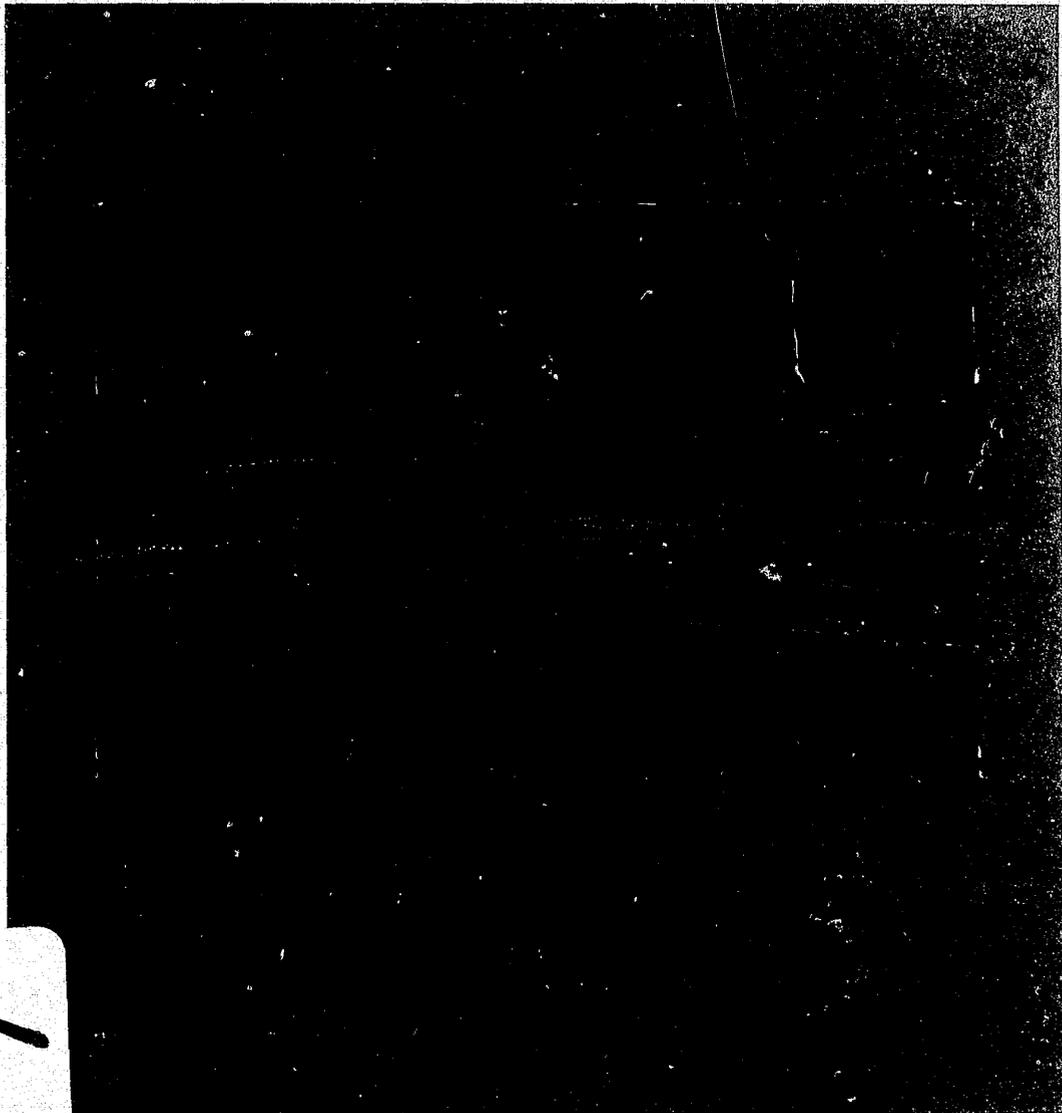


Report



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EQUAL EMPLOYMENT OPPORTUNITY IN THE COURTS

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INTRODUCTION

This report was developed during the first year of a project designed to study the status of equal employment opportunity and affirmative action (EEO/AA) in the courts. It is intended to provide a start toward answering some basic questions about the ability of courts to attract women and members of minority groups as employees at all levels of responsibility.

