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Equal Employment Advisory Council

Annual Report 1982

ANNUAL REPORT

1982

**Equal Employment
Advisory Council**



Equal Employment Advisory Council
1015 15th Street, N.W., Suite 1220
Washington, D.C. 20005
February, 1982

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Message to Members:

For corporate EEO practitioners and attorneys, 1981 was a year of uncertainty and confusion. "Midnight" regulations by the outgoing Administration, which were suspended before they became effective, and repeated delays by the new Administration in formulating policies left government contractors with minimal guidance as to what would be expected of them under Executive Order 11246. Delays in filling vacancies at the Equal Employment Opportunity Commission and well publicized differences of opinion within the Reagan Administration on basic approaches to equal employment opportunity created serious uncertainty as to the enforcement of Title VII and other federal statutes. And perhaps most importantly, the new Administration failed to develop a clearly identifiable position on how to remedy employment discrimination.

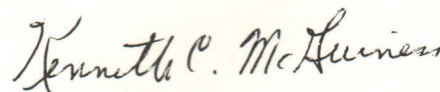
These developments have served to reemphasize the need for an employer-oriented organization concerned exclusively with equal employment opportunity and affirmative action. When the Equal Employment Advisory Council was organized in 1976, its founders were concerned by the rapid increase during the early 1970's in the volume of EEO-related court and administrative rulings. Most of these decisions were being made without the benefit of a detailed articulation of all of the issues which should be debated or of the practical consequences of the actions being considered. Today, when there is a possibility of major revisions in federal programs and enforcement methods, it is equally important that there be a vehicle through which businesses and industries can present their views in an effectual manner. Experience has demonstrated, however, that to have an impact, any suggestion or proposal, especially one from an employer or an employer group, must evidence a thorough understanding of the legal, political and practical ramifications of the issue in question.

The Council is now widely recognized as conforming to these standards as it seeks to meet the foregoing needs through its numerous amicus curiae briefs, comments, analytical studies and memoranda to members. In 1981 it filed 21 amicus briefs, increasing the total filed since its inception to 111. It also submitted comments on all significant regulations proposed by federal agencies and extensive suggestions for substantive improvements in the federal contract compliance program. Council members were kept informed of major program and policy changes during the year through more than 100 memoranda prepared especially for their use. Similarly, the Council's educational seminars and membership meetings which were presented in 1981 helped to increase the individual expertise of representatives from member companies.

In reporting to the Sixth Annual Meeting, we are confident that EEAC is having the impact desired by its membership. Its success is directly attributable to a recognition that both the Council and its individual members are committed to the goals of the nation's equal employment opportunity laws. This commitment, coupled with the unique knowledge and experience of the membership, has enabled the Council to serve as an effective voice on the difficult and complex issues faced by all who wish to make equal employment opportunity a reality.



James I. Nixon
Chairman of the Board



Kenneth C. McGuiness
President

AN EXPLANATION OF EEAC'S PURPOSE AND OPERATION

The growth of the Equal Employment Advisory Council, in terms of both the size of its membership and the scope of its mission, directly mirrors the rapid expansion of employer involvement in equal employment opportunity and affirmative action. At its inception in 1976, its organizers believed that the Council's primary purpose would be to monitor federal EEO court litigation and file amicus curiae briefs on behalf of its membership in precedent-setting cases. Federal regulations and enforcement methods have become increasingly complex, however, and the number of people and employment policies covered by government rules has risen sharply. Today, few if any employment decisions are made without consideration at some point of the impact of federal, state and local nondiscrimination statutes and regulations.

Council Activities

The needs and expectations of Council members have reflected this evolution. While EEAC's initial objective of monitoring federal EEO court cases and filing amicus curiae briefs in important suits continues to be one of the principal activities of the Council, its functions today are sufficiently diverse to satisfy a variety of member interests. EEAC activities now include:

- Monitoring court and agency EEO decisions;
- Preparing and filing amicus curiae briefs in important cases;
- Commenting on federal regulatory proposals;
- Analyzing Congressional legislation;
- Commenting on federal regulatory proposals;
- Analyzing Congressional legislation;
- Monitoring state level judicial, legislative and administrative EEO activity;
- Serving as a clearinghouse on enforcement policies and methods of compliance with federal requirements;
- Assisting members in complying with federal EEO requirements;

- Providing members with two days of meetings and workshops on important EEO issues three times each year;

- Presenting skill-development seminars on EEO compliance and administration; and

- Developing and publishing analytical studies on major EEO issues.

There are, however, five functions the Council has not performed in the past nor will it do so in the future. Its Board of Directors feels that these restrictions are essential to the success of the organization.

First, EEAC will not become a party, either as plaintiff or formal intervenor, in any litigation. The volume of litigation in the EEO area is sufficiently large to assure that existing cases are adequate to provide the vehicles needed to present industry's views without the substantial expense and exposure incurred by parties to such cases.

Second, the Council will neither file nor finance cases brought for the sole purpose of testing legal issues. Such activities involve very substantial legal expenses and, except in rare instances, the same purposes may be served by providing technical assistance in existing cases.

Third, EEAC will not file any amicus curiae brief in any case involving a member employer without the acquiescence of the employer involved and its approval of the brief.

Fourth, EEAC will furnish information and assistance to members with respect to specific cases when possible but will not act as a substitute for legal counsel for member companies and trade associations.

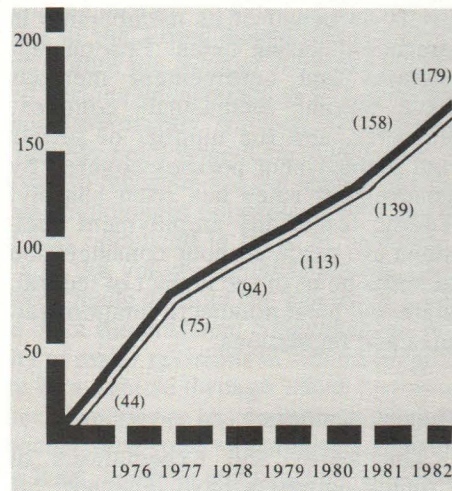
Finally, the Council will not lobby on Capitol Hill. While EEAC works closely with all groups interested in EEO legislation and on occasion may provide technical analyses to such groups, all lobbying is left to trade and general business associations or individual corporate members.

MEMBERSHIP

The Council's membership consists of trade and industry associations and companies who share a common interest in the purpose of the Council. Special contributor status is available for

public employer associations. Each pays dues or makes contributions annually in an amount designated by the Board of Directors. As the following chart demonstrates, the Council has grown in size in every year since its formation, a clear indication of its acceptance by both industry and government.

GROWTH OF MEMBERSHIP

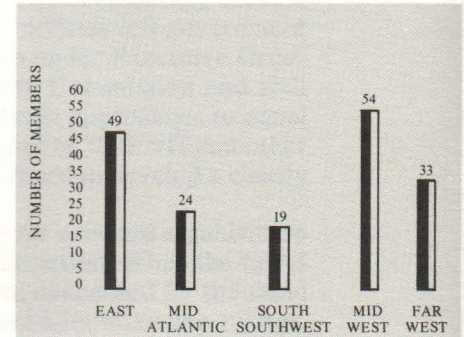


Size alone, however, is not the only consideration. To reflect adequately the opinions and concerns of the entire business community, emphasis has always been placed on maintaining a diverse membership. Experience has shown that such variety provides the necessary financial resources and comprehensive expertise required to address the numerous and often complex issues confronting employers today. Industry or business groups presently represented within EEAC include:

Accounting	Food Products
Aerospace	Forest Products
Agribusiness	Glass
Agricultural	Heavy Machinery
Equipment	Insurance
Automotive	Leisure Products
Banking	Milling
Business	Mining
Machines	Oil
Chemical	Pharmaceuticals
Communications	Public Utilities
Computers	Railroads
Construction	Retail
Consumer	Steel
Products	Shipping
Electronics	Textiles
Engineering	Tobacco
Food Processing	Trucking

EEAC's credibility is also enhanced by the national character of its membership. As the following chart illustrates, the Council draws its members from every section of the country, reflecting in geography the same diversity found in the business and industry of its members.

EEAC MEMBERSHIP BY GEOGRAPHIC REGION



Membership solicitation is not a staff function. Instead, EEAC's current size reflects the individual efforts of EEAC's members and initiative taken by companies familiar with the Council's work.

Committee Structure

To perform the numerous functions listed above, the Council has established the following standing committees, which are comprised of individual representatives from member companies and trade associations:

- Affirmative Action Practices Committee
- Case Selection Committee
- Legislative Oversight Committee
- Regulatory Oversight Committee
- Committee on Seminars
- State Oversight Committee

This structure has enabled members to pool their experience and expertise. Although specific tasks vary somewhat, each committee is responsible for tracking significant issues within its assigned area and making recommendations to the Board of Directors on possible Council activities. Each committee is backed up by one of EEAC's staff members.

The Case Selection Committee, EEAC's largest standing committee, provides an example of how the Council's committees work. Its primary function is to make recommendations to the Board of Directors on cases which should be briefed and the argu-

ments to be advanced. To accomplish this task, Council staff members review all reported federal court and agency decisions, selecting for consideration those cases likely to be of interest to the membership. These cases are augmented by other decisions, both reported and unreported, suggested by EEAC members, other employers and practicing attorneys. Written summaries of the cases are then prepared and distributed among company representatives who are on the Case Selection Committee.

If time permits, the screened cases are discussed by the Committee at EEAC Membership Meetings and recommendations are presented to the Board of Directors for final action. In other instances, Committee members are polled for their recommendations, which are subsequently submitted to the Board. In emergencies due to filing deadlines and where EEAC's position is already established, the Executive Committee of the Board of Directors determines whether a brief should be filed.

These alternative procedures have enabled the Council to participate actively in all important cases regardless of filing deadlines and, at the same time, provide the necessary time and means for a thorough review and discussion by the membership. Obviously, on some issues member opinions differ significantly, and no one position can quickly be developed for all employers. In these instances, particularly careful consideration is given to all varying interests to assure that the Council's position is truly representative.

The Regulatory Oversight Committee operates in a similar fashion. It is responsible for keeping the membership abreast of developments at the numerous federal agencies responsible for enforcing Title VII, Executive Order 11246, and other EEO statutes. Committee members assist the staff in this monitoring process and, when new rules or regulations are proposed, they are called upon for observations and recommendations for inclusion in EEAC formal comments. In most instances, Committee members have at least two opportunities to make recommendations concerning the Council's formal comments prior to their approval by the Board of Directors and their subsequent submission to the re-

questing agency. Once proposed regulations are adopted by the agencies, EEAC prepares, where necessary, detailed analyses of the new rules and their anticipated consequences.

The work of the Legislative Oversight Committee and the State Oversight Committee, however, is almost exclusively informational. The Legislative Oversight Committee is responsible for preparing summaries of proposed and enacted amendments to federal statutes and analyses of both the practical and legal impact of legislation likely to be passed. Because the Council does not lobby, further use of the material is left to individual member companies or trade associations. The State Oversight Committee monitors legislative, regulatory, and judicial EEO developments at the state level, but it is only under extraordinary circumstances that EEAC will actually file formal comments with a state agency.

The Affirmative Action Practices Committee concentrates on the implementation and administration of affirmative action concepts, government regulations and judicial decisions. It serves as a forum for an interchange of ideas on how to comply with the mechanics of federal requirements, enabling members to exchange ideas about the practical side of EEO administration. The Committee provides a "how to" function for EEAC rather than an oversight activity; its focus is on what a company should or can do once a law has been passed, a regulation issued or a case decided.

Seminars

EEAC provides for its members a series of educational seminars on EEO administration and compliance. In developing this activity, the Council recognized that there are many seminars on all aspects of EEO, but that most emphasize general information on a topic rather than specific instruction. As a result, EEAC's seminars are carefully designed to be of long-range educational value. Each program is developed under the guidance of the Committee on Seminars, a process which assures the direct participation of industry representatives who have the appropriate skills and who are familiar with their own companies' train-

ing needs and methods for dealing with such needs.

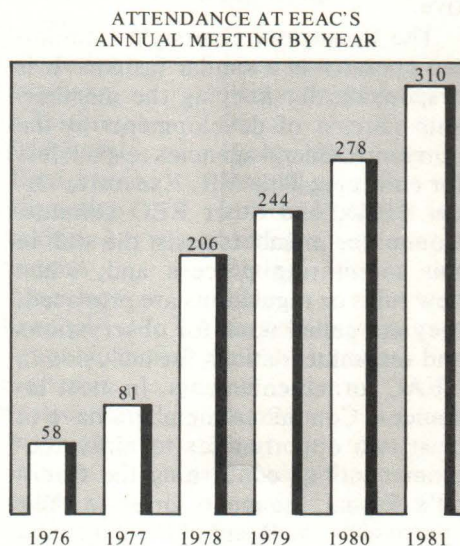
The Committee also works closely with other professional associations to develop joint programs of broad interest to the employer community. These seminars, as well as others developed by EEAC, are now open to the general public.

Membership Meetings

EEAC conducts three membership meetings each year, all of which are a day and a half in length. They include meetings of all of the Council's standing committees, a general session with guest speakers, and four workshops or discussion sessions. The first of these, the Annual Meeting, is usually held in Washington, D.C., in February, followed by a meeting on the West Coast in June and in the Midwest in October. A list of guest speakers, subjects covered and brief descriptions of workshop topics for each of the three meetings held in 1981 can be found in Appendix B, beginning on page 49. The meeting schedule for 1982 is as follows:

Washington, D.C. . . . February 18-19
San Francisco June 22-23
Chicago October 28-29

The membership meetings always have been one of EEAC's more popular activities. Attendance at the meetings has grown steadily each year and, as shown by the following chart, this pattern continued in 1981.



Clearinghouse Activities

EEAC's functions are not completely committee-oriented. The Council's staff is in regular contact with its members throughout the nation as well as with a substantial number of lawyers and other professionals specializing in the EEO area. These sources provide valuable insight into formally issued policies and procedures of the regulatory agencies and those unannounced practices which have been adopted on a regional or national basis. By using the EEAC staff as a conduit, the members receive the benefit of the experience of other companies and can be placed in direct contact with employers having similar problems.

Also, there is a broader implication to EEAC's work. A substantial number of telephone calls are received daily from management lawyers who have no affiliation with EEAC but have heard of its value as an available resource. These calls are welcomed, for whenever the Council can enhance the quality of employer representation in an EEO case, the business community in general benefits from the improvement in the substance of the legal precedents which flow from its resolution.

Publications and Memoranda to Members

Since its inception, EEAC has published six in-depth, objective resource books on corporate compliance with EEO requirements as well as the transcript of its 1980 symposium on comparable worth. Two of the six books are second editions of early studies which were sold out. A description of all the Council's publications can be found in Appendix C, page 51.

In addition to copies of all Council briefs and comments, members receive approximately 100 memoranda over the course of each year on important judicial and regulatory developments. These include case summaries, analyses of regulatory proposals, or copies of government memoranda obtained under the Freedom of Information Act and other materials not generally available through commercial EEO information services. A complete list of the memoranda sent to members in 1981 can be found in Appendix A, page 45.

Administration

EEAC is a non-profit corporation organized under the laws of the District of Columbia. It has tax exempt status under Sec. 501(c)(6) of the Internal Revenue Code.

Members determine EEAC's policy through selection of a Board of Directors and participation on its standing and ad hoc committees. The Board of Directors is elected yearly by the membership at the Annual Membership Meeting and meets periodically throughout the year. The current Board is composed of representatives of companies and associations that are widely diversified as to industry, size and geography. For a list of Board members, see Appendix D, page 53.

As noted before, the primary functions of the Board are the formulation of the Council's policies and review and approval of the positions recom-

mended by the various committees. In addition, it establishes ad hoc committees to address specific issues or tasks. The Board also exercises control over EEAC's finances by setting its dues structure, allocating resources among the various activities and approving its annual budget.

Each year the Board elects six of its members to an Executive Committee, which is authorized to act for the Board when necessary. The Committee can, for example, authorize EEAC's participation in cases as *amicus curiae* or approve action or comments proposed by the various committees in circumstances where immediate action is required. The majority of the staff work is performed by fourteen attorneys who are skilled in equal employment law and who have the practical experience of performing work for clients in the labor and employment law area.

The coming of a new Administration to Washington in 1981 raised many questions about the continuation and direction of federal EEO programs and policies. Instead of a decline in EEO activity as some expected, the combination of new policymakers and new issues required an increase in the efforts of the Council and contributed to its steady growth in membership. EEAC's three regional meetings in 1981 gave members a chance to meet with officials of the new Administration, members of Congress and key congressional staff personnel, providing a firsthand exchange of information on new initiatives being taken in Congress and new directions in federal EEO policy. Workshops supplied additional opportunities for members to obtain timely information on topics of general interest to EEO managers and planners. A complete list of speakers, subjects covered and workshop topics for each meeting is included as Appendix B, beginning on page 49.

While comparable worth, age and sex discrimination issues continued to occupy the headlines in 1981, many other aspects of EEO laws and regulations came under review by the Administration and the courts. The Council submitted comments on a number of proposed regulatory changes and, since the last annual meeting, filed 21 briefs before the courts of appeals and the United States Supreme Court. Among the more than 100 memoranda sent to members were specially prepared detailed analyses of the Supreme Court's decision in *Gunther v. County of Washington*; the National Academy of Sciences' study, "Women, Work and Wages: Equal Pay for Jobs of Equal Value," and a series of memoranda on proposed modifications to Executive Order 11246. A more detailed report on the Council's work during 1981 follows.

Amicus Curiae Activities

The constant flow of equal employment litigation continues to be reflected in EEAC's case selection legal activities. Moreover, experience over the years also shows that suits by private plaintiffs are the major source of EEO lawsuits, and that the predominant court activity in many ways is independent of government efforts. For example, of the 21 lawsuits in

which EEAC was involved this year, only 7 were brought by government agencies. Similarly, the government instituted only 2 of the 8 Supreme Court cases EEAC briefed in 1981.

Over the years, EEAC's briefing activity has had a substantial impact on the development of equal employment law. Since its inception, the Council has filed 111 briefs in 107 cases. Reflecting the importance of these cases, 43 EEAC briefs were filed with the United States Supreme Court. The briefing activity has been successful as well as productive. Sixty-five court opinions reached the issues EEAC briefed. Of these, two-thirds (43) adopted the position advanced by the Council. Twenty-two of the remaining decisions were either inconclusive, settled or did not reach the relevant questions. Only 22 cases were decided against the Council's arguments.

