Court, whose cases hold that loss of an opportunity to compete for contracts is sufficient injury to confer standing."

The AGC brief cites the decision of the Ninth Circuit in *Coral Construction Co. v. King County*, 941 F.2d 910, cert. denied, 112 S.Ct. 875 (1992), in which a construction company challenged the county's minority and women's set-aside program. The ninth circuit found that "as a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually lost a bid, but every time the company simply places a bid."

Jacksonville, Florida's Argument

The city argues that the 11th Circuit correctly found that "an association challenging an affirmative action ordinance must plead and prove individualized injury, which is specific and concrete, and not merely rely on a generalized grievance, to satisfy its constitutional standing in accordance with Supreme Court precedent."

The brief further states:

> "The fundamental predicate for standing is the demonstration of a threatened injury. Article III, Section 2 of the United States Constitution limits the exercise of judicial power to actual cases and controversies. To establish Article III standing, a plaintiff must demonstrate actual or threatened injury, fairly traceable to the challenged action, and redressable by a favorable decision....
>
> "Article III demands that a plaintiff clearly and specifically set forth facts sufficient to satisfy judicial intervention...There is a necessity that a litigant plead a 'distinct and palpable' injury, that is, he has suffered an 'injury-in-fact.' Allegations of possible future injury do not constitute 'injury-in-fact'...The injury must be real and immediate and not conjectural or hypothetical."

Editors' Note: A restrictive view of standing requiring that a claimant demonstrate that if the challenged practice were ended he actually would receive the benefit has been employed by courts most often to deny access to the courts to civil rights plaintiffs. Accordingly, some observers hope that the Jacksonville program will be sustained on the merits and not by use of a doctrine that may keep civil rights plaintiffs out of court.

UPDATE: MISSISSIPPI HIGHER EDUCATION SCHOOL DESEGREGATION

As we reported in the Fall 1992 **CIVIL RIGHTS MONITOR**, on June 26, 1992, the Supreme Court in an 8-1 ruling vacated and remanded an en banc Fifth Circuit Court of Appeals decision affirming the District Court's conclusion that the "State of Mississippi had met its affirmative duty to disestablish its former de jure segregated system of higher education...". The District Court had found that Mississippi had met its affirmative duty "by discontinuing prior discriminatory practices and adopting and implementing good-faith, race neutral policies and procedures. In remanding the case, the Supreme Court said that in determining whether a previously segregated higher education system has meet its affirmative obligation...the courts must assess whether "policies traceable to the *de jure* system are still in force and have discriminatory effects,170] and if such policies still exist they must be "reformed to the extent practicable and consistent with sound educational practices", *U.S. v. Fordice.*

The case was sent back to the U.S. Court of Appeals for the Fifth Circuit in New Orleans which in turn remanded it to the Federal District Court in Oxford, Mississippi. On October 22, 1992, Judge Neal Biggers held a status conference. The defendants tendered to the court a Mississippi Board of Trustees proposal which provided for the closing of Mississippi Valley State University, a historically black institution (HBI) in the Delta Region, and the continued operation of Delta State University, the predominantly white institution in the Delta; the merger of Alcorn State (the nation's oldest black land grant institution) with Mississippi State University which is predominantly white; and the enhancement and improvement of Jackson State University, the one remaining HBI. The judge took no action on the proposal.

Judge Biggers instructed the parties to meet and determine whether any agreement could be reached over the existence of remnants of the prior de jure system of segregation, and the legal ramifications of such remnants under the Supreme Court's opinion. The parties met on November 12, but were unable to reach agreement on the remnants of the segregated system and thus filed separate documents with the court on November 19.

The Mississippi Board of Trustees' Proposed Stipulations Regarding Remnants provides that while the Board recognizes that "certain practices are traceable to the past", the Board does not view the practices as unlawful because "they do not presently cause racial separation". The document then lists six Challengeable Policies and/or Practices which the Board proposes to eliminate or replace in order to avoid interminable litigation. They are:

> The continued utilization of admission standards at predominantly black institutions that differ from those at predominantly white institutions. The Board agrees to eliminate the different standards.
>
> The continued utilization of the American College Testing Program (ACT) as the criterion for automatic admission without enhanced consideration of various other

educational criteria. The Board stipulates that with "cautious and deliberate efforts, this practice can be eliminated consistent with sound educational policies."