The EEO in the Courts project was initiated in 1977 under a grant to the National Center for State Courts from the Office of Civil Rights Compliance of the Law Enforcement Assistance Administration. The goal of the project was to improve the capacity of court systems to provide equal employment opportunities to individuals or groups considered to have been deprived historically of job opportunities within judicial systems.

To achieve this goal, the study was designed to provide needed research regarding a rational basis for application of equal employment opportunity laws and regulations to state courts. It was also designed to document the ways in which courts have responded to these legislative and procedural mandates. Finally, the program was designed to provide direct technical assistance to state courts in the development and implementation of equal employment opportunity/affirmative action plans and programs required by such statutes and regulations.

To achieve these objectives, the project staff

- 1) reviewed the historical and legal basis for the establishment of equal employment opportunity laws and for the application of such laws to state court systems;

- 2) surveyed the state of the art of equal employment opportunity/affirmative action compliance in state court systems through a combination of questionnaires, telephone interviews, and on-site technical assistance visits; and
- 3) provided a program of on-site technical assistance upon request to state courts in need of assistance in the design, development, implementation or evaluation of such programs.

During recent years, the traditional philosophy of personnel administration in the courts and throughout society has undergone dramatic change as the validity of traditional management concepts have become open to increasing challenges of civil rights legislation and litigation. Equal employment opportunity and affirmative action have become the by-words and the most significant evidence of these changes. While EEO/AA concepts have been readily integrated into the operating framework of most public and private sector agencies, they have been slow to develop in the state courts environment.

The report which follows attempts to assess the reasons for this perceived lack of EEO activity in the courts, and to offer guidance to court systems interested in developing solutions to problems in the EEO area. The monograph is divided into the following six chapter headings:

CHAPTER I: Courts and the Concepts of Equal Employment Opportunity and Affirmative Action: An overview of the EEO in the Courts environment, including a historical perspective on the development of EEO concepts; the implications of EEO concepts for judicial agency roles and functions; and an assessment of the relative resistance of state courts to apply EEO concepts to non judicial personnel systems in terms of external institutional and internal operational characteristics of courts.

- CHAPTER II: Response of State Courts to Equal Employment Opportunity: This chapter quantifies the level of EEO activity in the courts through a summary analysis of responses to a survey of state court administrative agency representatives regarding the state-of-the-art of EEO activities in state courts.
- CHAPTER III: Lack of EEO Court System Controls: In this chapter, external factors outside the control of courts are reviewed in terms of their impact on the ability and capacity of court systems to conduct EEO activities. Characteristics assessed include: the structure of state court system financing, and the implications of financing for judicial administration; the role of elected and appointed officials within the judiciary and the implications of judicial selection for court administration control; and the relationship between collective bargaining and EEO activities in courts.
- CHAPTER IV: Guide to EEO Planning in State Courts: This chapter provides a reference tool for judicial and non-judicial personnel interested in the development and implementation of EEO programs in state courts. Information provided includes a summary review of all relevant federal legislation and regulations; guidelines regarding organizational and staffing requirements; and recommended procedures for the design and development of written EEO programs.
- CHAPTER V: Applicability of Federal EEO Laws to State Courts: This chapter provides an analysis of the legal issues raised in the context of the application of federal EEO laws; primarily Title VII of the Civil Rights Act of 1964, to state court system administration. Issues examined include: separation of powers, exemption under the Tenth Amendment and sovereign immunity under the Eleventh Amendment, judicial and quasi-judicial immunity, the application of the exemption provision of Title VII to elected and appointed judicial agency officials, as well as a summary review of relevant employment practice decisional law in the context of its potential for application to court system recruitment and hiring practices.

CHAPTER VI:

Findings and Recommendations: This chapter provides a summary of the major findings of the report as well as a series of nine public policy recommendations designed to promote the concept of EEO in state courts.