Important substantive legal questions predominated over technical or procedural issues in the past year. The most significant briefed case was *County of Washington v. Gunther*. This landmark Supreme Court decision is expected to greatly expand litigation concerning sex-based compensation discrimination. The Court resolved a major issue in favor of Title VII plaintiffs by ruling that at least some suits could be brought even if plaintiffs did not prove that they were performing the same work for less pay than members of the opposite sex. The Court, however, refused to spell out how these suits will be tried, and left that task to the lower courts. EEAC then briefed *Kouba v. Allstate*, the first major post-*Gunther* appellate court case. The case allowed EEAC to present its views on the appropriate standards and burdens of proof to be applied in compensation litigation.

In other Title VII sex-discrimination cases, EEAC opposed EEOC guidelines that require pregnancy disability payments to the dependents of employees (*Newport News Shipbuilding, Lockheed*), and, contrary to EEOC's view, the Council argued that employers may adopt assignment procedures designed to protect an unborn fetus from chemical exposure in the workplace (*EEOC v. Olin*). Both issues were new to EEAC in the court arena, but positions on the questions briefed also were fully argued in comments opposing proposed government guidelines.

Several briefs were filed dealing with the appropriate use of statistical evidence in Title VII suits. Basically, EEAC argued that statistics are relevant only if they relate to persons who are qualified and available for particular jobs. General internal or external workforce statistics are not probative, in the Council's view. EEAC also briefed *Texas Dept. of Community Affairs v. Burdine*, which resulted in an important Supreme Court opinion defining the burden of proof in disparate treatment cases. Under that opinion, the employer is *not* required to *prove* its defense; neither is it required to *prefer* members of one race or sex over other equally qualified persons. In addition, the Supreme Court's decision in *Connecticut v. Teal* will determine whether a written examination that has an adverse impact on minorities is discriminatory when the overall effect (or bottom line) of the selection process favors minority applicants.

Significant seniority issues also were briefed. These included *Pullman-Standard v. Swint*, where the Supreme Court will decide the standards that will determine whether a seniority system is bona fide. *American Tobacco v. Patterson* raises the question of whether the provision in Title VII that protects seniority systems unless they were *intended* to discriminate applies to systems instituted or modified *after* the effective date of Title VII. The Fourth Circuit had ruled that only pre-Act systems were protected. Unless reversed, that decision over time could negate Title VII's protections for virtually all systems. Another threat to seniority systems was averted by the decision in *U.S. v. Trucking Management* which held that systems permitted by Title VII could not be invalidated under Executive Order 11246. This decision struck down attempts by the Executive Branch and OFCCP that were contrary to the will of Congress.

Other briefs involving OFCCP were filed. The *Harris Bank* brief urged the Secretary of Labor to rule that back pay is not an appropriate remedy under E.O. 11246. The district court decision in the *Firestone* case held that it was illegal for the OFCCP to require *absolute* parity between the percent of minorities or women in an employer's workforce and the percent of those available for the work. The government's appeal of the decision was

withdrawn when the OFCCP proposed more flexible regulations. Also, even after the Supreme Court's decision in *Chrysler v. Brown*, many issues remain unresolved over the OFCCP's authority to turn over to third parties EEO information submitted to the OFCCP by federal contractors. EEAC briefs in *Burroughs v. Brown* and *CNA v. Donovan* argued several legal and procedural points opposing such disclosure.

An outline, case table and detailed analysis of all past amicus curiae activities are found on pp. 12-32.

Regulatory Comments

During 1981, the Council's regulatory comments focused primarily upon the OFCCP enforcement regulations, EEOC modifications to traditional procedures and interpretive rules used in enforcing the Equal Pay and Age Discrimination in Employment Acts, and the application of Title VI of the Civil Rights Act of 1964 to the employment practices of recipients of Federal financial assistance. A complete summary of all of the Council comments on proposed regulations can be found on pp. 33-42.

The Reagan Administration review of the E.O. 11246 contract compliance program culminated in the publication of an Advance Notice of Proposed Rulemaking (ANPR) in July and the publication of a number of proposed modifications to its current enforcement regulations in August. The Council commented extensively on both proposals. The ANPR solicited public comment on a variety of crucial issues including job group determination, availability and remedial back pay. The Council suggested that the standards for establishing job groups be stated broadly with emphasis placed on job content. To the extent that availability is used as a benchmark for evaluating the existence of underutilization and the equity of personnel transactions, Title VII standards should be adopted and the availability pool should include only persons who are qualified and interested in the job. Back pay is not an appropriate E.O. 11246 remedy and all requests for retroactive relief for past discrimination such as back pay should be referred to EEOC for processing.

Through letters to Labor Secretary Donovan, the Council urged the Department to postpone issuance of pro-

posed modifications to the current E.O. 11246 enforcement regulations. On the basis of pre-publication consultations with several DOL officials, it became apparent that for the most part the proposals would amount to little more than "tinkering" with a conceptually deficient program, and that a proposal to exempt approximately 75% of the contractors subject to E.O. 11246 from the obligation to prepare written AAPs would be perceived by the public as a retrenchment on affirmative action. Working in cooperation with several other industry organizations, the Council developed a consensus position on the basic elements of a revised contract compliance program. Included among those elements would be: (1) the program would be prospective in focus, concentrating exclusively on affirmative action with all discrimination issues being referred to EEOC; (2) contractor efforts to enable minorities and women to become qualified candidates for actual job openings through employment training and plant relocation into areas of high unemployment should be emphasized; (3) the program should encompass all federal contractors but include methods for focusing agency resources on the contractors doing the least to promote EEO; (4) incentives for voluntary compliance should be developed; and (5) the success of the program should be measured in terms of increased minority and female employment rather than the number of monetary awards collected or contractors debarred. Although the Department concluded that it legally could not delay publication of the proposed regulations, several aspects of the industry consensus position developed under Council auspices were included in the ANPR or the proposed regulatory modifications.

The Council also filed comments relating to EEOC's enforcement of Title VII, the Equal Pay Act (EPA) and the Age Discrimination in Employment Act (ADEA). With regard to Title VII, the Council opposed EEOC's view that charges of discrimination which are not timely filed with an appropriate state or local agency may nevertheless be filed with the Commission up to 300 days following the date of the alleged violation. The Council argued that in order to benefit from the extended 300 day filing limit, charges must be timely

filed with the state or local agency. The Council commented also upon EEOC proposals for modifying the interpretive rules under the Equal Pay Act. While supporting the Commission's overall effort to achieve more efficient EPA enforcement, the Council noted that proposed modifications to the definition of "establishment" and the addition of an "equal benefits" requirement modeled after the *Manhart* decision would be costly and would expand significantly the scope of traditional EPA requirements.

In addition, the Council filed comments regarding EEOC proposals for processing charges and issuing interpretations and opinions under the ADEA. The comments touched upon a wide variety of issues and included suggestions that confidential complaints and charges by third parties not be permitted; all charges, whether filed initially with the EEOC or with state agencies, must be filed within 180 days; internal review and appeal procedures be established to consider challenges to administrative subpoenas; and, steps be taken to encourage voluntary settlements by eliminating unnecessarily broad investigations.

Finally, the Council filed four comment letters during 1981 concerning Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the part of recipients of Federal financial assistance. Three of the letters urged agencies to adopt the position that Title VI nondiscrimination requirements do not apply to the employment practices of recipients unless the primary objective of the financial assistance is to provide employment. One letter commented favorably upon proposals by the Department of Justice and EEOC which would require federal agencies to refer many of their Title VI and Title IX employment discrimination charges to EEOC for processing.

Congressional and State Oversight

The 1st session of the 97th Congress generated a substantial amount of activity for the Legislative Oversight Committee. The election of a Republican Majority in the Senate resulted in a shift in emphasis from major legislative proposals to expand the jurisdiction of the civil rights enforcement agencies that characterized past Congresses to oversight hearings concern-

ing enforcement of existing programs.

Oversight hearings were held by the Senate Labor and Human Resources Committee on the enforcement of federal laws concerning sex discrimination and the OFCCP's enforcement of Executive Order 11246 governing federal contractors. In addition, the Senate Judiciary Committee conducted a series of hearings on the legality and desirability of affirmative action. The House Subcommittee on Employment Opportunities likewise conducted several days of hearings concerning the EEO related enforcement objectives and activities of the Departments of Justice and Labor and the EEOC.

The Legislative Oversight Committee provided periodic summaries to the membership concerning the topics addressed in these hearings and, in addition, surveyed its viewpoints on a number of key issues at the request of Senate staff. To facilitate communication between EEAC members and the Congress, a number of Congressmen and staff spoke at each Membership Meeting and met informally with the Committee.

Although Congressional oversight dominated the first session of this Congress, several significant legislative measures were proposed and monitored by the Committee. The House Wednesday Group initiated a proposal that would transfer almost all EEO enforcement activities from EEOC to the Justice Department. Congressman Robert S. Walker also offered a rider to the House Health & Human Services, Labor, and Education Departments' appropriations bill that would prohibit federal enforcement of quota and quota-like requirements. The amendment passed the House but failed to gain Senate approval. A complete summary of bills introduced during the first session of the 97th Congress can be found at page 43.

The State Oversight Committee continued to expand its monitoring capabilities during 1981. Early in the year, the Committee issued its 1980 state EEO legislative review. In response to the growing interest in and concern about the comparable worth theory, the Committee prepared a summary of state "Comparable Work" provisions. Hearings on the issue of comparable worth conducted by the State of California also were followed closely.

This year saw the Committee introduce guest speakers to its meeting format. The featured speaker at its meeting in June was a Commission Counsel for the California Fair Employment and Housing Commission. After giving a brief summary of the respective functions of the Commission and the Department of Fair Employment and Housing, she discussed recent developments in California EEO law, including handicap law issues and proposed state contract compliance regulations.

Most recently, the Committee has been engaged in measuring the extent to which changes in federal EEO policy may influence EEO enforcement at the state and local level. Some federal officials have indicated that state and local agencies may play a more prominent role in the national EEO effort during the 1980's. The Committee will monitor and report on developments in this area.

Affirmative Action Practices

The Affirmative Action Practices Committee at its first meeting established the priorities and interests of the Committee for 1981. It determined that a portion of each Committee meeting would be devoted to providing a forum for members to present and discuss current EEO and affirmative action policies and problems. Among the issues discussed in 1981 were: (1) actions which corporations are taking with respect to compensation systems after the Supreme Court's decision in *Gunther v. County of Washington*; (2) steps corporations are taking to accommodate the handicapped; (3) EEO problems associated with layoffs; (4) formation of job groups; and (5) OFCCP enforcement and compliance activities.

The Committee also established three subcommittees to address specialized areas of interest—availability, affirmative action and employee selection. At the end of 1981, it was exploring the feasibility of forming subcommittees on layoff procedures, job evaluation, and training programs.

The Availability Subcommittee developed a set of principles on availability, utilization analysis, and goals and timetables and also provided substantive expertise for the Regulatory Oversight Committee's comments to OFCCP on availability. In 1982 it will

continue to monitor progress on the 1980 Census, especially with respect to occupational groups.

The purpose of the Creative Approaches to Affirmative Action Subcommittee is to identify and inform the Committee on practical "how to" approaches to meet specific equal employment and affirmative action objectives. During 1981, the Subcommittee conducted a number of sample surveys of EEAC members with respect to their particular practices and policies involving internal complaint procedures, management accountability, sexual harassment, and upward mobility programs. Future activities include establishing a resource file for use of EEAC's members on successful and innovative equal employment and affirmative action programs.

The Employee Selection Subcommittee is composed of both EEO practitioners and industrial psychologists. As a result of the targeting for review by Vice President George Bush's Regulatory Task Force of the Uniform Guidelines on Employee Selection Procedures, the activities of the Subcommittee were directed to drafting a revision of the Guidelines for consideration by the Task Force and the federal enforcement agencies. The Subcommittee also prepared bibliographies on the Uniform Guidelines, job analysis, assessment centers, performance appraisals and comparable worth which were distributed to AAP Committee members. Work is also in progress on a manual concerning truth-in-testing legislation at both the federal and state levels.

Seminars

In 1981, EEAC presented two seminar series. The first—"What Every Good EEO Coordinator Should Know About Statistical Methodologies"—was given twice. It is a continuation of the highly successful seminar developed in 1979 which has been attended by over 330 EEO practitioners. The program is designed to teach attendees how to identify and apply the appropriate statistical concept necessary for an accurate assessment of common problems facing corporate compliance personnel, such as affected classes, wage disparities, underutilization and promotion. It was designed for those who have little or no exposure to statistical methodologies, yet proved

beneficial as a refresher to those who have had some statistical training. The seminar will be held again in 1982 in Washington, D.C., on April 21, 22 and 23, and in Chicago, Illinois, on September 28, 29, and 30.

The second seminar entitled—"Availability: What It Means, How to Determine It, and How to Defend It"—was also presented twice in 1981. Its purpose is to familiarize attendees with the basic elements of availability and with methodologies for computing availability under Executive Order 11246 and Title VII. No attempt is made to advocate a particular approach. Instead, the broadest possible spectrum of alternatives is presented, and time is allotted for a discussion of the strengths and weaknesses associated with each. The seminar will be offered again in 1982 on May 10, 11, and 12, in Chicago, Illinois, and September 13, 14 and 15, in Philadelphia, Pennsylvania.

Development of three new seminars to be presented in 1982 also took place this year. A series of seminars on "Comparable Worth: A Team Response to the Issues," is jointly sponsored by EEAC, the American Compensation Association, American Society for Personnel Administration, and the International Personnel Management Association. The seminar is designed for all human resource professionals—compensation, EEO, training, staffing, labor and industrial relations, and benefits—as well as legal professionals. Team participation is encouraged. Fundamental compensation, EEO, labor relations and legal considerations will be provided by the seminar faculty followed by specialty workshops applying the principles involved. The seminar will be presented three times in 1982:

January 18-19 Los Angeles
January 25-26 Boston
February 8-9 Chicago

A second seminar entitled "Age Discrimination in Employment Act: A Symposium on Legal and Practical Considerations for Attorneys and Personnel Practitioners" was developed in cooperation with The National Council on the Aging and the American Bar Association's Commission on Legal Problems of the Elderly and Section on Labor and Employment Law. The seminar is being presented on Jan-

uary 11 and 12, 1982, in Washington, D.C.

The seminar is designed to provide personnel practitioners and attorneys with detailed information on the current state of the law, "best practices" in the use of older workers, and how to minimize the potential for complaints and employer liability.

Finally, a seminar on "Developing Sound Employee Selection Procedures: A Detailed Look at Job Analysis and the Requirements of the Uniform Guidelines on Employee Selection Procedures" will be presented twice in 1982. The seminar is designed to provide EEO specialists, industrial psychologists and attorneys with a comprehensive understanding of the requirements of the Guidelines including their legal context, the applicability of professional standards, key concepts, and job analysis procedures. The seminar will be given on March 16, 17, and 18, in Washington, D.C., and June 14, 15, and 16, in Chicago, Illinois.

Publications & Memoranda to Members

Early in 1981, EEAC published in paperback the transcript of its one-day symposium on comparable worth which was held in November of 1980. The transcript was sent to members in April and is now available as an EEAC publication alone or as a set with the Council's successful hardbound study, "Comparable Worth: Issues and Alternatives." One of EEAC's earlier publications, "Preferential Treatment in Employment—Affirmative Action or Reverse Discrimination," has been sold out. A second edition is not planned. A more complete summary of the Council's publications can be found in Appendix C, beginning on page 51.

In addition to its published resource materials, the Council issues for the use of its members memoranda providing a major source of timely information on a variety of EEO topics. A list of the subjects covered in the 121 memoranda sent to members during 1981 can be found in Appendix A, beginning on page 45.

Finances

During 1981, EEAC continued to be in sound financial condition. Approximate figures for income and expenditures were as follows:

RECEIPTS

Dues and Contributions
Receipts from
Membership Meetings,
Publications, and
Seminars; and
Miscellaneous Income \$1,267,000

DISBURSEMENTS

Amicus Curiae	280,000
Legal Research	15,000
AAP	30,000
Clearinghouse	35,000
Regulatory Oversight	165,000
Legislative Oversight	15,000
State Oversight	18,000
Seminars	135,000
Publications	38,000
Membership Meetings	150,000
Salaries, rent, duplicating, mailing, travel, telephones and other administrative expenses	284,000
Office furniture & equipment	3,000
Long range planning & Annual Report	17,000
Membership	6,000
TOTAL	
DISBURSEMENTS	\$1,191,000

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<i>University of Texas v. Camenisch</i> , 101 S. Ct., 1830 (1981)	101	31
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<i>Westinghouse Electric Corp.</i> , 239 NLRB No. 19 (1978)	95	30

SUMMARY OF CASES

Case Name	Issue Briefed	EEAC's Argument—Court Holding
I. TITLE VII		
A. Affirmative Action:		
* 1. <i>University of California Regents v. Allen Bakke</i> , 438 U.S. 265, 17 FEP Cases 1000 (1978).	What is the proper scope of a remedy to reverse discriminatees in the event a court finds invalid a University's preferential admissions program for minority applicants?	EEAC took no position on the legality of affirmative action programs (AAPs). Instead, it requested guidance for employers who may face Title VII liability or lose government contracts if they do not enact an AAP, but also may be sued by whites for "reverse discrimination" for having an AAP. Because of the unsettled law governing affirmative action, EEAC argued that even if AAPs are found improper, remedies to reverse discriminatees should be prospective only, and employers should not be liable for back pay in such cases. EEAC's brief was printed in full in BNA's July 14, 1977, Daily Labor Report. The Supreme Court's decision did not reach these remedial questions. In a split decision, the Court held that the University's quota system improperly excluded whites from competition for a set number of places at the school. The Court ruled, however, that race may properly be used as a "factor" in making admissions decisions.
** 2. <i>United Steelworkers and Kaiser Aluminum & Chemical Corporation v. Brian F. Weber</i> , 99 S. Ct. 2721, 20 FEP Cases 1 (1979).	Do Title VII and E. O. 11246 permit the employer and union to enact a voluntary racially-based affirmative action plan designed to remedy underrepresentation of minorities when there is no showing of discrimination by the employer?	EEAC filed two briefs—one supporting the petition for certiorari, the other on the merits. As in <i>Bakke</i> , EEAC took no position on the validity of the AAP, explaining to the Court that employers differed on the merits of the case due in part to the confusing state of the law. The factors impelling the enactment of AAPs were spelled out for the Court, and the Justices were urged to adopt suggested standards to relieve employers from potential reverse discrimination liability. The Court ruled that the specific, <i>voluntary</i> AAP in this case was permitted by Title VII.
** 3. <i>Fullilove v. Klutznick</i> , 100 S. Ct. 2758 (1980).	Is the minority business set-aside quota in the Public Works Act of 1977 constitutional?	EEAC filed two briefs. The first urged the court to accept the case for review in order to clarify the law. The brief on the merits argued that the quota was unconstitutional because it was enacted without any Congressional findings of discrimination against minority contractors. The court upheld the set-aside because it felt it was based upon Congressional findings of discrimination.
* 4. <i>Minnick v. California Dept. of Corrections</i> , 101 S. Ct. 2211, 25 FEP Cases 1383 (1981)	Whether a state can implement an AAP for prison personnel based upon the racial makeup of the inmate population, and an AAP for women based upon state-wide population figures?	The Council's brief argued that the racial quota was improper because there is no relationship between the qualifications for the job and those possessed by inmates. The sex-based quota was improper because it was not based upon representation in the relevant labor market. EEAC also argued that both AAPs were unconstitutional because there was no finding of past discrimination against minorities or women. The Supreme Court declined to rule on the merits. It ordered that the petition to review the case should be dismissed and remanded the case for further trial before the California courts.