The continued offering of academic programs at predominantly black institutions which duplicate programs at predominantly white institutions. The Board asserts that "if the present system is continually maintained, the Board denies that the practice can be practicably eliminated consistent with sound educational policies, and denies that any such attempted elimination would result in desegregation."

The continued utilization of the 1981 mission statements. The Board states that this policy can be eliminated consistent with sound educational policies.

The continued maintenance of eight public universities. The Board proposes to close, merge and consolidate the eight institutions.

The continued maintenance of Delta State University and Mississippi Valley State University as separate institutions, located near each other, to serve the Delta region. The Board proposes to merge the two institutions and operate a single, racially integrated campus in the Delta.

The private plaintiffs and the Department of Justice as plaintiff-intervenor submitted a list of 38 practices and/or policies which they "state are properly in issue before the Court." The policies and practices cover five major areas: the Governance of the System; Admissions and Student Access; the Ability of the Historically Black Institutions to Attract Diverse Student Populations; Employment; and Number of Institutions.

The specific policies and procedures listed by the plaintiffs include:

"The State has continued its policy and practice of excluding Black persons from equitable representation on the Board of Trustees, from employment as Board administrators and staff, and from enjoying full participation in the activities of the Board.

"The State has continued its practice of denying Black students equal access to the institutions of higher learning because of the entrance requirements established by the Board of Trustees, including the use of the Act test scores, in a manner that disproportionately excludes Black students from enrollment at historically white universities and relegates those students to the historically Black schools.

"The policy and practice of continuing to use the 1981 mission statement.

"The policy and practice of providing greater funding per student to historically white universities than to the historically Black universities that effectively eliminates the Black universities as viable choices for attendance by white students.

"The practice of failing to take the necessary steps (including the provision of required facilities) to secure the accreditation of programs at the HBIs.

"The policy and practice of operating 'off campus' offerings of HWIs, in close proximity to HBIs, competing with HBIs for students, as well as utilizing facilities and other resources, including the Universities Center at Jackson competing with Jackson State University.

"The policy and practice of paying lower salaries to the faculty at the HBIs than to the faculty at the HWIs."

On the issue of maintaining the eight institutions, the plaintiffs state only that they recognize that this is an issue before the court.

These stipulations are under consideration by Judge Biggers.

AFFIRMATIVE ACTION PROGRAM AT BERKELEY LAW SCHOOL FOUND INCONSISTENT WITH TITLE VI REGULATION

The Office for Civil rights of the U.S. Department of Education has determined that some of the admissions procedures of the University of California at Berkeley School of Law (Boalt Hall) are "inconsistent" with the Title VI regulation, and OCR and Boalt Hall have entered into a Voluntary Conciliation and Settlement Agreement that resolves OCR's compliance concerns. In its letter of findings OCR states: "Race and ethnicity may be considered as plus factors in the admissions process where such characteristics are considered important by the University to achieving educational diversity. The pursuit of educational diversity cannot serve as a justification for handling admissions decisions in a manner that insulates applicants, based on their race or ethnicity, from competing with other applicants."

Background

Title VI of the Civil Rights Act of 1964 provides that no person shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. OCR in its analysis of Title VI states that an affirmative action admissions program may give consideration to race or national origin in order to remedy a finding of discrimination or even without such a finding "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." OCR, quoting from the Supreme Court's 1978 *Bakke* decision, further states that "an applicant's race or ethnicity may be deemed a 'plus' within the context of an effort to achieve educational diversity, but it cannot 'insulate the individual from comparison with all other candidates for the available seats.'"

In 1978, the Supreme Court ruled in *Regents of the University of California v. Bakke*, that the setting aside of 16 spaces for minority medical school applicants for which white applicants could not be considered was a violation of Title VI and the Fourteenth Amendment. The Court however said that the law permits schools to continue to give preference to minority students in the application process and that "race or ethnic background may be deemed a 'plus' in a particular applicant's file..."