CHAPTER I

COURTS AND THE CONCEPTS OF EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Equal Employment Opportunity (EEO), in theory, is a principle of employment policy which establishes the right of all persons to work and advance solely on the basis of merit, ability and potential. In practice, the term EEO is generally used to characterize the attitudes and actions of an organization's administrators and supervisors who are authorized to make employment decisions.

Affirmative Action (AA), on the other hand, denotes an affirmative duty to act remedially to correct employment practices which have effectively limited the employment opportunities of certain identifiable groups in our society.

All employment practices and decisions undertaken by an organization are affected by EEO. The term "employment practices" means all terms and conditions of employment relating to the screening, recruitment, selection, appointment, promotion, demotion and assignment of personnel. Further, the term covers advertising, hiring assignments, classification, discipline, lay-offs and termination, upgrading, transfer, leave policies, rates of pay, fringe benefits or other forms of pay or credit for services rendered, and use of facilities.

Since the first formal legislative pronouncement of the EEO concept, state courts have been increasingly impacted, not only in their function as arbiters of disputes, but also as

employers of judicial and nonjudicial personnel. Although the concepts of EEO and AA have been widely adopted and applied to employment situations in both the public and private sectors, recognition and application of these concepts to judicial system personnel administration have been slow to develop. In this chapter, we will present an historical perspective on the growth of EEO/AA, as well as an assessment of the implications of this growth for state court systems, including an analysis of the reasons for what is perceived to have been the limited adoption of the EEO concept in personnel systems in state courts.

HISTORICAL PERSPECTIVE

The Civil Rights Act of 1964: Equal Employment Opportunity

Prior to the enactment of equal employment opportunity legislation during the mid-1960s, even the most favorable of workforce analyses conducted in both the public and private sectors demonstrated tremendous disparity between what we know call the protected classes and the traditional workforce. In response to growing public criticism of the failure of government to actively oppose discriminatory employment practices, the Administration and Congress began extensive efforts to develop programs and policies designed to open employment opportunities to all persons. The first major legislative example of this new policy thrust was Title VII of the Civil Rights Act of 1964,¹ which specifically addressed the problems of exclusion of specific persons² from the workforce of employers in the private sector. Eight years later, the same protection was

¹ 42 U.S.C. 2000.

² Protection was based on a person's race, color, religion, national origin, and sex.

extended by amendment of the Act to include employers in the public sector.³

Systemic Discrimination: Affirmative Action

When EEO laws were first enacted, it was assumed that discrimination occurred primarily because of conscious, overt actions against individuals or groups of individuals. These laws expressly proscribed such activities and, to some degree, overt discrimination subsequently declined. Nonetheless, employment patterns changed very little, as evidenced by a continuing low representation of women and minority group employees in both public and private agencies.

In 1964, President Johnson issued Executive Order 11246⁴ which stated that employers must take "affirmative action" to correct this seeming imbalance. This pronouncement changed the thrust of EEO enforcement from an emphasis on individual acts of overt discrimination to an emphasis upon covert aspects of discrimination in employment systems which tend to perpetuate the exclusion of minority persons and women from meaningful employment. Identification and elimination of such "systemic" discrimination continues to be the major thrust of EEO today.

IMPLICATIONS FOR COURTS

The growth of EEO/AA activity was accompanied by a gradual increase in the number and type of federal and state agencies responsible for

³Act of March 24, 1972, P.L. 92-261, 86 Stat. 103.

⁴Subsequently amended by Executive Order 11375 (1976).

EEO enforcement and compliance. In addition to the establishment of both the Equal Employment Opportunity Commission (EEOC), which was assigned nation-wide responsibility for administrative enforcement of the provisions of Title VII⁵, and a proliferation of state and local Fair Employment Practices Commissions (Human Rights Agencies) responsible for administrative enforcement of state and local laws and ordinances, every federal agency which had contractor compliance responsibility soon established EEO monitoring and compliance programs divisions. The growth in the number of such agencies and divisions was likewise accompanied by a rapid increase in the amount and complexity of EEO-related litigation, and federal and state court caseloads began to increase dramatically as courts were called upon to decide EEO disputes. Today, 10 percent of the federal caseload alone consists of civil rights litigation.