*Decided Case

**More than one brief filed

Case Name	Issue Briefed	EEAC's Argument—Court Holding
* 5. <i>County of Los Angeles v. Davis</i> , 99 S. Ct. 1379, 19 FEP Cases 282 (1979).	a) Is the standard of proof for claims under 42 U.S.C. § 1981 the 14th Amendment <i>purposeful</i> discrimination test established in <i>Washington v. Davis</i> , and not the Title VII disproportionate impact standard of <i>Griggs v. Duke Power</i> ? b) Did the Ninth Circuit properly order a quota remedy when the only violation found was an <i>unfulfilled</i> decision to give a selection test which might have been discriminatory if actually used as a basis for employee selection?	a) EEAC argued that the first standard applies, and an <i>intent</i> to discriminate must be shown to establish a Section 1981 violation. b) It also argued that the Ninth Circuit acted beyond its authority when it ordered a quota hiring remedy that was unrelated to any violation that could have caused the imbalance between the number of minorities in the employer's workforce and the surrounding general population. The Supreme Court did not reach these issues because it found the case moot.
* 6. <i>City of Bridgeport v. Assn. Against Discrimination in Employment, Inc.</i> , 647 F.2d 256, 25 FEP Cases 1013 (2d Cir. 1981)	Did the district court have the authority under Title VII to order a 100% racial hiring quota based upon minority population figures rather than upon labor force statistics reflecting the availability of qualified workers?	EEAC urged that such a quota was <i>not</i> permitted by Title VII. The Second Circuit, however, held that the remedy was permitted to overcome the effects of egregious past discrimination.
* 7. <i>Fisher v. Procter & Gamble</i> , 22 FEP Cases 356 (5th Cir. 1980).	Is a court-ordered quota based upon "workforce parity" proper where the court disregarded the availability of qualified persons?	EEAC argued that an employer should not be required to hire or promote persons who do not possess the qualifications needed to fill a particular job. The court did not address the interim-hiring quota issue but decided the case on issues not briefed by EEAC.
* 8. <i>Virginia Commonwealth Univ. v. Cramer</i> , 569 F.2d 1300, 17 FEP Cases 644 (4th Cir. 1978).	What is the legality of an AAP under which only females were considered for job openings?	EEAC's position on remedies was similar to that advanced in <i>Bakke</i> [1]. In addition, as this case directly involved the OFCCP, EEAC detailed how OFCCP's requirements and sanction procedures leave employers little choice but to enact AAPs and urged that compliance with government requirements should afford a defense to reverse discrimination claims. The Fourth Circuit did not reach the issues presented and remanded the case so that the district court could hold hearings to determine whether the plaintiff actually had been considered for the positions but was found to be less qualified than other applicants.
* 9. <i>Leuvano v. Campbell</i> , Civil Action No. 79-0271 (D.D.C., 1981). No opinion.	Whether the district court should approve a proposed consent decree that would eliminate the federal PACE exam and substitute a hiring procedure requiring a 20% minimum minority hiring provision?	EEAC's brief argued that the hiring requirement was not permissible. When this provision was changed by the parties, and it became clear that the U.S. Attorney General would recommend approval of the revised decree, EEAC withdrew its brief.
B. Attorney's Fees:		
* 10. <i>Christiansburg Garment v. EEOC</i> , 434 U.S. 412, 16 FEP Cases 502 (1978).	What is the proper standard for awarding attorney's fees against unsuccessful plaintiffs or EEOC?	The Supreme Court rejected assertions that successful defendants always should receive fees or that the EEOC should be required to pay fees only when it acted in bad faith. The Court held that plaintiffs should pay when they act "unreasonably." The Court's decision adopts an alternative argument contained only in EEAC's brief.
* 11. <i>Smith v. Univ. of North Carolina</i> , 632 F.2d 316, 23 FEP Cases 1739 (4th Cir. 1980).	Is a Title VII plaintiff who obtained a preliminary injunction, but who ultimately lost on the merits of her claim, entitled to an award of attorney's fees expended to obtain the injunction?	The court concurred with EEAC's position that a plaintiff who does not prevail on the merits is not a "prevailing party" under the statute for purposes of receiving attorney's fees for the injunction.
* 12. <i>Honea v. Shell Oil Company</i> (5th Cir.) All decisions unreported.	Did the district court err by not awarding attorney's fees against a plaintiff whose Title VII suit was dismissed for failure to file an EEOC charge against Shell? The filing of such a charge is a prerequisite to filing a Title VII action.	EEAC argued that the plaintiff's suit was frivolous and unreasonable under the standards established by <i>Christiansburg</i> [10] and that failure to award the fees would result in unnecessary, costly and burdensome litigation. The court, however, affirmed the lower court without writing an opinion.

Case Name	Issue Briefed	EEAC's Argument—Court Holding
C. Class Actions:		
1. Class Representatives:		
* 13. <i>East Texas Motor Freight v. Rodriguez</i> , 431 U.S. 395, 14 FEP Cases 1505 (1977).	a) May plaintiffs who cannot demonstrate they suffered individual discrimination still represent a class of alleged discriminatees? b) Can general workforce statistics be used to prove discrimination under Title VII?	a) Relying on employer and EEAC arguments, the Supreme Court found that the plaintiffs had never suffered individual discrimination and thus were not appropriate class representatives. b) The Court did not reach this issue. EEAC argued that general workforce statistics do not necessarily prove discrimination.
14. <i>General Telephone Co. of the Southwest v. Falcon</i> (U.S. S. Ct.). Decision Below: 626 F.2d 369, 23 FEP Cases 1610 (5th Cir. 1980).	May a plaintiff who suffered only <i>promotion</i> discrimination represent a class of alleged <i>hiring</i> discriminatees?	The Council's brief argued that the individual could not represent hiring discriminatees and could only sue for promotion discrimination.
* 15. <i>Satterwhite v. Greenville, Texas</i> , 578 F.2d 987, 17 FEP Cases 1451 (5th Cir. 1978) (<i>reh'g en banc</i>).	May a plaintiff whose individual claim has been dismissed still represent a class?	Consistent with EEAC's position, a divided panel held that the named plaintiff was <i>not</i> a proper class representative because she did not have claims typical of the members of the asserted class or an adequate or common nexus with them.
* 16. <i>Western Electric v. Hill</i> , 596 F.2d 99, 19 FEP Cases 490 (4th Cir. 1979), 444 U.S. 929 (1979).	May class representatives consisting only of incumbent employees represent a class of applicants who allege hiring discrimination?	The Court agreed with EEAC's arguments that the incumbents did not have standing to represent applicants. The findings of hiring discrimination were vacated.
17. <i>Hill v. Western Electric</i> (4th Cir.). Decision Below: unreported.	May a new class of applicants intervene in this suit after the original applicants were dismissed because there was not a proper class representative? (See case above.)	EEAC's brief argues that the proposed intervention is untimely, and that the claims of the proposed intervenors are dissimilar to those originally tried.
2. Applicability of Federal Rule 23:		
* 18. <i>EEOC v. General Telephone Company of the Northwest</i> , 599 F.2d 322, 20 FEP Cases 52 (9th Cir. 1979), accepted for review by the U.S. Supreme Court (see 21).	Must EEOC follow the class action requirements of Rule 23, FRCP?	The Ninth Circuit held that Rule 23 does not apply to EEOC actions.
* 19. <i>EEOC v. D. H. Holmes</i> , 556 F.2d 787, 15 FEP Cases 378 (5th Cir. 1977), <i>cert. denied</i> , 17 FEP Cases 1000 (1978).	Must EEOC follow the class action requirements of Rule 23, FRCP, when it sues under Section 706 of Title VII?	The court, relying in part upon legislative history cited by EEAC, found that EEOC must follow the federal rules when it brings a class action.
* 20. <i>EEOC v. Datapoint Corp.</i> 570 F.2d 1264, 17 FEP Cases 281 (5th Cir. 1978).	The suit involves the same issues as in <i>Holmes</i> above.	The court agreed that it should, and that EEOC must notify potential class members of the suit. Because the members had not excluded themselves from the class, they were bound by the adverse ruling against EEOC.
* 21. <i>General Telephone Co. of the N.W. v. EEOC</i> , 444 U.S. 318, 22 FEP Cases 1196 (1980).	Do the class action requirements of Rule 23, FRCP, apply to EEOC suits?	The Supreme Court took this case to resolve the split between the Ninth Circuit's opinion [18], and that of <i>D. H. Holmes</i> [17] and <i>Datapoint</i> . [20]. It held, contrary to our position, that they do not. The court did rule, however, that the lower courts have equitable authority to prevent double recovery by plaintiffs.

D. Comparable Worth

- * 22. *County of Washington v. Gunther*, 452 U.S. ___, 101 S. Ct. 2242, 25 FEP Cases 1521 (1981).

23. *Gunther v. County of Washington* (9th Cir.). 623 F.2d 1303, 23 FEP Cases 1650 (9th Cir. 1980), *affirmed* 101 S. Ct. 2242 (1981).

24. *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094, 23 FEP Cases, 588 (3d Cir. 1980), *cert. denied*, 449 U.S. 1009 (1981).

25. *Lemons v. Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

Cases 22 through 25 involve the same issue: whether an employer who complies with the Equal Pay Act by paying women the same as men for jobs of equal skill, effort and responsibility may still violate Title VII by not providing equal pay for jobs that are dissimilar in content.

These cases are relevant to the theory of "comparable worth," which is being advanced by plaintiff groups in an attempt to expand the types of wage discrimination prohibited under Title VII. EEAC's publication "Comparable Worth: Issues and Alternatives" treats the issue in detail.

In all four briefs EEAC argued that a Title VII wage discrimination claim under Title VII cannot be maintained unless a violation could be found under the "equal work" standard of the Equal Pay Act. If such claims are permitted under Title VII, EEAC argued, the Equal Pay Act standard would be circumvented, contrary to the will of Congress. Moreover, there is no feasible methodology that could be utilized to determine whether dissimilar jobs are "comparable." Requiring the courts to make such determination could subject them to an impossible burden not intended for them by Congress.

In *Gunther* (22), the Supreme Court, in a 5-4 decision, held that Title VII permits some sex-based compensation suits even where plaintiffs are not alleging their work is "equal" to work performed by males, at least where intentional or transparently sex-based discrimination can be shown. Relying on many of EEAC's arguments, the dissent would have dismissed the suit. The court in *Lemons* dismissed a job comparability claim because it held the equal work standard applied to Title VII. The *Westinghouse* Court split 2-1, holding that allegations of intentional compensation discrimination should not be dismissed without a trial on the merits. The dissent agreed with EEAC's arguments.

26. *Allstate Insurance Company v. Kouba* (9th Cir.). Decision Below: 26 FEP Cases 1273 (E.D. Calif. 1981).

Does an employer violate Title VII by basing part of sales trainees' salaries on earnings from prior employers? The practice concededly is neutral, but there were allegations that such payments have an adverse impact on women by carrying forward general societal discrimination in women's wages.

EEAC's brief argues that the court erred in granting the plaintiff's motion for summary judgment when there was an obvious dispute of fact over the existence of the alleged discrimination. Also, the court placed an improper burden on the employer to inquire into whether the prior employer's pay practices were based upon sex-based factors. In sex-based compensation cases, EEAC argued, the burden should be on the plaintiff to prove that the wage disparity paid to women is "attributable" to sex discrimination. No such proof was demonstrated.

E. Procedural Requirements:**1. Continuing Violations:**

- * 27. *United Air Lines v. Evans*, 431 U.S. 553, 14 FEP Cases 1510 (1977).

Are the present effects of a previously time-barred act of discrimination enough to establish a continuing violation of Title VII?

The Supreme Court endorsed EEAC's arguments that a rehired plaintiff's lower seniority caused by an earlier illegal discharge was not a violation. Because she did not file a timely charge, the illegal act had "no present legal consequences."

- * 28. *Delaware State College v. Ricks*, 101 S. Ct. 498, 24 FEP Cases 827 (U.S. 1980).

Must a discharged employee file his EEOC charge within 180 days of the date he is informed of his discharge or on the date his employment actually ends?

Relying on *Evans* [27], the Supreme Court agreed with EEAC's arguments that there was no continuing violation and that the time period began when the employee received notification.

29. *Independent Federation of Flight Attendants v. Trans World Airlines* (U.S. S. Ct.). Decision Below: 23 FEP Cases 118 (7th Cir. 1980); 582 F.2d 1142, 17 FEP Cases 1513 (7th Cir. 1978).

Does a court have jurisdiction to accept a settlement with respect to claims which the court has ruled were time-barred because of the plaintiffs' failure to file timely charges with EEOC?

Although a charge must be timely, EEAC's brief argued that a court may permit the parties to settle cases which may involve untimely charges. Timeliness often is a hotly contested issue which the parties should be permitted to settle without awaiting a final appellate decision on that point.

- * 30. *Cates v. TWA*, 561 F.2d 1064, 15 FEP Cases 329 (2nd Cir. 1977).

Does a lower seniority slot resulting from a prior illegal refusal to hire constitute a continuing Title VII violation?

The Court concurred with EEAC's contention that there was *no* violation. The operation of a neutral seniority system does not resurrect a previously time-barred discrimination complaint.

Case Name	Issue Briefed	EEAC's Argument—Court Holding
* 31. <i>ITT Continental Baking Company, Inc. v. New York State Div. of Human Rights</i> , (N.Y.C.A.). Unreported.	Do the continuing effects of alleged seniority discrimination constitute a continuing violation?	EEAC filed an affidavit with the New York Court of Appeals arguing that it did <i>not</i> , pointing out that lower state ruling was at odds with federal law. The purpose of the affidavit was to urge the court to exercise its discretion to hear the case. It declined to do so, however.
2. Injunctions:		
* 32. <i>EEOC v. Bay Shipbuilding</i> (7th Cir.). Decision Below: 21 FEP Cases 747 (E.D. Wis. 1979).	Whether EEOC must show "irreparable harm" as a prerequisite to obtaining an injunction against a Title VII defendant?	EEAC argued that it must, and that the traditional standard for injunction relief applies to EEOC. In other words, an injunction should not be issued merely because EEOC alleges a violation. EEOC withdrew its appeal, but the district court's favorable ruling still stands.
* 33. <i>EEOC v. Anchor Hocking Corp.</i> (6th Cir.). Decision Below: 23 FEP Cases 81 (S.D. Ohio 1980).	Whether EEOC must show "irreparable harm" as a prerequisite to obtaining an injunction against a Title VII defendant?	As in 32, the Council and the 6th Circuit agreed that irreparable harm must be demonstrated. In this case, EEOC attempted to obtain an injunction even before it had begun its investigation. The district court ruled that no harm to EEOC's investigation had been shown.
3. Interlocutory Appeals:		
* 34. <i>Gardner v. Westinghouse Broadcasting</i> , 437 U.S. 478, 17 FEP Cases 1060 (1978).	May a Title VII plaintiff, as a matter of right, immediately appeal a denial of class certification?	The Supreme Court concurred with Westinghouse and EEAC's briefs that the district court should deny such an appeal in order to prevent frivolous or piecemeal review of procedural holdings which do not irreparably harm the plaintiff or class.
* 35. <i>Carson v. American Brands</i> , 101 S. Ct. 993, 25 FEP Cases 1 (1981).	Whether the district court's disapproval of a proposed consent decree is appealable prior to a trial on the merits?	EEAC's brief stated that the parties should be able to appeal the ruling in order to resolve the issues before a costly trial. The Supreme Court agreed.
4. Laches:		
* 36. <i>EEOC v. American National Bank</i> , 574 F.2d 1173, 17 FEP Cases 213 (4th Cir. 1978).	If EEOC delays in processing a Title VII charge, does the doctrine of "laches" require the dismissal of claims where the employer was prejudiced by the delay?	The court held, as argued by EEAC, that the doctrine of "laches" applies to EEOC and dismissed the charge that the employer had discriminated against a named individual. Allegations of class discrimination were remanded to the district court for a determination of whether the delay prejudiced the employer's suit.
* 37. <i>EEOC v. C & O Railway</i> , 577 F.2d 229, 17 FEP Cases 815 (4th Cir. 1978).	Does EEOC delay bar a back pay award?	Relying on its decision in <i>American National Bank</i> [36], the Fourth Circuit remanded the case to determine whether the delay prejudiced the employer in defending each individual claim for back pay. EEAC had argued that dismissal of claims was appropriate where prejudicial delay existed.
5. Offer of Judgment—Federal Rule 68:		
* 38. <i>Delta Air Lines v. August</i> , 101 S. Ct. 1146, 25 FEP Cases 233 (1981).	If discrimination claims are dismissed after a plaintiff refuses an offer of judgment, does Rule 68, FRCP, mandate that the plaintiff pay the defendant's cost accrued from the date the offer was rejected?	EEAC's brief argued that Rule 68 is mandatory and that requiring the plaintiff to pay the costs would encourage the parties to settle a case before a trial would be required. The Supreme Court held that Rule 68 is mandatory only if the plaintiff prevails but wins less than set out in the offer of judgment. But where the plaintiff has its suit dismissed entirely, the Court ruled that Rule 68 is not mandatory.