Boalt Hall Admissions Program

The affirmative consideration of race and ethnicity has been a part of Boalt Hall's admissions process since 1968. In 1978 the school set a goal of admitting 23 to 27 percent of each class from certain racial and ethnic groups and set specific percentages: 8 to 10 percent black; 8 to 10 percent Hispanic; 5 to 7 percent Asian; and 1 percent Native American. The school has met or exceeded its goal each year. In establishing the program, the school took into consideration general information about discrimination against racial and ethnic minority groups, the representation of these groups in law school and the law profession, and their representation in the U.S. population. The school determined that it was necessary to give these groups special consideration in the admissions process in order for them to be represented in significant numbers in the school.

The school receives annually 4,000 to 6,000 applicants for a class of 270 students. The applicants are given an index score based upon their Law School Admissions Test (LSAT) score and grade point average (GPA), and then placed in admission ranges A, B, C, or D. The race or ethnicity is noted on each file. The Director of Admissions usually admits half the students and may admit all A range applicants, most of the B range, some of the C, and special consideration students in D. In reviewing the applicants the Director may consider other factors such as difficulty of course work and work obligations, but only race and ethnicity are closely monitored and evaluated with reference to the percentage targets. The Director then refers to admission committee teams candidates in the A to C range and special consideration students in the D category. The Assistant Director reviews the D range regular students for a small number of applicants.

The Director gives the teams specific instructions as to the number of California resident students, non-resident students, and special consideration students (grouped by race and national origin) to admit and to wait list. On the waiting list regular and special consideration students are rank-ordered separately by tiers for admission. The Director is to select by tier the student with the highest index followed by the other student in the tier. However, the Director can deviate from the process to select members of a racial group not meeting the established percentage for admission.

OCR Findings

In finding that Boalt Hall's affirmative action program was inconsistent with Title VI, OCR stated:

> "Admissions decisions of the committee teams are made with no comparison between applicant batches or categories within those batches. Applicants referred to the Admissions Committee did not compete for all of the remaining seats, but rather only for whatever percentage remains unfilled for his or her particular racial or ethnic group. Also, admissions practices with respect to placing students on wait lists and selecting wait-listed students for admission circumscribed competition between special consideration applicants and applicants generally. Selections from wait lists were handled in a manner designed to ensure specific results along racial or ethnic lines."

In its findings OCR recognized that diversity is a legitimate goal for a university but said that such diversity must go beyond racial or ethnic diversity to include age, gender, geographic origin, postgraduate experience, work experience, extracurricular activities, and economic disadvantage. OCR stated:

> "As administered, Boalt Hall's affirmative consideration of race and ethnicity had the effect of isolating one aspect of educational diversity from all others, and in so doing, failed to ensure that all applicants would be afforded fair consideration with respect to potential diversity contributions. This approach failed to ensure that applicants would be free from discrimination on the basis of race, color, or national origin."

OCR allows race and ethnicity to be considered as plus factors in the admissions process to the extent a university considers them important to the educational diversity of a university.

Howard A. Glickstein, Dean of the Touro College Law School, in response to a question from MONITOR staff about the impact of OCR's challenge to Boalt Law School's affirmative action plan, stated:

> "Those aspects of Berkeley's admissions procedures that were questioned by the Department of Education are not typically a part of the affirmative action admissions program of most law schools...Among the aspects of the Berkeley program that were questioned by the Department of Education was the maintenance of separate waiting lists based on race and ethnic origin. Schools can achieve their diversity goals without the necessity of maintaining such lists. Another aspect of the Berkeley program that was questioned was the use of separate committees to review the files of minority students. Once again, utilization of separate committees is not a necessary ingredient of an effective affirmative action admissions program.
>
> "In short, the resolution of the dispute between the University of California School of Law at Berkeley and the...Department of Education should present no barriers to law school affirmative action programs. 'Race or ethnic background', as Justice Powell stated in the *Bakke* case, 'may be deemed a *plus* in a particular applicant's file.' There is no barrier to a law school meeting its commitment...to take concrete action to provide full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms."

UPDATE ON ADMINISTRATIVE AND JUDICIAL INTERPRETATION OF THE CIVIL RIGHTS ACT OF 1991

The Lawyers' Committee for Civil Rights Under Law has established a computer bulletin board and newsletter to provide lawyers with administrative and judicial information on that Civil Rights Act and equal opportunity. Most of the documents discussed below can be downloaded from the computer bulletin board. For further information, contact Rick Seymour, Lawyers Committee, Suite 400, 1400 Eye Street, N.W., Washington. D.C. 20005, (202) 371-1212. The following borrows heavily from the first three issues of the newsletter.