But the implications of EEO/AA go beyond the court's traditional function of providing a forum for the resolution of disputes. The state judiciary is also responsible for providing leadership in the improvement of the administration of justice; for providing services to counsel, litigants and the public; and, of course, for serving as employers of non-judicial personnel employed by the court systems. Each of these roles or functions have been likewise affected by the EEO movement. In the balance of this section, we will briefly review the EEO implications of each of the courts' roles.

⁵Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103.

The Court as Arbiter of Disputes

The traditional role of courts has been to provide a forum for the resolution of disputes. As courts have been called upon increasingly to define the parameters of employer-employee relationships, as well as to monitor compliance with court orders, the demands on judicial and non-judicial resources have substantially increased.

In addition to the need for additional judgeships and for the development of new substantive expertise on the part of the judiciary to contend with the increasing caseload, courts have also begun to find themselves faced with problems of conflict of interest where they have been called upon to serve as arbiters of disputes involving grievances or acts of alleged discrimination charged by nonjudicial personnel (see below, p. 9, The Court as Employer.)

Leadership Role of the Judiciary in the Improvement of the Administration of Justice

Judges are also expected to provide leadership in the improvement of the administration of justice, both by initiating and monitoring judicial and criminal justice system reform, and by serving as models of acceptable conduct and behavior both on and off the bench. In the context of equal employment opportunity, these roles have been manifested in some courts through the active participation or support of judges in programs to encourage the selection and retention of qualified women and minorities to serve in the judiciary⁶, as well as by

⁶ 16% of the courts responding to the EEO in the Courts state-of-the-art survey reported that women and minorities were actively recruited in their jurisdictions to serve as judges. (See below, Chapter II, pp. 26.

the positive commitment of judges to the adoption of non-judicial merit personnel system practices and procedures in an increasing number of courts. (See Chapter II, p. 25.)⁷ Even where merit systems have been adopted, however, the presence of personal or confidential employees in the court systems workforce who are "exempt" from the operating effects of EEO law have tended to disrupt the basic mandates of uniformity, fairness, and effectiveness of EEO plans. (See below, Chapter III, "Confidential Employees", pp. 38-39).

The Court as a Service Agency for Counsel, Litigants and the Public:
Impact of Title VI.⁸

Courts also provide "services" to counsel, litigants and the public. Since Title VI of the Civil Rights Act proscribes discrimination in the delivery of services,⁹ courts are presumably under the same obligation as other public and private agencies to assure that members of these constituencies are not being subject to any form of unlawful discrimination

⁷Data gathered during the survey phase of the EEO in the Courts Project indicated that courts with higher percentages of women and minorities serving as judges were most likely to employ proportionately higher percentages of women and minority employees in the court system's workforce. (See below, Chapter II, pp.26).

⁸Title VI jurisdiction requires a showing that the court is currently receiving some form of federal assistance. Note, however, that EEO guidelines issued by LEAA require a showing that the court has received at least \$25,000 cumulative since 1968 and employs 50 or more persons before Title VI provisions will be applied. On the other hand, receipt of any federal revenue sharing allocation "in whole or in part" will subject the court to Title VI provisions. Where no federal funding connection exists, the court may still be subject to comparable provisions of state law. (See below, Chapter IV.)

⁹The impacts of Title VI (42 U.S.C. 2000d) are specifically outside the scope of inquiry of this monograph. The nature of court services and the impacts of Title VI on court operations will be the subject of further research during Phase II of the EEO in the Courts Project.

in the delivery of such services.¹⁰

Services to Counsel

Courts are usually responsible for scheduling cases, for notifying counsel of scheduled hearing dates, and for accomodating scheduling conflicts and related needs of attorneys. Title VI presumably proscribes inconsistent or preferential treatment among counsel in the issuance of such notices, the granting of continuances, etc., on the basis of race, color, or national origin.¹¹