Case Name	Issue Briefed	EEAC's Argument—Court Holding
6. Timely Filing:		
* 39. <i>Mohasco v. Silver</i> , 100 S. Ct. 2486, 23 FEP Cases 1 (1980).	When is a Title VII charge which is first filed with a state agency considered filed with EEOC?	The Supreme Court held that if a timely state charge is filed, it can be considered filed with EEOC if the state finishes processing the charge within 300 days from the alleged unlawful event. It rejected the Council's argument that a charge must be filed with either EEOC or the state agency within 180 days.
* 40. <i>Gunn v. Dow Chemical</i> , 26 FEP Cases 1420 (S.D. Ind. 1981).	If a charging party fails to file within a state 90-day filing period, must a charge then be filed with EEOC within 180 days of the alleged unlawful act, or does <i>Mohasco</i> allow up to 300 days?	EEAC's position is that the 180-day period applies. The district court agreed.
F. Relationship to Other Regulatory Schemes:		
1. Arbitration or Grievance Procedure:		
* 41. <i>IUE, Local 790 v. Robbins & Meyers</i> , 429 U.S. 229, 13 FEP Cases 1813 (1976).	Does filing a contractual grievance toll Title VII's limitations period for filing an EEOC charge?	The Supreme Court agreed with EEAC's arguments that it did not.
** 42. <i>Strozier v. General Motors</i> , 635 F.2d 424, 24 FEP Cases 1370 (5th Cir. 1981).	Does the plaintiff's knowing and voluntary acceptance of reinstatement and back pay under a grievance settlement constitute a waiver of his right to file a later Title VII suit based upon the same facts?	EEAC argued that it did, and permitting district courts to dismiss such claims would assist in cutting down the volume of needless litigation. The Fifth Circuit did not reach these issues but dismissed the appeal on technical procedural grounds. Thereafter, the district court made a similar ruling that no discrimination had occurred. The case was appealed again to the Fifth Circuit and EEAC filed a second brief. The Fifth Circuit agreed with EEAC's arguments, and held that the arbitration award and settlement barred the Title VII suit.
43. <i>Becton v. Detroit Terminal, Consolidated Freightways</i> (6th Cir.). Decision Below: 22 FEP Cases 1655 (E.D. Mich. 1980).	May an arbitration decision that an employee was discharged for just cause be relied upon in a Title VII suit as stating a legitimate reason for the discharge?	EEAC's position is that an employer could rely upon the decision in order to state its reason for its action. The plaintiff then could show that the just cause rationale was pretextual.
2. EEOC or 706 Agency Action:		
44. <i>Rubin Kremer v. Chemical Constr. Company</i> (U.S. S. Ct.). Decision Below: 623 F.2d 786, <i>aff'g</i> 477 F. Supp. 587 (S.D.N.Y. 1979).	Does a state court judgment adverse to the plaintiff's claim bar a later Title VII action on the same claim in federal court?	The Council's brief agreed with the Second Circuit that the state court determination precluded a Title VII trial on the same facts.
* 45. <i>Lyght v. Ford Motor Co.</i> , 25 FEP Cases 246 (6th Cir. 1981).	Should a plaintiff's acceptance of a settlement with a state EEO agency be viewed as a final resolution of the claim and act as a bar to a further federal Title VII suit?	EEAC argued that further federal proceedings should be barred because both plaintiff and employer had relied upon the state settlement. The Sixth Circuit held that the employee had not voluntarily waived his right to a Title VII suit.
* 46. <i>Mosley v. St. Louis Southwestern Rwy Co.</i> , 634 F.2d 942, 24 FEP Cases 1366 (5th Cir. 1981).	Did a settlement agreement signed at an EEOC fact-finding conference bar a later Title VII suit based upon the same claim?	The Council's brief urged that the plaintiffs had knowingly and voluntarily waived their right to bring the suit and that to permit its continuance would undercut Title VII's purpose to encourage voluntary settlement of EEO claims. The court, however, held that the plaintiffs had not waived the right to bring the suit. The court's decision was based in part upon the questionable way the plaintiffs were treated by the EEOC investigator.

3. Executive Order Program:

- * 47. *U.S. v. East Texas Motor Freight System*, 564 F.2d 179, 16 FEP Cases 163 (5th Cir. 1977).

The issue in cases 47-50 was whether the government can rely on E.O. 11246 to require an employer to change a bona fide seniority system permitted under Section 703(h) of Title VII? The government claimed the authority to require changes in seniority systems that were valid under Title VII.

In *East Texas*, the Fifth Circuit, using language closely paralleling that in EEAC's brief, agreed with EEAC's arguments that the government's interpretation conflicted with the will of Congress, the provisions of Title VII and *Teamsters v. U.S.* [62]. The D.C. Circuit in *Trucking Management* held the same, relying on the *East Texas* decision. The *Crown Zellerbach* case settled. The decision in *Lee Way* did not address the issue, but remanded the case for further consideration. *Lee Way* then also settled.

- * 48. *U.S. v. Trucking Management, Inc.*, 26 FEP Cases 809 (D.C. Cir. 1981).

- * 49. *U.S. and EEOC v. Lee Way Motor Freight*, 20 FEP Cases 1345 (10th Cir. 1979).

- * 50. *Crown Zellerbach v. Marshall* (5th Cir.). Decision Below: 15 FEP 1628 (E.D. La. 1977).

G. Religious Accommodation:

- * 51. *TWA v. Hardison*, 432 U.S. 63, 14 FEP Cases 1697 (1977).

What is proper "religious accommodation" under Title VII?

The Supreme Court agreed with EEAC's argument that only *de minimis* accommodation of religious beliefs is required and then only if it would not conflict with a bona fide seniority system.

- * 52. *Gavin v. Peoples Natural Gas Co.*, 613 F.2d 482, 21 FEP Cases 1186 (3d Cir. 1980).

Was it proper for the district court to rule that it would be unconstitutional to interpret the "reasonable [religious] accommodation" provision of Title VII as permitting public agencies to inquire into the validity or sincerity of religious beliefs?

EEAC argued that the district court's decision was correct. The Third Circuit did not reach this issue but remanded the case to see if the employer had accommodated plaintiff's beliefs.

53. *Nottelson v. A.O. Smith Corp.* (7th Cir. 1981) *cert. denied*, 17 FEP Cases 136 (1981).

Whether Title VII's religious accommodation requirement violates the Establishment Clause of the 1st Amendment to the United States Constitution. In both 53 and 54, the employer, at the Union's demand, discharged an employee who refused on religious grounds to pay dues under a union security agreement.

EEAC took the position that Section 701(j) was unconstitutional because its purpose and primary effect was the advancement of religious beliefs. Also, as the courts would have to decide the bona fides of the asserted religious belief, the government would become improperly entangled in making religious determinations. The courts, however, held to the contrary and did not find that the religious accommodation provision was unconstitutional.

54. *Anderson v. General Dynamics*, 648 F.2d 1247, 26 FEP Cases 161 (9th Cir. 1981).

Case Name	Issue Briefed	EEAC's Argument—Court Holding
H. Seniority Systems:		
* 55. <i>California Brewers Assn. v. Bryant</i> , 444 U.S. 598, 654 F.2d 294, 26 FEP Cases 571 (4th Cir. 1981).	Does the immunity given to bona fide seniority systems by 703(h) of Title VII extend to a contract provision requiring a person to work at least 45 weeks in one calendar year before he or she can be considered a permanent employee?	The Supreme Court agreed with EEAC that it does, holding that the concept of a "seniority system" should be broadly defined; otherwise, many existing systems would be found impermissible under Title VII, a result contrary to Congress' intent to give employers and unions broad latitude in collective bargaining.
56. <i>Pullman-Standard v. Swint</i> (U.S. S. Ct.). Decision Below: 624 F.2d 525 (5th Cir. 1980).	What are the proper Title VII standards to determine the <i>bona fides</i> of seniority systems?	EEAC's brief contends that the standards applied by the Fifth Circuit improperly have the result of invalidating seniority systems merely because the perpetuate the effects of prior discrimination. In the Council's view, the Fifth Circuit's approach is contrary to <i>Int'l Bro. of Teamsters v. U.S.</i> , 431 U.S. 324, 14 FEP Cases 1514 (1977), discussed below on other issues in number 62.
57. <i>American Tobacco Co. v. Patterson</i> (U.S. S. Ct.). Decision Below: 634 F.2d 525, 24 FEP Cases 531 (4th Cir. 1981) (<i>en banc</i>).	Does the immunity which Section 703(h) gives to <i>bona fide</i> seniority systems apply to only those systems instituted before the 1965 effective date of Title VII?	The Council's brief urged the Supreme Court to reverse the Fourth Circuit and to hold that systems instituted or modified after 1965 also are protected by Title VII.
I. Sexual Harassment:		
* 58. <i>Miller v. Bank of America</i> , 600 F.2d 211, 20 FEP Cases 462 (9th Cir. 1979).	Does a male supervisor's unauthorized sexual demand on a female employee violate Title VII?	EEAC argued that such conduct, neither sanctioned nor ratified by the employer, was not within Title VII's definition of sex discrimination. The Ninth Circuit did not directly address this question, but rather assumed that Title VII covers such alleged conduct. Even though the supervisor's conduct violated official company policy, the court found the employer could be liable under Title VII.
J. Pregnancy Disability Payments		
59. <i>EEOC v. Newport News Shipbuilding Co.</i> (4th Cir.) Decision Below: 25 FEP Cases 5, 25 EPD ¶ 31,678 (E.D. Va. 1981).	Do EEOC's interpretive guidelines improperly require employers to pay pregnancy disability payments to the dependents of employees?	In both cases, the position of the Council is that the Pregnancy Discrimination Act of 1978 requires disability payments only to employees and not to their dependents.
60. <i>EEOC v. Lockheed Missiles & Space Company, Inc.</i> (9th Cir.). Decision Below; unreported.	Same as 59.	
K. Fetal Vulnerability Policies		
61. <i>EEOC v. The Olin Corp.</i> (4th Cir.). Decision Below: 24 FEP Cases 1646 (W.D.N.C. 1980).	Did the district court properly rule that employers may exclude female employees who are of childbearing capability from jobs involving exposure to chemicals that could be harmful to the fetus?	In EEAC's view, the district court's decision was correct.
L. Statistics		
* 62. <i>Int'l Bro. of Teamsters v. U.S.</i> , 431 U.S. 324, 14 FEP Cases 1514 (1977).	a) What is the proper use of statistics in Title VII Cases? b) Can only "identifiable" victims of discrimination receive retroactive seniority relief?	a) The Supreme Court adopted EEAC's position that a plaintiff's prima facie case may be rebutted if a statistical imbalance was caused by pre-Act events. Other rebuttal factors include small sample size, low number of employment decisions or lack of qualified applicants. b) The Court concurred with EEAC arguments that only persons who could demonstrate that they were victims should be awarded preferential seniority and job bidding rights.

Case Name	Issue Briefed	EEAC's Argument—Court Holding
* 63. <i>Furnco Construction Co. v. Waters</i> , 438 U.S. 567, 17 FEP Cases 1062 (1978).	In a hiring discrimination case, did the court improperly exclude evidence that the employer's workforce contained an overrepresentation of protected class members?	Adopting the position urged by the employer and EEAC, the Supreme Court found that the employer had been improperly denied an opportunity to rebut a prima facie showing of discrimination by demonstrating that its workforce was racially balanced or contained a high percentage of minority workers.
* 64. <i>Texas Dept. of Community Affairs v. Burdine</i> , 101 S. Ct. 1089, 25 FEP Cases 529 (1981)	Was the Fifth Circuit correct when it required a Title VII defendant to rebut a prima facie case of disparate treatment with a showing by a <i>preponderance of the evidence</i> that nondiscriminatory reasons existed?	EEAC argued that the Fifth Circuit's decision was contrary to several Supreme Court decisions that merely required an employer to <i>articulate</i> nondiscriminatory reasons for its actions. The Supreme Court concurred, holding that to rebut a prima facie case, the employer need only introduce evidence stating a legitimate reason for its decision. The plaintiff then must show the employer's stated reasons were pretextual.
* 65. <i>Scott v. University of Delaware, cert. denied</i> , 444 U.S. 431 (1979).	Did the plaintiff's statistics demonstrate a <i>prima facie</i> case of faculty hiring discrimination; and can such a showing be rebutted by evidence that the underutilization of minorities was caused by a "seller's market" for Ph.D's in which the demand for such persons exceeded the supply?	EEAC argued that the statistical evidence did not establish a <i>prima facie</i> case. It also stated that when the overall demand for qualified minority workers exceeds the supply, a proportionate shortage in one employer's workforce is not a reliable indication of discrimination. The court was not required to address these arguments, as it ruled for other reasons that the plaintiff failed to establish he was a victim of discrimination.
* 66. <i>Grant v. Bethlehem Steel</i> , 635 F.2d 1007, 24 FEP Cases 1482 (1979)	Did the district court properly conclude that the employer was permitted by Title VII to use subjective criteria and previous work experience as a basis for selecting foremen?	EEAC argued that such criteria were permitted, due to the extremely hazardous nature of the job. Moreover, its statistical analysis demonstrated that the selection procedures did not have a disparate impact on minorities. The court disagreed and found a violation.
67. <i>Pouncy v. Prudential Insurance Company</i> (5th Cir.). Decision Below: 23 FEP Cases 1349 (S.D. Tex. 1980).	May subjective appraisal and promotion procedures be used, where proper safeguards against discrimination are in effect? Did the district court properly rule that the employer had rebutted the plaintiff's adverse impact statistics?	The Council's brief urged the Fifth Circuit to affirm the lower court ruling finding no violation. EEAC argued that the plaintiff's statistics did not consider the appropriate labor market nor consider job requirements. Also, the employer used superior statistics that entailed the flow of promotions during the appropriate time period.
* 68. <i>U.S. v. County of Fairfax</i> , 629 F.2d 432, 23 FEP Cases 485 (4th Cir. 1980).	Did the district court correctly rule that the federal government's statistical case was faulty because it relied upon SMSA and applicant flow statistics that were not representative of the appropriate labor force?	EEAC urged that the SMSA statistics presented by the government failed to consider that many persons living within the SMSA could not be expected to commute to Fairfax County to work. Also the government's applicant flow statistics were utilized in a way which would penalize the employer for its affirmative action efforts. The court agreed that the District of Columbia should not be included in the Fairfax SMSA; but it then found a violation based upon the government's applicant flow data. The County had not kept current figures, and the government's data was found to be the best available substitute.
69. <i>Gay v. Waiters' and Dairy Lunchmen's Union Local No. 30</i> (9th Cir.). Decision Below: 22 FEP Cases 281 (N.D. Cal. 1980).	Was the plaintiff's statistical evidence sufficient to establish intentional discrimination?	The Council argued that it was not, and that a stronger statistical showing was necessary to establish an intentional violation than to demonstrate an adverse impact.

M. Selection Procedures—Bottom Line

70. <i>State of Connecticut v. Teal</i> (U.S. S. Ct.). Decision Below: 25 FEP Cases 529 (2d Cir. 1981).	May a selection procedure be found discriminatory when it results in a higher selection rate for Blacks than Whites, but where the written examination component of the test has an adverse impact on Black examinees?	EEAC and the U.S. Department of Justice both argued that this selection process was <i>not</i> discriminatory, as the "bottom line" selection rate showed no adverse impact on minorities.
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N. Back Pay

71. *Ford Motor Company v. EEOC* (U.S. S. Ct.). Decision Below: 645 F.2d 183, 25 FEP Cases 774 (4th Cir. 1981).

Is an employer's back pay liability to a discriminatee tolled when it offers that employee unconditional reinstatement to the job, or must the employer also offer the individual retroactive seniority and back pay?

The Council argued that the unconditional offer was sufficient. If back pay and seniority remedies are appropriate, they can be ordered by a court. Requiring the employer to expand the offer would discourage such offers and prolong litigation.

II. EXECUTIVE ORDER PROGRAM

72. *United States Dept. of Treasury v. Harris Trust and Savings Bank* (Before Secretary of Labor). Decision Below: No. 21 Daily Labor Report D-1 (2-2-81)

Is back pay an appropriate remedy under E.O. 11246?

EEAC urged that back pay and other retroactive relief are not available under the Order.

Did the ALJ improperly prevent the contractor from presenting a statistical defense because the employer refused to turn over a study prepared by one of its nontestifying witnesses?

The Council took the position that the employer's position was justified by the Federal Rules of Evidence, and that the ALJ's ruling was incorrect.

- * 73. *Kerr Glass Mfg. Co. v. Usery* (C.A.D.C.). Decision Below: Unreported.

Can OFCCP require payment of back pay and withhold contracts pending administrative resolution of affected class issues?

EEAC and the employer argued that the possibility of contract passover made the case ripe for judicial review. EEAC participated in the oral argument, during which the agency promised that Kerr would not be passed over for contracts until the issues were resolved by OFCCP. The court then directed Kerr to exhaust its administrative remedies and did not reach EEAC's arguments that the agency has no authority under E.O. 11246 to compel back pay for an affected class.

- * 74. *St. Regis Paper Co. v. GSA*, 414 F. Supp. 647, 14 FEP Cases 641 (D. Col. 1977).

Does OFCCP have authority to debar contractors without a hearing?

EEAC argued that OFCCP violated due process requirements because it denied future contracts prior to a hearing on the employer's alleged past contract violations. The court dismissed the suit, however, because OFCCP promised that St. Regis would not be passed over for government contracts while agency proceedings were pending.

EEAC monitoring of the de facto debarment issue provided it with extensive files of cases where the courts enjoined the agency's passover policy. EEAC members were able to use these files to assist in obtaining similar injunctions. Ultimately, the numerous adverse rulings forced OFCCP to abandon this policy.

75. *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 24 FEP Cases 1168 (4th Cir. 1981).

Whether an insurance carrier is a federal contractor solely because it underwrites workers' compensation insurance for companies which hold federal contracts.

EEAC's brief contended that Liberty had never consented to be a federal contractor and had never signed a contract obligating it to carry out the provisions of E.O. 11246. In a 2-1 opinion, the court agreed that the Labor Department had no authority to regulate Liberty's employment practices.

76. *Firestone v. Marshall*, 507 F. Supp. 1330, 24 FEP Cases 1699 (E.D. Tex. 1981).

Based upon Technical Guidance Memo No. 1 (TMG), OFCCP ruled that underutilization resulted when there was any difference between utilization and availability.