EEOC Policy Guidance

As we reported in the Spring 1992 issue of the *CIVIL RIGHTS MONITOR* the Equal Employment Opportunity Commission has issued a *Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct*. The policy states that "the Commission will not seek damages under the Civil Rights Act of 1991 for events occurring before November 21, 1991," the date on which President Bush signed the measure into law, at the same time endorsing the policy now adopted by the EEOC. The policy guidance applies only to damages claims, and does not address such other questions as, for example, whether disparate-impact cases should be subjected to the same narrow interpretation of the Act's coverage.

The relevant sections of the Civil Rights Act are:

> Section 402 which provides that "except as otherwise provided, the amendments made by this Act shall take effect upon enactment."
>
> Section 402(b) provides that "notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983." The effect of this provision is to prevent application of any of the rules prescribed by this Act to the long running *Wards Cove* case, the only known case to which this exemption applies.
>
> Section 109, which allows citizens of the U.S. working abroad for U.S. based employers to sue for discrimination, contains language that provides that this section does not apply to "conduct occurring before the date of the enactment of this Act."

On July 14, 1992, the EEOC's Office of Legal Counsel issued policy guidance on other issues related to the damages provisions of the Civil Rights Act. The provisions include:

> "Front pay, back pay, fringe benefits, and past pecuniary losses such as therapy bills are not included in damages (and are therefore not subject to the Act's cap on damages.)
>
> "Part-time employees are included in the employee total for determining which cap applies.
>
> "Where the EEOC pursues claims for multiple persons, the cap applies to each person separately.
>
> "In a private class action, the cap applies to each class member separately.
>
> "Therapy expenses, moving expenses, etc., occurring after the date of resolution of the case are awarded as damages and are therefore subject to the caps.
>
> "In determining the amount of punitive damages, the following should be among the factors considered:
>
>> "the revenue and liabilities of the business;
>>
>> "the fair market value of the respondent's assets;
>>
>> "the amount of liquid assets on hand, including amounts which can be reasonably be borrowed..."

The complete document is available from the EEOC's Office of Public Information and can be downloaded from the Lawyers' Committee's computer bulletin board.

Retroactivity

The 5th, 6th, 7th and 8th Circuits have all issued decisions on the application of the Civil Rights Act to pending cases concluding that the Act should not be applied to cases that were pending on the date it became law.

On October 6, 1992, the Ninth Circuit held unanimously in *Davis v. City and County of San Francisco*, an expert-fees case, that the plain language of the Act showed that it was intended to apply to pending cases and to pre-Act conduct which can still be challenged. The court reasoned that the limitations contained in sections 109(c) [U.S. citizens working abroad] and 402(b) [the *Wards Cove* case] would be surplusage unless the Act generally applied to pending pre-Act cases and to conduct which was still challengeable, and courts are not free to construe a statute so as to make any of its provisions surplusage. The court stated: "We would rob sections 109(c) and 402(b) of all purpose were we to hold that the rest of the Act does not apply to pre-Act conduct."

On October 20, 1992, the Eleventh Circuit held that sections 101 and 102 of the Act do not apply to cases which went to judgment in the trial court before enactment [Section 101 is a prohibition against all racial discrimination in the making and enforcement of contracts. Section 102 provides for damages in cases of intentional discrimination.]

Following the conflict created in the circuit courts with the *Davis* decision, the Lawyers' Committee and the New York law firm of Cravath, Swaine & Moore filed a petition for review in *Landgraf v. USI Film Products*, in which the Fifth Circuit held that the damages provisions do not apply to pending cases. The NAACP Legal Defense and Educational Fund has filed a similar petition for review in *Kuhn v. Island Creek Coal Co.*, in which the Sixth Circuit held that the Civil Rights Act does not apply retroactively to action that occurred in 1987.

In a related case, on October 13, 1992, the U.S. Court of Appeals for the Sixth Circuit rejected a challenge by a group of white job applicants to a 1974 consent decree which seeks to increase the number of minorities on the staff of the Cincinnati fire department, *Jansen v. City of Cincinnati*. The consent decree set a goal of increasing the percentage of minorities on the department's staff to eighteen percent and a promotional goal of achieving "a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race."