Services to Litigants

Litigants, of course, look to the courts to assure equal access and to provide a forum for timely resolution of disputes. In addition, civil and criminal litigants are also entitled to fair and impartial juries. Title VI (and perhaps Title VII)¹² would seem to require that the process for jury panel selection not discriminate among protected classes.¹³ Criminal defendants, in particular, should reasonably anticipate that both the criteria for eligibility for participation in pre-trial release programs, as well as the application of such criteria, be nondiscriminatory. Sentencing practices, including probation decisions,

¹⁰The types of services described herein are intended to serve only as examples of possible activities which courts conduct which may be deemed to constitute "services" within the meaning of Title VI of the Civil Rights Act; the survey conducted during the course of this study attempted to identify only the relative frequency of formal and informal complaints regarding certain types of alleged discrimination by court systems under Title VI. (See below, Chapter II, Evidence of Public Concern over Potentially Discriminatory Court Services Practices, p. 27.)

¹¹The Crime Control Act also prohibits sex discrimination in services provided by LEAA-funded programs, 42 USC 3766.

¹²See below, n. 15.

¹³24% of survey respondents reported they were aware of formal or informal allegations regarding discrimination in jury composition. (See Chapter II, p. 28.)

may likewise be subject to Title VI scrutiny. Some advocates argue that racism--even unconscious racism--contributes to more severe sentences for members of minority groups. One recent study concluded that minorities convicted of felonies were twice as likely to get straight workhouse or prison sentences as were whites.¹⁴

Services to the Public

The Civil Rights Act may likewise be invoked by private citizens utilizing the courts' services. As potential jurors, the public may reasonably anticipate that Title VII will guarantee that selection, exemption, and excuse criteria will be applied uniformly.¹⁵ Title VI may likewise require that non-English speaking persons coming to the courthouse for any lawful purpose be provided translation services.¹⁶ Under related legislation,¹⁷ provision of specialized facilities may be required of courts (as recipients of federal funds) to accommodate the needs of physically handicapped persons, including access ramps, Braille-coded elevators, directional signs, and convenient parking facilities.

¹⁴ Robert W. Graham and Rachel Rohde, "Race and Sentencing of Felons in Hennepin County", Augsburg College, Minneapolis, Mn., 1976. See also Taylor v. Louisiana, 419 U.S. 522, 42 L. Ed. 2nd 609, 95 S. Ct. 692 (1976).

¹⁵ The Equal Employment Opportunity Commission (EEOC) has not considered whether the selection of juries comes within the coverage of Title VII. One EEOC official indicated that whether jurors were covered by Title VII would depend upon whether it could be shown that the jury selection process constituted a form of employment selection.

¹⁶ 14% of courts responding to the EEO survey reported they were aware of formal or informal allegations regarding the unavailability of such services (Chapter II, p. 28.).

¹⁷ P.L. 92-512, October 20, 1972, 86 Stat. 919 (1972), amended by P.L. 93-288, May 22, 1974, as last amended by P.L. 94-488, October 13, 1976, effective January 1, 1977, 90 Stat. 2341, 31 U.S.C. 1221.

The Court as Employer

The Court's role as employer is the primary focus of this monograph. The more than 2000 state court agencies throughout the country employ thousands of persons in administrative, clerical, professional and quasi-professional positions. As employers, courts hire, fire, promote, transfer, train, discipline and supervise personnel; negotiate with collective bargaining units, provide physical and fiscal resources for the support of such personnel; and otherwise administer formal and informal personnel management systems much like other public sector agencies in the executive and legislative branches.

Within the context of EEO, courts are subject to the same kinds of scrutiny by EEOC and state human rights agencies as are other employers for alleged acts of discrimination in the conduct of employment practices; in addition, courts receiving federal funds are also subject to federal (e.g., LEAA) compliance procedures requiring, in some cases, the filing of plans or programs, the maintenance of workforce statistics, etc., (see below, Chapter IV). As indicated earlier, however, courts have been less active in the EEO area than other public sector agencies. In the concluding section of this chapter, we will examine the reasons why many courts, in their role as employers, appear to have moved more slowly.