EEAC argued, and the court agreed, that the interpretation was too rigid and contrary to E.O. 11246, and also that TGM No. 1 was questionable because it was not published for comment in the Federal Register. Because of the importance of the issue, this is one of the few district court briefs EEAC has filed. The government later withdrew its appeal to the Fifth Circuit.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Conciliation Agreements:

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| <p>* 77. <i>Marshall v. Sun Oil (Delaware)</i>, 605 F.2d 1331, 21 FEP Cases 257 (5th Cir. 1979).</p> | <p>Did the Secretary of Labor properly conciliate under the ADEA when it belatedly confronted the employer with broad class discrimination charges, refused to conciliate individual charges, and demanded that the employer waive the statute of limitations?</p> | <p>EEAC argued that the Secretary improperly relied upon statistical evidence, and also failed to meet the conciliation requirements of the Age Act. The Fifth Circuit held that the Secretary's conciliation efforts were adequate to satisfy the terms of the statute.</p> |
| <p>* 78. <i>Marshall v. Sun Oil (Penn.)</i>, 592 F.2d 563, 18 FEP Cases 1632 (5th Cir. 1979).</p> | <p>Does a district court have the authority to waive the ADEA's statute of limitations to permit further conciliation, where the Secretary fails to provide sufficient time for conciliation of individual complaints?</p> | <p>Again, EEAC argued that the Secretary's conciliation efforts were insufficient and improper. Although the Court agreed that DOL had failed to perform proper conciliation, it refused to dismiss the suit. It held that the district court had jurisdiction to stay the statute of limitations to permit further conciliation. Also, the Secretary's conciliation efforts were found to be "substantial" although not exhaustive. The case was remanded to the district court for further proceedings.</p> |

B. Filing Requirements:

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| <p>* 79. <i>Shell Oil Co. v. Dartt</i>, 434 U.S. 98, 16 FEP Cases 146 (1977).</p> | <p>Did the Tenth Circuit properly rule that the ADEA's requirement for a Notice of Intent to Sue may be tolled by equitable considerations?</p> | <p>EEAC's position was that the Age Act's notice requirements are "jurisdictional" and may not be tolled. The tolling permitted by the appellate court would undermine the Act's emphasis on conciliation. The Supreme Court split 4-4 and affirmed the Tenth Circuit without issuing a written opinion.</p> |
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C. Jury Trial:

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| <p>* 80. <i>Lorillard v. Pons</i>, 434 U.S. 575, 16 FEP Cases 885 (1978).</p> | <p>Is a jury trial available under the ADEA?</p> | <p>EEAC argued that the Age Discrimination Act does not provide for a jury trial. The Supreme Court disagreed, however, and held that either party to an ADEA suit may demand a jury trial.</p> |
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D. Pain and Suffering & Punitive Damages:

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| <p>* 81. <i>Rogers v. Exxon</i>, 550 F.2d 834, 14 FEP Cases 518 (3d Cir. 1977), cert. denied, 434 U.S. 1022.</p> | <p>Are damages for "pain and suffering" available under the ADEA?</p> | <p>The court accepted EEAC's argument that such damages are not awardable.</p> |
| <p>* 82. <i>American Motor Sales Corp. v. Murphy</i>, 570 F.2d 1227, 17 FEP Cases 180 (5th Cir. 1978).</p> | <p>Does the ADEA permit an award of punitive damages?</p> | <p>EEAC argued that punitive damages are not awardable. The court concurred.</p> |

E. Retroactivity of 1978 Amendments:

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| <p>83. <i>Sikora v. American Can Co.</i>, 622 F.2d 1116, 22 FEP Cases 638 (3d Cir. 1980).</p> | <p>Cases 83-86 raised the same issue: whether the 1978 amendments to the Age Discrimination in Employment Act may be applied retroactively to pending ADEA lawsuits and thus make illegal retirement plans which were permissible prior to the enactment of the amendments.</p> | <p>EEAC argued that retroactive application of the statute would be contrary to the statutory language and result in manifest injustice to employers. In <i>Sikora</i> [83], the court agreed with this interpretation. In <i>Caterpillar Tractor</i> [84] the plaintiff dropped the issue. The court agreed with the employer and EEAC that the plan was permissible under the law before the 1978 Amendments. In <i>B & O Railway</i> [85], the retroactivity issue was not decided because the retirement plan was found to have been changed to evade the ADEA. EEAC did not brief the bona fides of this plan. <i>Shell Oil</i> [86] adopted EEAC's position that the amendments were not retroactive.</p> |
| <p>84. <i>Gonsalves v. Caterpillar Tractor</i>, 634 F.2d 1065, 24 FEP Cases 687 (7th Cir. 1980).</p> | | |
| <p>85. <i>Marshall v. B & O Railway</i>, 632 F.2d 1107, 23 FEP Cases 1381 (4th Cir. 1980).</p> | | |
| <p>86. <i>Marshall v. Shell Oil Co.</i>, 637 F.2d 683, 25 FEP Cases 334 (9th Cir. 1981).</p> | | |

IV. CONSPIRACY STATUTES

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| <p>** 87. <i>Great American Savings & Loan Assn. v. Novotny</i>, 99 S. Ct. 2345, 19 FEP Cases 1482 (1979).</p> | <p>Can 42 U.S.C. § 1895(3) be construed to apply to an alleged conspiracy among officers and directors of a single corporation to apply to a Title VII violation?</p> | <p>EEAC filed two briefs. The first urged the Court to accept the case in order to reverse the appellate court, whose decision finding a violation was contrary to several other circuits. On the merits, the Court agreed with EEAC's arguments that Title VII should be enforced under its own terms and not through another statute. Otherwise, plaintiffs could ignore the conciliation and procedural requirements of Title VII.</p> |
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V. DISCLOSURE OF CONFIDENTIAL BUSINESS INFORMATION

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| <p>* 88. <i>Chrysler v. Brown</i>, 441 U.S. 281 (1979).</p> | <p>Do the Freedom of Information Act (FOIA) or the Trade Secrets Act (42 U.S.C. § 1905) prevent OFCCP from turning over confidential business information contained in an AAP to a private third party?</p> | <p>The Supreme Court ruled, contrary to EEAC's position, that the FOIA did <i>not</i> prevent disclosure, but it agreed with EEAC's argument that if the information was protected by § 1905, it could not be released. The case was remanded to determine whether § 1905 applied. The Court also agreed that the OFCCP's own regulations were insufficient to authorize the disclosure of the requested information.</p> |
| <p>* 89. <i>Burroughs Corp. and General Motors Corp. v. Brown</i>, 654 F.2d 294, 26 FEP Cases 571 (4th Cir. 1981).</p> | <p>Whether the district court correctly ruled that the documents submitted to OFCCP contained confidential business information the disclosure of which would violate the Trade Secrets Act?</p> | <p>The Council's brief argued that the information was protected from disclosure by the Trade Secrets Act. The court did not reach this issue. It remanded the case for reconsideration in light of <i>Chrysler v. Brown</i> (88).</p> |
| <p>90. <i>CNA Financial Corp. v. Donovan</i> (D.C. Cir.). Decision Below: No. 77-0808, unpublished opinion, October 29, 1981.</p> | <p>Whether OFCCP and the district court were correct in granting the FOIA request of a third party to receive EEO data that had been submitted to OFCCP by the federal contractor?</p> | <p>EEAC contended that the information contained confidential trade secrets that were exempt from disclosure. Also, the brief argued that it was improper for OFCCP to turn over such data withholding a hearing on the contractors confidentiality claims.</p> |
| <p>* 91. <i>Sears, Roebuck v. EEOC</i>, 581 F.2d 941, 17 FEP Cases 897 (D.C. Cir. 1978).</p> | <p>May EEOC release to private parties information voluntarily provided by an employer in predetermination settlement negotiations?</p> | <p>The court concurred with the position of Sears and EEAC that disclosure was improper because it violated Title VII and other statutes, decreased employer incentive to settle cases, and was inconsistent with EEOC's duty to conciliate the case.</p> |
| <p>* 92. <i>EEOC v. Joseph Horne Company, A Division of Associated Dry Goods</i>, 607 F.2d 1975, 20 FEP Cases 1752 (4th Cir. 1979).</p> | <p>As in <i>Sears</i> [91], the question involved the validity of EEOC's disclosure rules relied upon by the agency in its attempt to turn over investigatory data to private plaintiffs.</p> | <p>EEAC argued that the disclosure rules were void. The court agreed, holding that Title VII prohibits EEOC from disclosing investigative materials to the parties prior to the filing of an EEOC suit. Contrary EEOC regulations were declared invalid.</p> |
| <p>* 93. <i>EEOC v. Associated Dry Goods Corp.</i>, 101 S. Ct. 817, 24 FEP Cases 1356 (1981).</p> | <p>See No. 92.</p> | <p>The government appealed its loss in 92. The Council's brief argued that the case was correctly decided by the Fourth Circuit. The Supreme Court held that the information could be turned over to the charging party, but not to members of the general public.</p> |
| <p>* 94. <i>IUE v. NLRB (Westinghouse Electric Corp. and General Motors Corp.)</i>, 648 F.2d 18, 24 FEP Cases 627 (D.C. Cir. 1980).</p> | <p>Whether the NLRB properly ordered the employer to give the union data on minority and female advancement, copies of EEO charges and complaints, and workforce analyses? Whether the NLRB correctly refused to order the employer to provide the union copies of its AAP?</p> | <p>The Council's position was that none of the information had to be given to the Union. The court ordered the release of workforce analyses and advancement data. But it refused to require that AAPs be turned over because (1) disclosure would undercut employer candid self analysis, and (2) the information contained confidential business data protected by the Trade Secrets Act. It also reversed the Board's order that copies of charges and complaints should be given to the union. Rather, to protect the employees' privacy interests, it ordered the employers only to give the unions summaries of the charges, with the names deleted.</p> |
| <p>* 95. <i>Westinghouse Electric Corp.</i>, 239 NLRB No. 19 (1978).</p> | <p>The issue is described in 94.</p> | <p>EEAC's arguments are described in 94. EEAC filed a brief with the Board and participated in the oral argument. Except for AAPs, the Board ordered disclosure of the documents.</p> |

Case Name	Issue Briefed	EEAC's Argument—Court Holding
* 96. <i>IUE v. NLRB (White Farm Equipment Company)</i> , 650 F.2d 334, 24 FEP Cases 634 (D.C. Cir. 1980).	Whether the NLRB properly ordered the employer to give the union data on applicants and new hires?	The majority enforced the Board's order, but did not write an opinion. The dissent vigorously attacked the result, arguing, as did EEAC, that the union did not have any duty to represent applicants, and that the request was not relevant to the employer's bargaining obligation.
* 97. <i>Safeway Stores, Inc. v. NLRB</i> (10th Cir.). Decision Below: 252 NLRB No. 184 (September 30, 1980).	Whether the NLRB was correct in ordering the employer to provide the union with EEO data prepared under E.O. 11246?	EEAC urged that the Board erred in ordering the employer to give the information to the union.
* 98. <i>NLRB v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214, 98 LRRM 2617 (1978).	May the NLRB rely upon FOIA Exemptions 5 and 7 in refusing to provide an employer, prior to trial, witness statements in the Board's possession?	The court ruled, contrary to employer and EEAC contentions, that the NLRB did not have to disclose witness statements to Board respondents until after the witness testified at the Board hearing.

VI. ERISA

* 99. <i>Brooklyn Gas Co. and American Airlines v. Appeal Board</i> , 14 FEP Cases 42 (N.Y.C.A. 1976).	Is New York's requirement that an employer must pay pregnancy disability benefits preempted by the federal pension law (ERISA)?	EEAC's position was that state law was inconsistent with, and preempted by, ERISA. It filed a brief in support of the employer's petition for rehearing. The employer had failed to make the ERISA argument when the case was first argued. The court summarily denied the motion for rehearing without reaching the preemption issue.
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VII. THE REHABILITATION ACT

* 100. <i>Southeastern Community College v. Davis</i> , 99 S. Ct. 2361 (1979).	a) What is the appropriate definition of an "otherwise qualified" handicapped person under Section 504 of the Rehabilitation Act? b) What degree of affirmative action must be afforded to handicapped persons? c) Is there a private right to sue under Section 504?	a) The Court agreed with EEAC's arguments that the disability need not be disregarded when determining whether the person is qualified for the job. b) It also concurred with EEAC's position that the Act does not require recipients of federal funds to undertake affirmative action or make substantial changes in their programs in order to accommodate handicapped persons. c) EEAC argued that the statute did not permit a private suit, but the Court did not reach the issue.
* 101. <i>University of Texas v. Camenisch</i> , 101 S. Ct. 1830 (1981).	Does Section 504 provide for a private right of action and does it impose any obligation to accommodate otherwise qualified handicapped individuals?	As is <i>Davis</i> [100], EEAC argued that this statute does not provide a private right to sue. Also, relying on <i>Davis</i> , the Council argued that the statute does not require positive steps of accommodation, and in any event such steps need only be de minimis. The Supreme Court found the case was moot and did not reach these issues.
102. <i>Miller v. Abilene Christian Univ. of Dallas</i> (5th Cir.) (Unpublished opinion). Decision Below: 26 FEP Cases 346 (N.D. Tex. 1981)	Did the district court correctly rule that the plaintiff had no standing to sue under Section 504 of the Rehabilitation Act because he was not an intended beneficiary of or a participant in a program receiving federal financial assistance?	The Fifth Circuit, in agreement with the district court and EEAC's arguments, held that the plaintiff had no standing. The suit was dismissed.
103. <i>Beam v. Sun Shipbuilding and Dry Dock Company</i> (3d Cir.). Decision Below: No. 81-409 (E.D. Pa., Sept. 23, 1981) (unreported).	Whether a private right of action may be implied under Section 503 of the Rehabilitation Act?	EEAC contended that a private right of action may not be implied.
104. <i>OFCCP v. Western Electric Company</i> (Before the Sec. of Labor). Decision Below: 64 Daily Labor Report A-6 (April 3, 1981)	May an employee who does no work related to a federal contract invoke the protections of Section 503 of the Rehabilitation Act of 1973.	EEAC's brief agreed with the ALJ that the OFCCP had no jurisdiction over the case because the employee did not work on a federal contract.

Case Name	Issue Briefed	EEAC's Argument—Court Holding
VIII. TITLE IX OF THE 1964 CIVIL RIGHTS ACT		
*105. <i>Cannon v. Univ. of Chicago</i> , 441 U.S. 677 (1979).	Does Section 901 to Title IX of the 1964 Civil Rights Act, which prohibits sex discrimination in federally-assisted education programs, provide for a private right to sue?	A divided Supreme Court disagreed with EEAC's position and held that such a right could be found under the statute.
106. <i>North Haven Bd. of Educ. v. Bell, Sec. of Education</i> (U.S. S. Ct.). Decision Below: 629 F.2d 773, 23 FEP Cases 604 (2d Cir. 1980).	Does Title IX give the Department of Education authority to regulate the employment practices of universities who are recipients of federal funds?	The Council contended that the Department has such jurisdiction only when the primary purpose of the funding was to provide employment.

IX. 42 U.S.C. § 1981

107. <i>General Bldg. Contractors Ass'n Inc. v. Pennsylvania</i> (U.S. S. Ct.). Decision Below: 469 F. Supp. 329, 18 FEP Cases 1560 (E.D. Pa. 1978), <i>aff'd</i> 648 F.2d 923 (3d Cir.)	Does the standard of proof under § 1981 require a showing of <i>intentional</i> discrimination?	As in <i>Los Angeles v. Davis</i> (5), EEAC's position is that a showing of intentional discrimination is necessary and that merely demonstrating an adverse impact does not establish a violation.
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**SUMMARY OF REGULATORY PROPOSALS ON
WHICH EEAC HAS COMMENTED
(Through December 31, 1981)**

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SUMMARY OF PROPOSALS

Issuing Agency/Department	Issue	Status
I. TITLE VII		
A. Layoffs:		
1. Equal Employment Opportunity Commission, 45 Fed. Reg. 60832 (1980); EEAC Mem. 80-84.*	Policy Statement by Commission urging employers and labor organizations to seek alternatives to seniority-based layoff systems such as work-sharing programs and plantwide seniority.	Currently in effect.

*EEAC Mem. Refers to Council Memoranda to Members

B. National Origin Discrimination:

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| 2. Equal Employment Opportunity Commission, 45 Fed. Reg. 62728 (1980); EEAC Mem. 80-76. | Proposed modification of Commission interpretative guidelines on national origin discrimination. The proposal would make company rules requiring exclusive use of English presumptively invalid; would provide only a vague description of national origin harassment; and, would hold employers liable for the conduct of supervisors, non-supervisory employees and third parties. | Finalized with no significant changes from the proposal. See 45 Fed. Reg. 85632 (1980); EEAC Mem. 81-5. |
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C. Religious Discrimination:

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| 3. Equal Employment Opportunity Commission, 44 Fed. Reg. 53706 (1979); EEAC Mem. 79-94. | Proposed modification of Commission interpretative guidelines on religious discrimination. The proposal would redefine "religious beliefs" which must be accommodated to include moral and ethical beliefs not espoused by a recognized religion but which are sincerely held with the strength of traditional religious views. Also, the proposal broadly states the duty to reasonably accommodate and would restrict application of the "undue hardship" defense. | Finalized with some modifications consistent with the Council's comments. EEOC revised the guidelines to state that employers must consider all <i>available</i> methods of accommodation, not all <i>possible</i> methods; any accommodation which involves a variance with a <i>bona fide</i> seniority system constitutes undue hardship; and, use of invalid pre-selection availability inquiries which result in failure to hire a religionist will not constitute <i>prima facie</i> evidence but only an inference of a violation. See 45 Fed. Reg. 72610 (1980); EEAC Mem. 80-64. |
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D. Sex Discrimination:

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| 4. Equal Employment Opportunity Commission, 44 Fed. Reg. 13278 (1979); EEAC Mem. 79-19. | Interim amendments to Commission's interpretative guidelines on sex discrimination and questions and answers concerning the Pregnancy Discrimination Act. The amendments would make employers establish a sick or disability leave policy for all employees to ensure that pregnant employees are not adversely affected by the absence of such a policy. The proposed questions and answers failed to account for several practical difficulties which result from high absentee rates in positions requiring continuity in performance. | Finalized without substantive change. See 44 Fed. Reg. 23804 (1979); EEAC Mem. 79-32, 79-71. |
| 5. Equal Employment Opportunity Commission, 45 Fed. Reg. 25024 (1980); EEAC Mem. 80-35. | Interpretive guidelines on sexual harassment. The guidelines would include in the definition of sexual harassment conduct perceived by the individual as creating an intimidating, hostile or offensive work environment. Employers would be held liable for the conduct of supervisors, non-supervisory employees, and third parties. | Finalized with all of the original proposals retained and new provisions added. In addition to the requirements contained in the proposal, the final guidelines also would make employers liable to employees denied employment opportunities because others are granting sexual favors. See 45 Fed. Reg. 74676 (1980); EEAC Mem. 80-80. |
| 6. Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs, 45 Fed. Reg. 7514 (1980); as amended, 45 Fed. Reg. 16501 (1980); EEAC Mem. 80-40. | Proposed guidelines issued jointly by EEOC and OFCCP concerning employment policies governing employee exposure to substances potentially hazardous to human reproductive systems. The proposal would make exclusionary policies encompassing all women of child bearing capacity unlawful sex discrimination. Also, employers would be able to exclude pregnant employees from certain jobs only until research was completed on the effect of the hazardous substances on male employees. | The proposed guidelines were withdrawn by vote of the EEOC Commissioners. OFCCP agreed to follow the Commission's withdrawal. See EEAC Mem. 81-4. |

Issuing Agency/Department	Issue	Status
E. Procedural Requirements:		
7. Equal Employment Opportunity Commission, 45 Fed. Reg. 81039 (1980); EEAC Mem. 81-19.	Interim procedural regulation provides that charges of discrimination which are not timely filed with a 706 agency may nevertheless be filed with EEOC up to 300 days following the date of the alleged violation.	Finalized without substantial change. See 46 Fed. Reg. 43037 (1981); EEAC Mem. 81-85.