The department compiled separate lists of majority and minority candidates who were successful in completing all five phases of the selection process. In the selection process, 60 percent of the candidates were selected from the majority list and 40 percent from the minority list.

Fifteen white applicants challenged the consent decree alleging that they were denied employment by the fire department although they had higher scores on the civil service written exam than minority candidates who were hired. The District Court agreed with them and ordered the fire department to terminate the 18 percent hiring goal as the department had reached that goal in 1986. In reversing the District Court's decision, Judge Damon Keith, writing for the majority, reasoned that although the hiring goal was reached the goal was so related to the promotional goals that is should not be terminated until those goals had been reached also. Judge Keith further noted that the 18 percent was not a maximum goal. The opinion also provides that the written exam was one of five criteria in the hiring process and that the white applicants "had no reasonable expectation that hiring would be solely on the basis of ranked exam scores."

HOME MORTGAGE DISCLOSURE ACT DATA REVEAL MORTGAGE DISCRIMINATION BY LENDING INSTITUTIONS

A review of Home Mortgage Disclosure Act (HMDA) 1991 data by the Federal Financial Institutions Examination Council (Board of Governors of the financial regulatory institutions of the Federal Government) and ACORN (Association of Community Organizations for Reform Now) reveal wide discrepancies in the granting of mortgages by race. A Federal Reserve Bank of Boston study of mortgage files in the Boston metropolitan area found similar results. In a related matter the Department of Justice entered into a consent decree with a savings and loan accused of marketing its services and products to white residents.

The Home Mortgage Disclosure Act requires lending institutions to collect and provide the public with information about the persons who apply for and receive home loans. In 1989 HMDA was amended by the Financial Institutions Reform, Recovery and Enforcement Act to require more detailed information on the race, national origin, sex and income of applicants for home mortgages.

ACORN Study

ACORN has released a follow-up to its 1991 study *Banking on Discrimination* which found "wide discrepancies in the rate at which minority and white applicants for home loans were rejected by lenders." The study analyzed the Home Mortgage Disclosure Act (HMDA) statements for 46 lenders in thirteen metropolitan areas. Conventional, single-family mortgage loan applications were examined. ACORN has now found that the patterns revealed in 1990 by HMDA data remained virtually unchanged in 1991.

ACORN reports that a comparison of 1991 with 1990 HMDA data found that:

> "The later survey of 46 lenders indicates no substantial improvement in the disparities in mortgage lending by race. Blacks and Hispanics continue to be rejected between two and four times as often as white applicants for conventional, single-family mortgage loans.
>
> > "27 of the lenders studied received at least 20 applications from blacks and Hispanics. At eleven of these institutions, the racial disparity decreased, at one the racial disparity was unchanged, and at fifteen the disparity increased.
> >
> > "Of the eleven institutions that improved, 8 saw an increase in the percentage of applications that were from blacks or Hispanics...Of the 15 that deteriorated, 9 saw an increase in the number of applications from blacks and Hispanics as a percentage of all applications received.
>
> "Thus, while the argument that increasing racial disparities may result from aggressive marketing efforts may seem plausible on its face, this study suggests that decreasing disparities and aggressive marketing may indeed be compatible."

Other findings include:

> "The identified racial disparities are not meaningfully reduced when one compares applicants of different race or ethnicity, but similar income.
>
> > "Overall, the 46 lenders in the study rejected blacks 2.6 times as often as white applicants. Low- and moderate-income blacks were rejected 1.6 times as often as low- and moderate- income whites. Middle-income blacks were rejected 2.6 times as often as middle-income whites, and upper-income blacks were rejected 3.3 times as often as upper-income whites.
> >
> > "Overall, the 46 lenders studied rejected Hispanics 3.3 times as often as white applicants. Low- and moderate-income Hispanics were rejected 1.8 times as often as low- and moderate-income whites. Middle-income Hispanics were rejected 3.6 times as often as middle-income whites, and upper-income Hispanics were rejected 3.6 times as often as upper-income whites.
>
> "There appears to be little correlation between the trend in a bank's relative rejection of black and Hispanic applicants and the trend in its applications from minorities as a percentage of all applications.