RELATIVE RESISTANCE OF SOME STATE COURTS TO APPLY EEO CONCEPTS TO NON-JUDICIAL PERSONNEL SYSTEMS

Prior to the EEO in the Courts study, courts had been widely perceived to have been relatively slow to integrate EEO concepts into their own non-judicial personnel systems. Data to confirm or refute this perception gathered during the survey phase of the EEO in the Courts

Project was relatively inconclusive¹⁸

extensive EEO-related activity, those which did were able to document significant progress in the development of employment opportunities for women and minorities.

Why have most courts been slow (or slower than other criminal justice system agencies) to adopt EEO concepts for their own internal personnel systems? The reasons are numerous and complex; however, a variety of factors both within and outside the control of court systems have been identified which appear to provide at least part of the answer. In the balance of this chapter, we will present an overview of what we perceive to be the most significant demographic, legal, organizational/structural/political and operational reasons for the state courts relatively limited level of activity in this area.

Demographic Factors

One reason frequently cited by administrators for the lack of EEO activity in some courts is that minority groups constitute an extremely small percentage of the population in the area served by these courts.¹⁹ This concern is ordinarily raised in the context of a court's experience in implementing a plan^{19A}, rather than as an excuse or rationalization for failure to assume an EEO posture.

¹⁸ See below, Chapter II, p. 29.

¹⁹ Note, however, that under LEAA's EEO Guidelines, an agency is not required to file an EEO plan for minorities where the local minority population is less than 3% of total population.

^{19A} Four percent of EEO in the Courts respondents cited small minority population as a significant barrier to plan implementation (Chapter II, p. 27).

A related problem, cited by the largest number of survey respondents as a barrier to plan implementation (Chapter II, p. 27), is the perceived lack of skills presented by minority job applicants. The need for training, combined with the relatively low profile of court systems as employers (see below, p. 14), prompted one State Court Administrator to develop a CETA-funded program to recruit and train minority group members in one jurisdiction for court employment, thereby effecting a solution for the lack of minority skills problem at minimal cost to the court system.²⁰

An additional demographic issue concerns the composition of women in the courts workforce, particularly in non-urban areas. In areas served by rural courts, a relatively high percentage of women tend to be employed in agricultural occupations and, as a result, are generally less available for court (and other business-related) employment than are women in urban areas.

Questions Relating to the Applicability of Federal Law

One major reason why courts appear to have been slow to respond to EEO concepts stems from a belief widely held by judges and court administrators alike that state courts are not subject to the federal EEO mandates in the same way as are other executive and legislative branch agencies. This belief is variously attributed to the fact that:

- The judiciary is an independent branch of government.

Although the concept of judicial branch independence arose out of concern for the judiciary as "the weaker department"²²

²⁰Interview with Mark Geddes, State Court Administrator, South Dakota Unified Judicial System, December, 1978.

²¹A detailed analysis of the applicability of EEO laws to state courts appears below, Chapter V.

²²James Madison, The Federalist, No. 51, Anchor Books, Doubleday & Co., Inc., Garden City, N.Y., 1961, p. 158.

of government, the doctrine is frequently cited as a rationale for the unwillingness of some judicial agencies to adopt legislative programs mandated for other branches of government.²³ This argument, however, seems to have had at least some residual effect in the compliance sector, as manifested is a seemingly "hands-off" attitude toward courts. (See below, Implications of Legal Questions for Compliance and Enforcement Agencies);

- The Tenth and Eleventh Amendments to the U.S. Constitution effectively exempt or immunize states and state agencies from the operating effects of federal laws not specifically extended thereto. Note, however, that the 1972 amendments to the Civil Rights Act specifically extended the application of the Act to the states through the Fourteenth Amendment. (This subject is treated in detail below, Chapter V, pp. 70-75);
- Judges are immune from prosecution for alleged EEO violations under the Doctrine of Judicial Immunity. Note, however, that administration of a court's personnel system has been uniformly interpreted to be a ministerial or non-judicial act not subject to the cloak of judicial immunity.²⁴ (See below, Chapter V, pp. 75-79); and,

²³

?