II. EXECUTIVE ORDER PROGRAM

A. Affirmative Action Requirements:

8. Office of Federal Contract Compliance Programs, informal request (1979); EEAC Mem. 79-10.	A request from OFCCP to comment informally on chapters 4 and 7 of its draft Federal Contract Compliance Manual. Chapter 4 concerns job structuring, availability, and goals and timetables, and Chapter 7 addresses affected class investigations and litigation.	OFCCP considered the comments during its preparation of the final version of the manual.
9. Office of Federal Contract Compliance Programs, 44 Fed. Reg. 17136 (1979); EEAC Mem. 79-21.	Proposed regulations concerning conciliation agreements and expedited hearing procedures. The proposals would authorize use of back pay as a remedy, would differentiate between use of a conciliation agreement and a letter of commitment, and would establish an expedited hearing process.	Finalized without significant alteration but on an interim basis, pending completion of other proposals. See 44 Fed. Reg. 77000 (1979); EEAC Mem. 80-5.
10. Office of Federal Contract Compliance Programs, 44 Fed. Reg. 17136 (1979), as amended 44 Fed. Reg. 22761 (1979); EEAC Mem. 79-29.	Proposed regulation concerning affirmative action plan summaries. The proposal would require employers to submit annually a summary of each AAP and the results being obtained thereunder. The summaries would be used for targeting contractors for compliance reviews and would allow the public to measure the success of the Executive Order program.	Finalized, but the agency has not yet prepared the summary format. See 44 Fed. Reg. 77000 (1979); EEAC Mem. 80-5. On August 25, 1981, OFCCP proposed deleting the AAP summary requirement from the regulations. See 46 Fed. Reg. 42976 (1981), item 50.
11. Office of Federal Contract Compliance Programs, unsolicited submission (1979); EEAC Mem. 79-57.	Proposed national affirmative action plan standards for the banking industry. The proposal would establish industry-wide standards for recordkeeping, job groups, workforce analysis and goals. The standards also would require achievement of goals within five years.	The standards never were published in the Federal Register as an official OFCCP proposal. The feasibility of such standards is still under consideration by the agency.
12. Office of Federal Contract Compliance Programs, 44 Fed. Reg. 52283 (1979); EEAC Mem. 79-78.	The proposals defined the applicability of E.O. 11246 to the construction industry and established goals and timetables for minority participation in the industry. Goals were proposed for each geographical area in the United States. The goals were not by craft but instead were a single weighted goal for all crafts.	Finalized essentially as proposed. See 45 Fed. Reg. 65976, (1980); EEAC Mem. 80-67. On July 17, 1981, OFCCP issued an Advanced Notice of Proposed Rulemaking which solicited additional public comment on issues raised in this rulemaking. See item 15 below.
13. Office of Federal Contract Compliance Programs, 44 Fed. Reg. 77006 (1979); EEAC Mem. 80-20.	Proposed amendments to OFCCP procedures. The proposal encompassed a wide range of issues affecting all aspects of OFCCP's regulations. Highlights included consolidation of enforcement authority for E.O. 11246, § 503 of the Rehabilitation Act and § 402 of the Vietnam Era Veterans' Readjustment Assistance Act; enhanced participation of labor organizations in conciliation efforts; a reduction in mandatory pre-award reviews; and a preliminary administrative enforcement procedure.	Finalized essentially as proposed. See 45 Fed. Reg. 86216 (1980). The effective date of the proposal has been postponed indefinitely pending completion of the rulemaking proceeding mentioned in item 16 below.

Issuing Agency/Department	Issue	Status
14. Office of Federal Contract Compliance Programs, EEAC Mem. 81-58; 81-81.	Letters to Labor Secretary Donovan outlining deficiencies in existing E.O. 11246 programs and suggesting alternative approaches to OFCCP enforcement which emphasize affirmative action such as employment training and referral of discrimination charges to EEOC for processing.	The Council's letters were considered by the Department of Labor and the Office of Management and Budget in evaluating OFCCP's enforcement package described in item 16 below.
15. Office of Federal Contract Compliance Programs, 46 Fed. Reg. 36213 (1981) as amended 46 Fed. Reg. 42490 (1981); EEAC Mem. 81-91.	The Advance Notice of Proposed Rule-making solicited public comment on the following issues: (1) calculation of availability, (2) determination of job groups, (3) the appropriateness of back pay as an E.O. 11246 remedy, (4) the scope of E.O. 11246 application to the construction industry, and (5) the best method for computing minority and female employment goals for the construction industry. In general, the comments suggested that back pay not be used as a remedy under the Order, and contractors be afforded considerable flexibility in determining availability, job groups and employment goals.	Pending
16. Office of Federal Contract Compliance Programs, 46 Fed. Reg. 42968 (1981); EEAC Mem. 81-106.	Proposal makes several changes in the regulatory package described in item 13 above. Among the more significant changes (1) pre-award reviews are eliminated entirely, (2) certain contractor certification requirements are deleted, (3) contractors with fewer than 250 employees and/or contracts under \$1 million need not prepare written affirmative action plans, (4) separate establishments located within the same chain of command may be consolidated into a single plan, (5) contractors which are 80% utilized need not establish employment goals, and (6) contractors with approved training programs may prepare five-year affirmative action plans.	Pending

B. Club Dues:

17. Office of Federal Contract Compliance Programs, 45 Fed. Reg. 4954 (1980); EEAC Mem. 80-19.	Proposed regulation prohibiting contractor subsidization of employee memberships in private clubs which have selective admissions policies. The proposed regulation would make it a violation of E.O. 11246 for federal contractors to continue fee payment policies for club memberships when it can be shown that (1) a club offers career-enhancing opportunities for members and (2) selective membership policies preclude equal access to membership for similarly situated employees.	Finalized with minor modifications which reduce the burden on contractors to examine the membership policies of clubs. See 46 Fed. Reg. 3892 (1981); EEAC Mem. 81-12. On March 27, 1981, OFCCP proposed withdrawing the club dues regulations. See 46 Fed. Reg. 19004 (1981); EEAC Mem. 81-46.
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C. Statistics:

18. Office of Federal Contract Compliance Programs, informal request (1979).	Preliminary draft of OFCCP's Statistical Standards Panel Report on affected class analysis. The draft recognized the relevancy of Title VII precedent and the immunity of pre-Executive Order conduct. It also preferred unrefined applicant flow data over workforce statistics, assumed average wage rates could be used as proof of wage discrimination, and urged a lenient evidentiary standard for <i>prima facie</i> proof of discrimination by OFCCP.	The draft was later incorporated into the final report. See. No. 19 below.
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Issuing Agency/Department	Issue	Status
19. Office of Federal Contract Compliance Programs, informal request (1980); EEAC Mem. 80-7.	The agency asked EEAC to comment on the entire text of the Statistical Standards Panel Report. The report dealt with statistical methodologies for establishing a <i>prima facie</i> case of discrimination against an affected class, the computation of back pay, and the creation of a uniform data base for statistical analysis.	The report is still under study by OFCCP.
III. AGE DISCRIMINATION		
20. Department of Labor, 43 Fed. Reg. 43263 (1978); EEAC Mem. 78-59.	Proposed amendments to the Department of Labor Interpretive Bulletin Implementing the Age Discrimination in Employment Act (ADEA). The amendments would require cost analyses of fringe benefits to be made annually on a benefit-by-benefit basis, and would prohibit reductions in benefits for older workers on the basis of actuarially significant cost considerations.	Finalized with major changes reflecting the concerns addressed in the Council's comments. The final Bulletin would allow actuarially justified fringe benefit reductions for older workers on a benefit package rather than benefit-by-benefit basis. See 44 Fed. Reg. 30648 (1979).
21. Department of Health, Education and Welfare, 43 Fed. Reg. 56427 (1978); EEAC Mem. 79-12.	Proposed regulations concerning the Age Discrimination Act of 1978 (ADA). The proposal outlined the scope of ADA coverage and solicited comment on regulatory approaches to areas where ADA and ADEA coverage overlapped. In addition, the proposal stated that while federal assistance could be terminated only after a hearing, it could be deferred without a hearing for specific periods of time. Finally, necessary remedial and affirmative actions for those found to have discriminated were outlined.	Finalized essentially as proposed. HEW agreed with the Council's position that most employment practices should be addressed under the ADEA rather than the ADA. See 44 Fed. Reg. 33768 (1979).
22. Equal Employment Opportunity Commission, 44 Fed. Reg. 68858 (1979); EEAC Mem. 80-9.	Proposed Interpretations of the ADEA. The proposal would establish different standards of proof for suits under ADEA than for those under Title VII; would narrowly define what could qualify as a <i>bona fide</i> seniority system; and, would make the 1978 amendments retroactive, despite contrary case law.	Finalized with several changes reflecting the concerns addressed in the Council's comments. Under the final regulations, employment applications must be in writing, additional guidance is afforded on the requirements for <i>bona fide</i> occupational qualifications, and employers may not discriminate among individuals in the protected age group. See 46 Fed. Reg. 47724; EEAC Mem. 81-97.
23. Equal Employment Opportunity Commission, 45 Fed. Reg. 64212 (1980); EEAC Mem. 80-81.	Proposal to rescind ADEA exemption for apprenticeship programs granted by the Department of Labor.	The Commissioners split two to two on the proposals. As a result, they were not passed. See EEAC Mem. 81-13.
24. Equal Employment Opportunity Commission, 46 Fed. Reg. 9970 (1981); EEAC Mem. 81-37.	Proposal sets forth the procedures which the Commission will follow in processing charges and issuing interpretations and opinions under the ADEA.	Pending
IV. EQUAL PAY ACT:		
25. Equal Employment Opportunity Commission, 46 Fed. Reg. 43848 (1981); EEAC Mem. 81-110.	Proposal would make several changes in the interpretive rules for enforcement of the Equal Pay Act. The Council's comments suggest that the existing definition of "establishment" be retained, that the Commission may not use the <i>Manhart</i> decision as a basis for requiring equal fringe benefits for men and women, and that clarifying examples set forth in the existing rules should not be deleted.	Pending

V. EEOC OVERSIGHT ACTIVITIES

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| 26. Equal Employment Opportunity Commission, 43 Fed. Reg. 22610 (1978). | Proposal for Commission's implementation of E.O. 12044 relating to the control of federal regulations. | The proposal was never finalized. Executive Order 12044 has been superceded by E.O. 12291. See EEAC Mem. 81-26. |
| 27. Equal Employment Opportunity Commission, 44 Fed. Reg. 55907 (1979); EEAC Mem. 79-88. | Proposed implementation of the Commission's review and coordination functions under Executive Order 12067. The proposals outlined procedures for EEOC's review and resolution of disputes concerning federal agency or department EEO rule-making. | Finalized with minor modifications. See Fed. Reg. 68358 (1980). |
| 28. Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs, 45 Fed. Reg. 27071 (1980); EEAC Mem. 80-38. | Proposed EEOC/OFCCP memorandum of understanding. The memorandum facilitates the exchange of EEO enforcement data between the two agencies. Each is given unlimited authority to examine data collected by the other, and third party requests for information need only be coordinated with the collecting agency. | Finalized without substantial change. See 46 Fed. Reg. 7435 (1981); EEAC Mem. 81-9. |
| 29. Equal Employment Opportunity Commission, 44 Fed. Reg. 57491 (1979); EEAC Mem. 79-90. | Request for public comment on EEOC's suggestion that OFCCP's proposal for aggregate minority goals in the construction industry be modified to provide separate goals for each minority and ethnic group. | Consistent with the Council's position, EEOC permitted OFCCP to finalize its proposal providing for aggregate rather than separate minority goals. See 45 Fed. Reg. 65976 (1980); EEAC Mem. 80-67. |

VI. FEDERAL GRANT & ASSISTANCE PROGRAMS

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| 30. Department of Energy, 43 Fed. Reg. 53658 (1978); EEAC Mem. 79-1. | Proposed regulations concerning nondiscrimination in federal assistance program under § 504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964 and Title IX of the Higher Education Amendments of 1972. The employment restrictions would apply only to the extent that the main purpose of the assistance program is to provide employment or is affected by the recipient's employment practices. | Finalized with a broadening of its applicability to employment practices. See 45 Fed. Reg. 40514 (1980). |
| 31. Department of Health, Education and Welfare, 43 Fed. Reg. 59105 (1978); EEAC Mem. 79-3. | Proposed HEW guidelines on eliminating discrimination in vocational education programs. The proposal, contrary to Congressional admonitions, would apply Title VI, Title IX and Section 504 (mentioned above) to the general employment practices of federal recipients. Also, the proposal would define a handicapped individual differently than the definition under Section 503 of the Rehabilitation Act, and would require affirmative action by recipients. | Finalized without substantial change. See 44 Fed. Reg. 17162 (1979). |
| 32. Department of Labor, 44 Fed. Reg. 4363 (1979); EEAC Mem. 79-12. | Proposed regulations concerning CETA programs. The proposed regulations would require recipients of CETA funds found to have discriminated to take affirmative action to remedy its effects. Appropriate relief would include back pay and preferential treatment. | Finalized without substantial change. See 44 Fed. Reg. 19990 (1979). |
| 33. Veterans Administration, 44 Fed. Reg. 24320 (1979); EEAC Mem. 79-33. | Proposed regulations concerning the Veterans Administration's federally assisted educational programs. According to the proposal, recipients of federal educational assistance, such as educational institutions that receive VA benefits, would have to meet the Administration's nondiscrimination standards or take remedial and affirmative action. | Pending |

Issuing Agency/Department	Issue	Status
34. National Endowment for the Arts, 44 Fed. Reg. 39509 (1979).	Proposed guidelines concerning nondiscrimination in federally assisted programs under Title VI, Title IX and Section 504 (mentioned above). The proposal stated that employment restrictions in the regulations would apply only where the principal purpose of the assistance was employment.	Pending
35. Department of Health, Education and Welfare, 44 Fed. Reg. 75676 (1979).	Proposed regulations concerning recipients of federal funds from the Corporation for Public Broadcasting. The proposal would affect employment practices and policies of corporate recipients of such funds.	Pending
36. Department of Justice, 45 Fed. Reg. 41001 (1980); EEAC Mem. 80-50.	Proposed regulations prohibiting sex discrimination in federally assisted education programs and activities. The proposals would use Title IX as a means for regulating recipients' general employment practices, would require use of affirmative action and would establish special validation requirements for admissions tests similar to those struck down by the Supreme Court in <i>Furnco v. Waters</i> , and <i>Keene State v. Sweeney</i> .	Pending
37. National Endowment for the Humanities, 45 Fed. Reg. 41661 (1980).	Proposed regulations prohibiting sex discrimination in federally assisted educational programs. The proposals would use Title IX to regulate a recipient's general employment practices.	Pending
38. Department of Health and Human Services, 45 Fed. Reg. 82972 (1980); EEAC Mem. 81-20.	The Department expressed an intention to develop a regulation which would require recipients under Title VI to develop the capacity to communicate effectively with persons of limited English-speaking ability.	Proposed regulation not yet published.
39. National Endowment for the Arts, 46 Fed. Reg. 11557 (1981).	Proposal would authorize Endowment to regulate a wide range of employment practices under Title VI in situations where the primary objective of the Federal financial assistance is not to provide employment.	Pending
40. Department of Transportation, 46 Fed. Reg. 5588 (1981); EEAC Mem. 81-47.	Proposal would authorize DOT to regulate a wide range of employment practices under Title VI in situations where the primary objective of the Federal financial assistance is not to provide employment.	Pending
41. Department of Justice and Equal Employment Opportunity Commission, 46 Fed. Reg. 22395 (1981); EEAC Mem. 81-61.	Joint proposal would authorize federal agencies to defer certain charges of employment discrimination arising under Titles VI and IX to EEOC for processing.	Pending

VII. LABOR DEPARTMENT OVERSIGHT RESPONSIBILITIES

42. Department of Labor, 43 Fed. Reg. 22915 (1978).	Proposed regulations implementing E.O. 12044. The proposal would establish procedures for routine review of regulations and for public comment.	Finalized without substantial change. See 44 Fed. Reg. 5570 (1979).
43. Department of Labor, 43 Fed. Reg. 49694 (1978).	Proposed regulations governing services offered by State Employment Service Agencies. The proposal would allow placing of "affirmative action job orders," and outlines what would constitute a necessary <i>bona fide</i> occupational qualification as to religion, sex and age.	Pending

Issuing Agency/Department	Issue	Status
VIII. MINORITY BUSINESS ENTERPRISE PROGRAMS		
44. Office of Management and Budget, 44 Fed. Reg. 3340 (1979); EEAC Mem. 79-7.	Proposed policy statement concerning minority preferences in federal procurement. The proposals would require federal contractors to establish percentage subcontracting goals for businesses owned by economically and socially disadvantaged individuals.	Finalized with changes from proposal. The final policy statement incorporated a Council recommendation that a contractor not be determined ineligible and passed over prior to a hearing. See 44 Fed. Reg. 23610 (1979); EEAC Mem. 79-26.
45. Department of Transportation, 44 Fed. Reg. 28928 (1979); EEAC Mem. 79-52.	Proposed regulations on participation by minority business enterprises in DOT assistance programs. The proposed regulation would require bidders to include within their bids specific subcontracting goals for minority and women-owned businesses.	Finalized, but the Department is keeping open the comment period for one year to allow for additional review of the program. See 45 Fed. Reg. 21172 (1980); EEAC Mem. 80-34.
46. Office of Management and Budget, 44 Fed. Reg. 62091 (1979); EEAC Mem. 80-1.	Proposed regulations concerning subcontracting with Women's Business Enterprises. The proposal would establish a women's business program, separate from the socially and economically disadvantaged business enterprise program.	Finalized with no significant change. See 45 Fed. Reg. 31033 (1980); EEAC Mem. 80-32.
47. Office of Management and Budget, 44 Fed. Reg. 62093 (1979); EEAC Mem. 79-95.	Proposed changes to current regulations concerning minority business enterprise programs and related data collection. The proposal would require offers on federal contracts over \$500,000 to set percentage goals for subcontracting to disadvantaged businesses and would require these even though the contract involved standard commercial items.	Finalized in part. The regulatory changes were adopted as proposed, but no action has been taken on developing a format for the data collection. See 45 Fed. Reg. 31028 (1980); EEAC Mem. 80-32.
48. Department of the Interior, 45 Fed. Reg. 31040 (1980); EEAC Mem. 80-46.	Proposed creation of a minority and female-owned business enterprise program. The program would require off-shore lessees to submit written affirmative action programs which would include contracting goals for minority and female-owned business.	Finalized without significant change. See 45 Fed. Reg. 80258 (1980); EEAC Mem. 80-89. Subsequently, the Department proposed to withdraw the final rule (See Fed. Reg. 29955 (1981); EEAC Mem. 81-59; 81-68), and formally withdrew it on September 16, 1981. See 46 Fed. Reg. 45951 (1981); EEAC Mem. 81-92.
49. Federal Energy Regulatory Commission, 45 Fed. Reg. 49102 (1980); EEAC Mem. 80-49.	Inquiry concerning affirmative action requirements under the Outer Continental Shelf Lands Act. The Commission sought opinions on the need for special programs concerning affirmative action for MBE's under the Act.	No decision has been made by the Commission.
50. Department of Transportation, 46 Fed. Reg. 16282 (1981); EEAC Mem. 81-33.	Proposal would amend existing regulations to require that not all bidders on DOT-assisted projects, but only the apparently successful bidder, would need to demonstrate compliance with MBE requirements.	Finalized with technical modifications. See 46 Fed. Reg. 23457 (1981); EEAC Mem. 81-50.