Federal Financial Institutions Examination Council Studies

A review of the HMDA data by the Federal Financial Institutions Examination Council supports the findings of the ACORN study. The Council's review of the HMDA data revealed that:

> "Nationally, about 14.4 percent of white applicants for conventional home purchase loans were denied credit in 1990. In sharp contrast, the denial rate for black applicants was 33.9 and for Hispanics 21.4 percent... At 12.9 percent, the denial rate for applicants of Asian extraction was lower than that for any other racial or ethnic group....

> "The differences in 1990 denial rates when applicants are grouped by race or national origin do not change notably when they also are categorized by income...[In fact, the denial rate for upper income Asians was higher than for lower income Asians.] For example, among applicants whose incomes place them in the lowest income group, the denial rates for blacks, Hispanics and Asians were 40.1 percent, 31.1 percent, and 17.2 percent respectively, compared with 23.1 percent for white applicants. Among applicants in the highest income group, denial rates for blacks, Hispanics, and Asians were 21.4 percent, 15.8 percent, and 11.2 percent respectively, compared with 8.5 percent for whites.

An analysis of the 1991 data from HMDA, not separated by income, continues to show these differences. As reported in *Fair Housing-Fair Lending* the 1991 data collected from 9,358 lending institutions which originated 26,000 loans in metropolitan areas show:

> "For conventional home purchase loans nationwide, 37.6 percent of black applicants, 26.6 percent of Hispanic applicants, 15 percent of Asian applicants, and 17.3 percent of white applicants were denied mortgage loans."

Boston Study

A study by the Federal Reserve Bank of Boston of 1990 mortgage-files in its metropolitan area found that "minority applicants were approximately 60 percent more likely to be rejected for loans than are whites with equal qualifications." The study evaluated 38 factors in addition to those reported pursuant to the HMDA. After controlling for these factors, the study showed that the denial rate for whites is 11 percent compared to 17 percent for minorities. The study found:

> "that among applicants with unblemished credit and employment records, and among those clearly unqualified, minorities and whites have similar approval rates. But since most borrowers' records are not unblemished, lenders have discretion over how to treat the imperfections and any compensating factors, and this is where the different approval rates appear."

Department of Justice Consent Decree

The Department of Justice entered into a $1 million settlement in its lawsuit against Decatur Federal Savings and Loan Association in Atlanta, Georgia. Justice had sued the bank over its practice of marketing its services and products to white residents. An analysis of more than 4,000 loans showed substantial racial disparities in the bank's lending practices that remained after controlling for differences in credit history and other underwriting variables. The case was resolved without any admission of wrongdoing by the lender, but the settlement requires remedial action that includes $1 million in payments to black applicants whose home mortgage loan applications were rejected.

ACTIVITIES AT LEADERSHIP CONFERENCE EDUCATION FUND

The Leadership Conference Education Fund in conjunction with the Joint Center for Political and Economic Studies is publishing *Voting Rights in America, Continuing the Quest for Full Participation*. The distributor is University Press of America.

The book is based on a set of papers prepared for a Leadership Conference Education Fund Conference: *Celebrating the Bicentennial of the Constitution: Two Hundred Years of Expanding the Franchise*. The authors of the papers are noted scholars, elected officials, advocates and community leaders. Included in the group are President-elect Bill Clinton, historian Mary Frances Berry of the University of Pennsylvania, political scientist Charles V. Hamilton of Columbia University, and Damon Keith, Chief Judge of the U.S. Court of Appeals for the 6th Circuit.

The papers provide two perspectives on electoral participation in the United States. The first is a look at history, beginning with the debates on the franchise at the Constitutional Convention in Philadelphia in 1787 and the compromises that left minorities and women without the vote. The historical perspective includes also the

LEADERSHIP CONFERENCE EDUCATION FUND
Suite 1010
1629 K Street, N.W.
Washington, D.C. 20006 (202) 466-3434
Ralph G. Neas, Executive Director
Karen McGill Arrington, Deputy Director

The *CIVIL RIGHTS MONITOR* is published by the Leadership Conference Education Fund, Inc., an independent research organization that supports educational activities relevant to civil rights. The *MONITOR* is written by Karen McGill Arrington. William L. Taylor, Vice President of the LC Education Fund, serves as Senior Editor. Janet Kohn, Attorney, LCCR and AFL-CIO, also provides editorial assistance. Arnold Aronson is President of the LC Education Fund. Other Board members are Mary Frances Berry, William Robinson, and Patrisha Wright.