²⁴ Ex Parte Virginia, 100 U.S. 339 (1880).
Heard v. County of Allegheny, U. S. Dist. Ct. W.D. PA (1977), unreported opinion.
Pudgett v. Skin, 406 F. Supp. 287 (M.D. Pa. 1975).
Goldy v. Zeal, 429 F. Supp. 640 (M.D. Pa. 1976).

- Separation of powers exempts the state judiciary from the compliance provisions of the federal legislation. State judicial agencies are in fact exempt (by omission) from the provisions of most compliance and labor law regulations which are binding on other (executive and legislative branch) institutions. However, EEO guidelines promulgated by LEAA,²⁵ mandating EEO compliance as a pre-condition to receipt of federal funding, clearly apply. (This subject is treated in detail below, Chapter IV, pp. 45-47.)

Implications of Legal Questions for Compliance and Enforcement Agencies

EEO compliance and enforcement agencies have been relatively inactive in the courts environment, focusing vast amounts of resources instead on investigations and compliance reviews in other public and private sector agencies, and generally proceeding against courts only in specific instances where grievances have been filed.²⁶ This may be due in part to the fact that EEO guidelines promulgated by LEAA provide the primary federal nexus to state courts for compliance review purposes, and courts with less than 50 employees or who have received less than \$25,000 in federal funds are exempt from such compliance provisions.²⁷ LEAA's Office of Civil Rights Compliance has undertaken

²⁵ 28 CFR 42.301 et. seq., Subpart E.

²⁶ 28% of EEO in the Courts survey respondents reported awareness of one or more pending grievances on file in their courts. (See below, Table XXIII, Appendix B.)

²⁷ See below, Chapter IV, pp. 49-51.

a series of reviews of plans and programs of state court systems which have received total grants in excess of \$250,000, and recently announced its intention to undertake a series of court system compliance audits beginning in late 1978.

While the relatively limited compliance review activity by federal and state agencies in the courts arena may be attributable in part to an acceptance, in whole or in part, of the separation of powers and related arguments cited above, the more viable explanation may well be the fact that courts have had much lower public visibility as employers than other public sector agencies. Whether as a result of the courts' lengthy tradition of patronage employment or because of public acceptance of the judicial independence concept, courts as employers have remained largely insulated from attack for alleged employment practice violations by special interest groups and civil rights activists. Few other governmental agencies enjoy as much unsupervised discretion over their methods of operation.

Structural, Organizational and Political Factors²⁸

A variety of structural, organizational and political factors unique to judicial institutions further affect EEO activity in courts because of their implications for control of personnel system decisions.

Funding Authority

Another important consideration in understanding the relatively limited extent of EEO activity in the courts relates to the funding status of court agencies within the organizational structure of state

²⁸The issues of fragmentation of court funding sources; split administrative authority over personnel systems; and related characteristics of court system organization structure are treated in further detail below, Chapter III.

and local government. Administrative authority to regulate court systems and court personnel systems is a concomitant of financing authority. To the extent that courts are financed from an amalgamation of state and local executive and legislative agency sources, court personnel systems tend to be simply extensions of the personnel systems of such funding agencies, even though non-judicial personnel may be administratively responsible to a Chief Justice, a Chief Judge, a clerk of court or a court administrator in the performance of their functions. Particularly in non-unified judicial systems, court personnel are most likely to be subject to the same personnel rules and procedures as other executive level agency personnel. As a result, the EEO program of the funding agency or agencies may be posited to include court personnel, although judges or administrators may not deem the provisions of such program to be binding.

Political Authority

Where administrative authority over court personnel is split between judges and other locally elected officials (clerks of court, sheriffs, prosecutors, mayors, county commissioners), the fragmentation of authority (and allegiances) may effectively preclude participation by court employees in the court's own EEO program (see below, Chapter III, pp. 31-35.)

Operational Factors

Most courts which lack the internal capacity necessary for the establishment of an EEO program have either failed or have been unable to establish merit-based personnel systems. As indicated in the previous section, the capacity of a court for the establishment

of a judicial personnel system is a direct function of the extent to which funding of this system is or can be controlled by the court.