IX. RECORDKEEPING AND REPORTING REQUIREMENTS

51. Equal Employment Opportunity Commission, 43 Fed. Reg. 32280 (1978).	Proposed revision of recordkeeping regulations. The proposal would require employers to maintain a chronological list of applicants by sex and ethnicity, to keep all EEO-1 data for 2 years, and to segregate all data relating to sex and race from those involved in personnel decisions.	The Commission is evaluating the need for an economic regulatory analysis of the proposal. See 46 Fed. Reg. 48718 (1981).
52. Office of Management and Budget, 43 Fed. Reg. 32280 (1978).	Comments on EEOC's proposed revisions of its recordkeeping regulations. The comments sent to OMB addressed the legality of EEOC's proposals under the Federal Reports Act.	The Council's letter was referred to EEOC with the suggestion that the Commission consider our argument that an economic regulatory analysis of the proposal be prepared.

Issuing Agency/Department	Issue	Status
53. Office of Management and Budget, 44 Fed. Reg. 70939 (1979); EEAC Mem. 80-10.	OFCCP's request for OMB approval of its reporting and recordkeeping regulations. The agency sought Federal Reports Act approval for all of its regulations which impose reporting and recordkeeping requirements upon federal contractors.	The Council's letter was referred to OFCCP. The Agency was granted preliminary clearance by OMB pending a more detailed review when OFCCP's procedural regulations are finalized.
54. Office of Management and Budget, 44 Fed. Reg. 70941 (1979); EEAC Mem. 80-12.	Interim guidelines to allow federal agencies to collect information concerning an applicant's race, ethnicity, age and sex.	Pending
55. Office of Management and Budget, 45 Fed. Reg. 2586 (1980); EEAC Mem. 80-16.	Proposed rulemaking concerning paperwork burdens placed on the public by federal agencies. The proposal would create paperwork budgets for each agency and enhance the opportunity for public comment.	The proposed regulation will be modified in light of the Paperwork Reduction Act of 1980.
56. Administrative Conference of the United States, 45 Fed. Reg. 70033 (1980); EEAC Mem. 80-86.	Request for specific instances where release of business information obtained under the Freedom of Information Act has caused serious damage to the submitting party.	EEAC filed additional comments on this issue in October of 1981. See EEAC Mem. 81-117.
57. Office of Management and Budget; EEAC Mem. 81-62.	The EEOC developed a questionnaire to be sent to employers, unions, psychologists, attorneys and public interest groups designed to gather information concerning the usefulness of recordkeeping and reporting requirements under the Uniform Guidelines on Employee Selection Procedures. The comments suggested that the questionnaire might not generate the type of information sought by the Commission.	Pending
58. Equal Employment Opportunity Commission, 46 Fed. Reg. 21784, 21819 (1981); EEAC Mem. 81-63.	The proposed regulations would afford protections against public disclosure of certain information contained in ADEA and EPA investigative files. The comments suggest that additional protections be afforded for material contained in "closed" files, and employers be allowed to object prior to the release of any information.	Pending

X. REHABILITATION ACT

59. Department of Agriculture, 44 Fed. Reg. 4620 (1979); EEAC Mem. 79-23.	Proposals 59-78 concerned the government's use of Section 504 to regulate the employment practices of federal grantees. They all state that a handicapped individual would be considered qualified if he or she could perform the "essential functions" of a job, and that no physical examination could be given until an individual had been conditionally offered a job.	Pending
60. Department of Commerce, 43 Fed. Reg. 53765 (1978).		Pending
61. Department of Defense, 44 Fed. Reg. 58750 (1979).		Pending
62. Department of Energy, 43 Fed. Reg. 53658 (1978); EEAC Mem. 79-1		Finalized without alteration. See 45 Fed. Reg. 40514 (1980).
63. Department of the Interior, 44 Fed. Reg. 22372 (1979).		Pending
64. Department of Justice, 44 Fed. Reg. 54950 (1979).		Finalized without alteration. See 45 Fed. Reg. 37620 (1980).
65. Department of Labor, informal request 1979; formal request 45 Fed. Reg. 1392 (1980); EEAC Mem. 80-14.		Finalized without substantial alteration. See 45 Fed. Reg. 66706 (1980).

Issuing Agency/Department	Issue	Status
66. Department of State, 44 Fed. Reg. 21661 (1979).		Finalized without alteration. See 45 Fed. Reg. 69437 (1980).
67. Department of Transportation, 43 Fed. Reg. 25016 (1978).		Finalized without alteration. See 45 Fed. Reg. 11495 (1980).
68. Agency for International Development, 44 Fed. Reg. 24868 (1979).		Finalized without alteration. See 45 Fed. Reg. 66414 (1980).
69. Community Services Administration, 43 Fed. Reg. 28758 (1978).		Finalized without alteration. See 46 Fed. Reg. 5620 (1981).
70. Equal Employment Opportunity Commission, 44 Fed. Reg. 68482 (1979).		Pending
71. General Services Administration, 44 Fed. Reg. 62298 (1979).		Pending
72. Legal Services Corporation, 44 Fed. Reg. 22482 (1979).		Pending
73. National Aeronautics and Space Administration, 44 Fed. Reg. 52680 (1979).		Pending
74. Nuclear Regulatory Commission, 44 Fed. Reg. 26887 (1979).		Finalized without alteration. See 45 Fed. Reg. 14533 (1980).
75. Office of Management and Budget (unsolicited submission to the newly created Civil Rights Unit); EEAC Mem. No. 79-75.		The Council's comments were referred to the Inter-agency Coordinating Council for consideration.
76. Veterans Administration, 43 Fed. Reg. 19166 (1978).		Finalized without alteration. See 45 Fed. Reg. 63264 (1980).
77. Water Resources Council, 43 Fed. Reg. 54262 (1978).		Pending
78. Office of Federal Contract Compliance Programs, 45 Fed. Reg. 82606 (1980); EEAC Mem. 81-29.	Proposed amendments would make several changes in the manner in which § 503 and § 402 of the Vietnam Era Veterans' Readjustment Assistance Act are enforced. In particular, changes were proposed in definitions, reasonable accommodation requirements and the use of pre-employment physical examinations.	Pending

XI. VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT

79. Office of Federal Contract Compliance Programs, 45 Fed. Reg. 82606 (1980); EEAC Mem. 81-29.	See item 78 above.	See item 78 above as supplemented by EEAC Mem. 81-57.
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XII. TOXIC SUBSTANCES

80. Interagency Regulation Liaison Group, 45 Fed. Reg. 63553 (1980); EEAC Mem. 80-79.	Request for comments on work plan for Task Force on Reproductive Toxicity Risk Assessment. The Task Force sought to develop criteria for using teratological data.	No report has been issued.
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SUMMARY OF LEGISLATION MONITORED BY EEAC

97th Congress

Bill Number	Introduced By	Purpose	Legislative Action
I. TITLE VII			
A. Handicap Discrimination:			
1. H.R. 255 2. H.R. 1919	Guyer (R-Ohio) Moakley (D-Mass.)	Both bills sought to amend Title VII to include physically and mentally handicapped.	Referred to House Education and Labor Committee. No action taken.
B. Military Discharge Status:			
3. H.R. 1284	Dellums (D-Calif.)	Amend Title VII to prohibit employment discrimination on the basis of military discharge status.	Referred to House Education and Labor Committee. No action taken.
C. Religious Accommodation:			
4. H.R. 254	Guyer (R-Ohio)	Amend Title VII to change the definition of reasonable accommodation to mean more than a <i>de minimus</i> cost.	Referred to House Education and Labor Committee. No action taken.
D. Sexual Orientation:			
5. S. 1708	Tsongas (D-Mass.)	Amend Title VII to include protection of individual sexual orientation.	Referred to Senate Labor and Human Resources Committee. No action taken.
6. H.R. 1454	Weiss (D-N.Y.)	Amend Title VII to include protection of sexual orientation.	Referred to House Education and Labor Committee. Hearing conducted on January 27, 1982.
II. AGE DISCRIMINATION			
7. H.R. 3397 8. H.R. 1666	Pepper (D-Fla.) Young (R-Fla.)	Amend the ADEA to eliminate any mandatory retirement age and certain defenses.	Referred to House Committees on Education and Labor and Ways and Means. No action taken.
9. H.R. 3396	Pepper (D-Fla.)	Amend the ADEA, ERISA and Internal Revenue Code to allow accrual of pension benefits for those working beyond normal retirement age.	Referred to the House Committees on Education and Labor and Ways and Means. No action taken.
10. H.R. 935	Weiss (D-N.Y.)	Amend the ADEA to eliminate any state deferral requirement.	Referred to House Education and Labor Committee. No action taken.
11. H.R. 537	Roe (D-N.J.)	Directs the Civil Rights Commission to study and evaluate federal policies and laws concerning age discrimination.	Referred to the Judiciary Committee. No action taken.

Bill Number	Introduced By	Purpose	Legislative Action
III. ANTI-QUOTA AND PREFERENTIAL TREATMENT			
12. H.R. 313 13. H.R. 742 14. H.R. 973 15. H.R. 3466	Hansen (R-Ida.) Collins (R-Tex.) Guyer (R-Ohio) Walker (R-Pa.)	The bills would limit the power of the federal government to require employers, contractors and grantees to take affirmative action.	The bills were referred to the Committees on the Judiciary and Education and Labor. No action has been taken.
16. S.J. Res. 41	Hatch (R-Utah)	This resolution proposes a constitutional amendment prohibiting the federal government from requiring or permitting distinctions based on race, color or national origin.	Referred to the Senate Judiciary Committee where several hearings have been conducted.
IV. EMPLOYMENT AND EDUCATIONAL TESTING			
17. H.R. 1312 18. H.R. 1662	Gibbons (D-Fla.) Weiss (D-N.Y.)	Require federal regulation of employment and educational testing.	Referred to Committee on Education and Labor. Several days of hearings have been held before the House Subcommittee on Elementary, Secondary and Vocational Education.
V. COMPETITIVE SERVICE EXAMS IN FEDERAL EMPLOYMENT			
19. H. Con. Res. 23	Collins (R-Tex.)	Expresses the sense of Congress that testing standards in the federal civil service should not be adjusted to comply with EEO quotas. It implicitly seeks to prohibit the PACE Exam consent decree.	Referred to Committee on Post Office & Civil Service.
VI. PREVENTION OF SEX DISCRIMINATION IN INSURANCE COVERAGE			
20. H.R. 323	Holt (R-Md.)	Prohibits any limit on the availability or scope of insurance coverage on the basis of sex. Does allow the use of relevant actuarial data with respect to sex in the setting of rates.	Referred to Committee on Energy & Commerce.
21. H.R. 100 22. H.R. 3117	Dingell (D-Mich.) Schroeder (D-Colo.)	Both bills prohibit discrimination in the insurance industry on the basis of race, color, national origin and sex.	Hearings have been held before the House Subcommittee on Commerce, Transportation and Tourism. Referred to Education and Labor and Judiciary Committees.
23. S. 888	Durenberger (D-Minn.)	Prohibits discrimination in the insurance industry on the basis of race, color, national origin and sex.	Referred to the Senate Finance Committee. No action taken.

APPENDIX A

1981 INDEX OF EEAC MEMORANDA TO MEMBERSHIP

- 81-1 Brief Amici Curiae in *County of Washington v. Gunther* (U.S. Supreme Court).
- 81-2 (1) Suspension of Reporting Form CC-257 for Construction Contractors; and
(2) Indefinite Extension of 6.9 Percent Female Utilization Goal for Construction Contractors
- 81-3 General Services Administration Request for Assistance in Reducing Public Reporting Burdens
- 81-4 EEOC and OFCCP Withdraw Proposed Guidelines on Reproductive Hazards and Employment Discrimination
- 81-5 EEOC's Final Guidelines on Discrimination Because of National Origin
- 81-6 EEAC's Brief in *Gunn v. The Dow Chemical Company*, (S.D. Ind.)
- 81-7 EEAC's Brief in *Luevano v. Campbell* (D.D.C.)
- 81-8 Decision in *Liberty Mutual Insurance Company v. Friedman* (4th Cir.), January 9, 1981
- 81-9 EEOC/OFCCP Memorandum of Understanding
- 81-10 Final Amendments to OFCCP Regulations 41 C.F.R. Parts 60-1, 60-20, 60-30, 60-50, 60-60, 60-250, and 60-741
- 81-11 Decision in *EEOC v. Shell Oil Company* (9th Cir., January 25, 1981)
- 81-12 Final Club Dues Rule, 46 Fed. Reg. 3892 (January 16, 1981)
- 81-13 Exemption for Apprenticeship Programs Under the Age Discrimination in Employment Act of 1967
- 81-14 Letter of the Attorney General in *Luevano v. Campbell* (D.D.C.)
- 81-16* Decision in *EEOC v. Associated Dry Goods Corporation* (U.S. Sup. Ct.), Daily Labor Report D-1 (BNA January 26, 1981)
- 81-17 Decision in *Strozier v. General Motors Corporation* (5th Cir., January 27, 1981)
- 81-18 Decision in *Mosely v. St. Louis Southwestern Railway Co.*, (5th Cir. January 22, 1981), 18 Daily Lab. Rep. D-1 (BNA January 28, 1981)
- 81-19 EEAC's Comments on an Interim Revision to EEOC's Procedural Regulations Relating to the Timely Filing of Charges with the Commission in Deferral Jurisdictions
- 81-20 Decision of the Department of Health & Human Services to Develop Regulations Requiring Recipients under Title VI to Communicate Effectively with Persons of Limited English Proficiency
- 81-21 Postponement of Department of Labor Regulations
- 81-22 Analysis of Amendment to National Labor Relations Act Relative to Persons Holding Religious Objections to Joining a Labor Organization
- 81-23 EEOC's Final Regulations on Recordkeeping and Investigations Under the Equal Pay Act
- 81-24 Extended Duration of Employment Preferences for Vietnam-Era Veterans: Public Law 96-466
- 81-25 EEAC's brief in *Becton v. Detroit Terminal of Consolidated Freightways* (6th Cir.)
- 81-26 Executive Order No. 12291: The New Administration's Policy on Regulatory Management
- 81-27 (1) Suspension of the Final Rule of the Department of the Interior concerning Non-Discrimination against MBEs and WBEs in Outer Continental Shelf Leasing Activities
(2) Subcontracting Reporting Forms Required Under the P.L. No. 95-507 Program
- 81-28 EEAC's Brief in *Safeway Stores, Inc. v. National Labor Relations Board* (10th Cir.)
- 81-29 Proposed Regulations for Implementing Section 503 of the Rehabilitation Act of 1973 and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 45 Fed. Reg. 86206 (December 30, 1980)

- 81-30 U.S. Supreme Court Decision in *Delta Air Lines, Inc. v. Rosemary August*, No. 79-814, 49 U.S.L.W. 4241, 45 Daily Lab. Rep. D-1 (BNA March 9, 1981)
- 81-31 Decision in *Nottelson and E.E.O.C. v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO, and A.O. Smith Corporation* Nos. 80-1678 and 80-1705 (7th Cir. February 27, 1981)
- 81-32 Decision in *Texas Department of Community Affairs v. Burdine*, 49 U.S.L.W. 4214 (U.S. 1981)
- 81-33 EEAC's Comments on DOT's Notice of Proposed Rulemaking for Participation by Minority Business Enterprises (MBEs) in Financial Assistance Programs, 46 Fed. Reg. 16282 (March 12, 1981)
- 81-34 Decision in *Firestone Tire & Rubber Co. v. Marshall*, 24 FEP Cases 1699 (U.S. D. Ct. E.D. Texas, February 12, 1981)
- 81-35 Membership Update Memo
- 81-36 Availability and Statistical Seminars
- 81-37 EEAC's Comments on EEOC's Proposed Procedural Regulations under the Age Discrimination in Employment Act
- 81-38 Index to EEAC Memoranda
- 81-39 Membership and Contributor Dues
- 81-40 EEAC Publishes Comparable Worth Symposium Proceedings
- 81-41 EEAC's Policy on Public Appearances
- 81-42 Law Review Article concerning Minority Business Enterprise (MBE) Assistance Programs
- 81-43 Decision in *Carson v. American Brands, Inc.*, 49 U.S.L.W. 4171, 25 FEP Cases 1, 25 EPD ¶ 31,524 (U.S. February 25, 1981)
- 81-44 Decision in *Lyght v. Ford Motor Co.*, 25 FEP Cases 246 (6th Cir. 1981)
- 81-45 Consent Decree Checklist
- 81-46 Proposed Withdrawal of OFCCP's Club Dues Regulation, 46 Fed. Reg. 19004 (March 27, 1981)
- 81-47 EEAC Comments on Proposed Title VI Regulations by the Department of Transportation
- 81-48 Affirmative Action Obligations under the Alaska Natural Gas Transportation Act
- 81-49 Department of Labor Regulatory Activity
- 81-50 Promulgation of DOT's Final Rule to Make an Interim Amendment to its Minority Business Enterprise (MBE) Regulation
- 81-51 Comments concerning the United States Commission on Civil Rights' Proposed Statement on Affirmative Action
- 81-52 EEAC Brief in *Pouncy v. Prudential Insurance Company* (5th Cir.)
- 81-53 Corporate Data Exchange FOIA Request; New FOIA Guidelines Announced
- 81-54 EEAC Amicus Curiae Brief in *United States Department of the Treasury v. Harris Trust and Savings Bank* (No. 78-OFCCP-2)
- 81-55 Decision in *University of Texas v. Camenisch*, 49 U.S.L.W. 4468 (U.S. April 29, 1981)
- 81-56 U.S. Supreme Court Decision in *Minnick v. California Department of Corrections*, No. 79-1213, Daily Labor Report, June 1, 1981, p. D-1
- 81-57 EEAC Supplementary Comments to OFCCP Regarding Proposed Regulations on Affirmative Action for Disabled Veterans (Modifying EEAC Memorandum 81-24)
- 81-58 Executive Order 11246 Program
- 81-59 Proposed Rescission of the Interior Department's MBE and WBE Program in Outer Continental Shelf Leasing Activities, 46 Fed. Reg. 29955 (June 4, 1981)
- 81-60 EEAC's Brief in *OFCCP v. Western Electric Company*, No. 80-OFCCP-29 (U.S. Department of Labor)
- 81-61 EEAC Comments to EEOC/Department of Justice on Proposed Procedures for Handling Complaints under Title VI and Title IX

- 81-62 EEAC Comments to OMB on Proposed Survey to Determine Practical Utility of Recordkeeping Required by Uniform Guidelines on Employee Selection Procedures
- 81-63 EEAC's Comments on EEOC's Proposed Privacy Act Record System EEOC-1, Age and Equal Pay Act Discrimination Case Files
- 81-64 Pending Senate Oversight Hearings on Executive Order 11246
- 81-65 Summary of the Status and Content of EEO-Related Legislation and Congressional Oversight Activity
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- 81-67 Election of New Member to the Board of Directors
- 81-68 EEAC Comments on the Interior Department's Proposal to Rescind MBE Rule; Regulatory Guidance by OFPP on Small and Disadvantaged Business Subcontracting Under P.L. No. 95-507
- 81-69 Recent Developments Concerning Revision of the Executive Order Program and EEAC's Data Package
- 81-70 Analysis of the Supreme Court's *Gunther* Decision, 25 FEP Cases 1521 (1981)
- 81-71 EEAC Brief in *North Haven Board of Education v. Bell*, (U.S. Sup. Ct.)
- 81-72 EEAC's Amicus Curiae Brief in *Newport News Shipbuilding and Dry Dock Co. v. Equal Employment Opportunity Commission*, Nos. 81-1283 and 81-1307 (4th Cir.)
- 81-73 Comments from Members Sought for EEAC Response to OFCCP Advance Notice of Proposed Rulemaking
- 81-74 EEAC's Amicus Curiae Brief in *Pullman Standard v. Swint* (U.S. Supreme Court)
- 81-75 Census Bureau EEO File
- 81-77* Review of California Fair Employment Practice Commission Regulations
- 81-78 Government motion to withdraw its appeal in *The Firestone Synthetic Rubber and Laytex Company and Koppers Company v. Donovan* (5th Cir.)
- 81-79 Lack of OFCCP Standards for Granting Waivers to Labor Department Jurisdiction under Section 503 of the Rehabilitation Act
- 81-80 Decision in *Burroughs Corp. v. Brown* and *General Motors Corp. v. Marshall*, No. 81-1179 and 81-1183 (4th Cir., July 17, 1981)
- 81-81 Recent Developments Concerning Revision of the Executive Order Program
- 81-82 Senator Hatch Questionnaire on OFCCP
- 81-83 EEAC brief in *American Tobacco Company v. Patterson* (U.S. Supreme Court)
- 81-84 Comment from Members Sought for EEAC Response to OFCCP Regulatory Proposal
- 81-85 Final Promulgation of EEOC's Interim Procedural Regulation on the Filing and Deferral of Employment Discrimination Charges, 46 Fed. Reg. 43037 (Aug. 27, 1981).
- 81-86 EEAC brief in *Anne B. Zipes, et al. v. Trans World Airlines, Inc.* (U.S. Supreme Court)
- 81-87 Decision in *United States v. Trucking Management, Inc.*, 26 FEP Cases 809 (D.C. Cir. August 14, 1981)
- 81-88 The Ninth Circuit's Decisions in *Anderson v. General Dynamics Convair Aerospace Division* and *Tooley v. Martin-Marietta Corporation*
- 81-89 National Academy of Sciences Study: "Women, Work, and Wages: Equal Pay for Jobs of Equal Value"
- 81-90 District Court Order Remanding the Case of *E.E. Black v. Raymond J. Donovan, et al* to the Department of Labor
- 81-91 EEAC Comments on OFCCP Advance Notice of Proposed Rulemaking
- 81-92 Interior Department's Rescission of its MBE and WBE Program in Outer Continental Shelf Leasing Activities, 46 Fed. Reg. 45951 (Sept. 16, 1981)
- 81-93 Schedule of Upcoming EEAC Seminars
- 81-94 EEAC Amicus Curiae Brief in *Gay v. Waiters' and Dairy Lunchmen's Union* (9th Cir., No. 80-4120)

- 81-95 EEOC Processing of Wage Discrimination Claims
- 81-96 District Court Ruling in *Marcella Gunn v. The Dow Chemical Company*, No. IP 80-699-C (S.D. Ind., Sept. 30, 1981).
- 81-97 EEOC's Final Substantive Interpretations of the Age Discrimination in Employment Act
- 81-98 EEAC's brief in *Miller v. Abilene Christian University of Dallas*, No. 81-1343 (5th Cir.)
- 81-99 EEAC Amicus Curiae Brief in *Rubin Kremer v. Chemical Construction Corp.*, Sup. Ct. No. 80-6045
- 81-100 EEOC Final Rule To Permit Greater Flexibility in the Operations of Section 706 Deferral Agencies, 46 Fed. Reg. 50366 (Oct. 13, 1981)
- 81-101 Index to EEAC Memoranda
- 81-102 Reagan Administration Policies Concerning Remedial Goals and Timetables
- 81-103 U.S. Supreme Court Decision in *Chardon et al. v. Fernandez, et al.*, No. 81-249, November 2, 1981
- 81-104 EEAC Brief in *EEOC v. The Olin Corporation* (4th Cir.)
- 81-105 EEAC Co-Sponsors Seminar on Age Discrimination Litigation
- 81-106 EEAC Comments on OFCCP Proposed Regulations Concerning Government Contractors and Affirmative Action Requirements, 46 Fed. Reg. 42968 (August 25, 1981)
- 81-107 Performance Standards for EEOC Employees and Their Impact on Negotiations and Settlements
- 81-108 "Wednesday Group" Legislative Proposal that Would Consolidate Federal Civil Rights Enforcement Authority in the Department of Justice
- 81-109 Request for Comments Concerning Voluntary Training Programs under a Restructured OFCCP
- 81-110 EEAC Comments on Proposed Interpretive Rules for Enforcement of the Equal Pay Act
- 81-111 EEAC Brief in *CNA Financial Corporation v. Donovan* (D.C. Circuit)
- 81-112 EEAC's Seminar "Comparable Worth: A Team Response to the Issues"
- 81-113 EEAC Brief in *General Building Contractors Association, Inc., et al. v. Commonwealth of Pennsylvania, et al.* (U.S. Supreme Court)
- 81-114 EEAC Brief in *State of Connecticut v. Teal* (U.S. Sup. Ct.)
- 81-115 Decision in *Miller v. Abilene Christian University of Dallas*, No. 81-1343 (5th Cir. Dec. 7, 1981)
- 81-116 EEAC Brief in *Allstate Insurance Co. v. Kouba* (9th Cir., Nos. 81-4536 and 81-4566)
- 81-117 EEAC Responses to Administrative Conference Concerning Proposed Changes in the Freedom of Information Act
- 81-118 Recent MBE Regulatory Developments from the Departments of Interior and Transportation
- 81-119 Recent Developments in California Fair Employment Practices Law: Proposed Fair Employment Regulations and Enactment of Public Sector "Comparable Worth" Law
- 81-120 EEAC Brief in *Ford Motor Co. v. EEOC*
- 81-121 Decision in *EEOC and Murry v. Anchor Hocking Corp.*, (6th Cir., Nos. 80-3456 and 3457, Dec. 16, 1981)

*Memo No. 81-51 was inadvertently omitted.

*Memo No. 81-76 was inadvertently omitted.

APPENDIX B

1981 MEMBERSHIP MEETINGS

Program Summary*

ANNUAL MEETING—February 19-20, 1981, Washington, D.C.

Speaker	Subject
Senator Orrin G. Hatch, Chairman Senate Committee on Labor and Human Resources	EEO and Affirmative Action in the 97th Congress
Daniel Leach, Vice Chair, EEOC David Rose, Chief, Federal Enforcement, Civil Rights Division, Department of Justice Stephen E. Tallent, Esq. Gibson, Dunn & Crutcher	Panel Discussion of the Directions of EEO Enforcement Under the Reagan Administration
Congressman Ronald V. Dellums U.S. House of Representatives	Black Issues of the 1980's: A View From the Congressional Black Caucus

Workshops

I. Religious Discrimination, The Collective Bargaining Agreement, and The Union

Leaders: Sigrid E. Dynek, Esq.
A. O. Smith Corporation
Douglas F. Olins, Esq.
Olins, Foerster & Siegel

Moderator: David H. Larry, EEAC

III. OFCCP Implementation of its New Enforcement Regulations

Leaders: Kenneth G. Patton
Director of Program Policy
OFCCP
James Cisco
Program Policy Division, OFCCP

Moderator: Jeffrey A. Norris, EEAC

II. An Open Discussion With Senate and House Staff Representatives Responsible for Congressional Oversight of the OFCCP and EEOC Concerning the Enforcement of E.O. 11246 and Title VII

Leaders: Charles W. Radcliffe, Esq.
James M. Stephens, Esq.
House Education and Labor Comm.
Kristine Iverson
Legislative Assistant to Sen. Hatch

Moderator: Monte B. Lake, EEAC

IV. Can You Affect Employer Consent Decree Obligations?

Leaders: John Ferguson
Ford Motor Company
Marilyn K. Quaintance
International Personnel Management Ass'n
Richard C. White, Esq.
O'Melveny & Myers

Moderator: Douglas S. McDowell, EEAC

WEST COAST MEETING—June 16-17, 1981, San Francisco, California

Speaker	Subject
John Florez, Staff Representative for EEO Legislation and Oversight, Senate Committee on Labor and Human Resources	EEO Legislative and Oversight Activity in the 97th Congress
Paul Grossman, Esq. Paul, Hastings, Janofsky & Walker	Future Directions of EEO Litigation and Law
Bob Farnquist Director of Personnel, City of San Jose Paul Grossman Douglas S. McDowell, EEAC	Comparable Worth: A Panel Discussion of the <i>Gunter</i> Decision and the City of San Jose's Experience with the Theory as a Collective Bargaining Issue

*Regular features at EEAC meetings—Committee Chair reports, staff legal and regulatory updates and the open forum on EEO topics of current interest with EEAC member-panelists—are not included in this summary.

Workshops

I. Avoiding and Handling Age Discrimination Litigation

Leaders: William L. Diedrich, Jr., Esq.
Pillsbury, Madison & Sutro
John A. Priest, Esq.
The Boeing Company

Moderator: Monte B. Lake, EEAC

III. Current Developments in the Use of Statistics in EEO Litigation

Leaders: Frank C. Morris, Jr., Esq.
Epstein, Becker, Borsody & Green
Frank J. Peters
American Telephone & Telegraph Co.

Moderator: Edward E. Potter, EEAC

II. Personal Liability of Corporate Officials in EEO Litigation

Leaders: Owen Johnson
Continental Bank
Charles A. Lawrence
McDonnell Douglas Corp.

Moderator: Douglas S. McDowell, EEAC

IV. Executive Order 11246 Modifications—What Are Industry Groups Seeking?

Leaders: Edmond J. Dilworth, Jr.
Representative of U.S. Chamber of
Commerce
William H. Reynolds
Representative of NAM
Kevin S. McGuiness
Representative of EEAC
Edward H. Miller
Representative of The Business Roundtable

Moderator: Jeffrey A. Norris, EEAC

MIDWEST MEETING—October 20-21, 1981, Detroit, Michigan

Speaker

Ellen Shong, Director Office of Federal Contract
Compliance Programs, Department of Labor

Congressman Robert S. Walker
Congressman Harold Washington

Edward Keller
Yankelovich, Skelly and White, Inc.

Helen McLane
Heidrick & Struggles, Inc.

Subject

OFCCP's New and Proposed Regulations

Affirmative Action—Has it Gone Too Far?

Current Public and Leadership Attitudes on Equal
Employment Opportunity

Selecting, Developing and Retaining Female
Executives

Workshops

I. Developing a Coordinated Company Response to the Gunther Decision

Leaders: Robert E. Williams, Esq.
McGuiness & Williams
C. G. Schmidt
TRW, Inc.

Moderator: Lorence L. Kessler, EEAC

III. Development of Effective Performance Appraisal Systems

Leaders: Edward Kahn, Ph.D.
Shell Oil Company
Pamela Cannon
Continental Bank

Moderator: Walter Vertreace
Amerada Hess Corp.

II. Complying With The Employee Selection Guidelines in the 1980's

Leaders: Mary L. Tenopyr, Ph.D.
American Telephone & Telegraph Co.
John Hunter, Ph.D.
Michigan State University

Moderator: Edward E. Potter, EEAC

IV. The Management of OFCCP: A Look at How OFCCP's Administrative Policies Affect You and How You Can Use Them to Your Advantage

Leader: John M. Heneghan
Retired Director of Enforcement
Coordination, OFCCP
EEO Consultant

Moderator: Kevin S. McGuiness, EEAC

APPENDIX C

COUNCIL STUDIES AND PUBLICATIONS

1. Comparable Worth: Issues and Alternatives, Edited by E. Robert Livernash (Hardbound, 1980).

A timely and comprehensive analysis of the concept of equal pay for jobs of comparable worth. The book, a compilation of seven papers prepared by nationally known academic and legal experts, is the first detailed study of the ramifications of using a comparable worth approach to pay setting. The authors discuss the current disparity between the average earnings of majority males and those of women and minorities. They analyze the reasons for this disparity and the accuracy of such comparisons. The methods employers currently use to establish wage rates are explained, as is foreign experience comparability issues and the importance of the market factor to job evaluation plans. Also, there are discussions of the origin of the concept, the practical impact of its adoption, pertinent legislative history, court precedents and its legal status.

The book begins with an overview of the topic and the papers by E. Robert Livernash, one of the pre-eminent academic authorities in the field of job evaluation. The contributing authors are:

Prof. Janice R. Bellace
Prof. George H. Hildebrand
Douglas S. McDowell, Esq.
Prof. George T. Milkovich

Prof. Herbert R. Northrup
Prof. Harry V. Roberts
Prof. Donald P. Schwab
Robert E. Williams, Esq.

2. Comparable Worth: A Symposium on the Issues and Alternatives (Softbound, 1981)

In November 1980, the Equal Employment Advisory Council sponsored a symposium in Washington, D.C., on the issue of equal pay for jobs of comparable worth. That symposium represented the first time that leaders in government, academic experts, and representatives of private industry were brought together in a single public forum for a thorough discussion of this issue. The discussion focused on whether the gap in earnings between the average male worker and the average female worker is the result of illegal wage discrimination and whether the comparable worth theory should be adopted as a practical means of ending that differential.

This volume is a transcript of the symposium and includes the presentations of the speakers and their response to questions from the audience. Featured were such prominent speakers as Eleanor Holmes Norton, former Chair, EEOC; Professors E. Robert Livernash, Harvard Business School; George Hildebrand and George Milkovich, Cornell University; Herbert Northrup and Janice Bellace, Wharton School, Univ. of Penna.; Harry V. Roberts, Univ. of Wisconsin-Madison and Jonathan Ratner, State Univ. of New York; as well as Dr. Margaret Moses, Women's Rights Project, American Civil Liberties Union; Dr. June Ann O'Neill, Urban Institute; Carin Ann Clauss, former U.S. Solicitor of Labor; Douglas S. McDowell, Esq., and Walter DeForest, Esq.

3. Human Resources Planning—A Guide to Data, (2nd Edition), Edited by Patricia J. Snider and Renae F. Broderick (Softbound, 1980).

An updated and expanded edition of EEAC's earlier *Guide to Data* designed to facilitate the search for appropriate availability data needed for affirmative action planning and other aspects of EEO administration. This new 400-page volume offers detailed descriptions of data contained in 116 data resources published by federal agencies and private organizations. The guide does not present actual data, but does identify the types of data, methodology, geographic units, significant findings and acquisition information for each report.

In addition to covering 25 new data sources, the Second Edition includes a glossary of common data terms, a detailed explanation of issues affecting data use, and a more convenient summary matrix. The guide has been recommended by the OFCCP in its compliance manual as a reference book for availability analysis.

4. Current Trends in the Use (and Misuse) of Statistics in Employment Discrimination Litigation, (2nd Edition), by Frank C. Morris, Jr. (Softbound, 1978).

An analysis of key issues in the use of statistics in litigating employment bias cases. Significant materials and cases, including the Supreme Court decisions in *Furnco, Teamsters* and *T.I.M.E.—D.C.*, and *Hazelwood*, are discussed in detail to shed light on such key issues concerning statistical proofs as: proof and rebuttal of a prima facie case; necessary "tailoring" of statistical proofs; adequacy of statistical sample size; the meaning of "substantial statistical disparity"; use of applicant flow, population and other measures in developing availability figures; and, rigid confidence levels in test validation studies. It will be useful to EEOC specialists, attorneys and those concerned with the current and future use of statistics in EEO litigation of planning.

5. Preferential Treatment in Employment—Affirmative Action or Reverse Discrimination?, Edited by Kenneth C. McGuiness (Softbound, 1977).

An in-depth description and analysis of the use of preferential treatment in employment practices. The constitutional implications involved in the use of race and gender-based preference are examined, as are the court decisions that have interpreted applicable federal statutes. The book also discusses in great detail the scope and nature of the federal contract compliance program and the legal precedents for the government's policies in establishing it. The final chapter describes the dilemma facing employers who are attempting to provide equal employment opportunities to minorities and females and, at the same time, insuring nondiscriminatory treatment to majority males. Currently out of print.

6. Perspectives on Availability, Papers by Robert J. Flanagan, George T. Milkovich, Richard B. Freeman, David W. Peterson, Alan E. Bayer and Nathan Glazer (Softbound, 1977).

An economist, two sociologists, a statistician, an applied mathematician and an expert in industrial relations analyze the issues and conceptual problems involved in measuring the availability of minorities and women in the labor market for the purposes of affirmative action planning. Each author approaches the topic from a perspective shaped by his own expertise, enabling the reader to view the concept of availability from a variety of vantage points and to consider an assortment of practical solutions. Those involved in the difficult task of availability analysis or who are concerned with the legal and social ramifications of determining availability will find the book to be a valuable, thought-provoking study.

7. Government Memoranda on Affirmative Action Programs, by Kevin S. McGuiness (Softbound, 1976)

A compilation and analysis of documents issued by the Office of Federal Contract Compliance Programs and the compliance agencies concerning the administration of the federal contract compliance program under E.O. 11246. The study is a useful aid in understanding the more complicated requirements of an affirmative action program. Most of the documents included have not been publicly issued by the government; they were secured from the compliance agencies and the OFCCP through Freedom of Information Act procedures.

APPENDIX D

BOARD OF DIRECTORS

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**Ex officio member, Board of Directors
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Washington, D.C.

Monte B. Lake
Equal Employment Advisory Council
Washington, D.C.

President

Secretary/Treasurer