In addition, many court systems lack the internal resources, capability and technical expertise to set up and operate an effective personnel system supported by the kinds of basic records needed to generate a statistical evaluation of the courts' workforce. Although it is possible to maintain an EEO posture independent of such a system, it is difficult to imagine operating and maintaining an effective EEO program which is not a component of an adequately staffed and properly administered personnel management system. Furthermore, without the requisite EEO expertise, the personnel staff may be unable to effectively establish and maintain such a program. Although a number of court personnel have developed extensive on-the-job expertise in the area, no mechanism has been available to date to promote and effect transfer of this expertise from court to court.

Finally, a substantial barrier to the establishment of EEO programs in court systems has been a lack of commitment on the part of the judicial system's leadership. As indicated earlier, many judges do not feel that the judiciary is under any obligation to implement EEO programs in court personnel systems. Even among courts which have adopted EEO programs and plans, a number of administrators have expressed doubts about the likelihood of implementation²⁹ and this perception is attributable at least in part to a perceived lack of support for the concept by the judges of these courts.³⁰ The issue of judicial commitment may be the single most critical barrier to continued or expanded adoption of the EEO concept in court personnel systems.

²⁹See below, Chapter II, p. 25.

³⁰See Table XI, Appendix B.

In the following chapter, we will examine the results of the EEO in the Courts survey in further detail, and will attempt to quantify and qualify the nature of and the reasons for the limited level of EEO activity in state courts.

CHAPTER II

RESPONSE OF STATE COURTS TO EQUAL EMPLOYMENT OPPORTUNITY

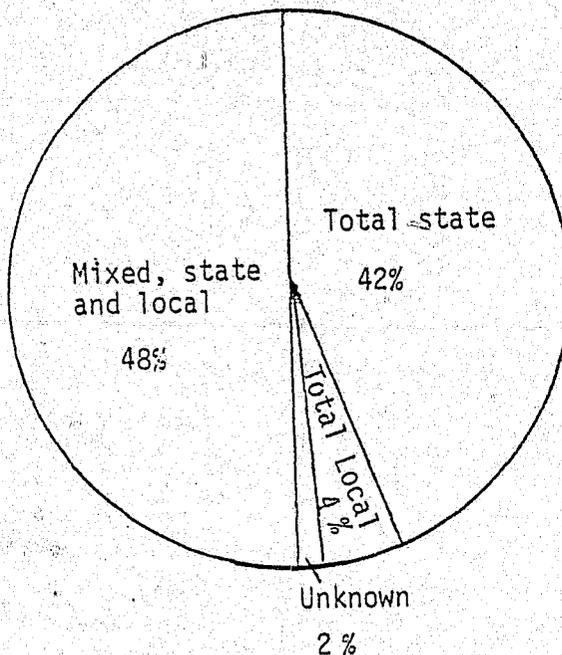
An initial premise of the Equal Employment Opportunity in the Courts study was that state courts have been slow to respond to the formal and informal mandates of the federal legislation, in part because of legal questions regarding the applicability of federal law; because of problems inherent in the political, organizational and structural nature of court systems; and in part because of a lack of internal operating resources. A primary objective of the EEO in the Courts study was to test this premise through an assessment of the response of state court personnel systems either to EEO/AA-related regulations and decisions (EEOC, LEAA and Department of Labor regulations and litigation instituted thereunder), or to independent policy initiatives of the states' judicial system leadership.

METHODOLOGY

The primary research tool utilized by project staff was a questionnaire (see Appendix A) administered to representatives of 51 state court administrative offices. Questionnaire responses were verified through follow-up telephone contact with the state court administrator of each jurisdiction and/or the administrator's representative (see Appendix B, Table 1). Complete or partial responses were received from 47 jurisdictions. In addition, project staff identified some 15 additional state and local judicial personnel systems which had indicated or were reported to be particularly active in the EEO area, in part to validate survey findings, but also to assess the approaches being used in those

jurisdictions to respond to EEO/AA requirements. Although the resources of the project did not permit a complete survey of all state-wide and local court systems, project staff endeavored to obtain a representative sample of responses from unified and non-unified court systems; rural and urban court systems; state-funded and locally funded systems; merit and patronage systems; as well as court systems operating in every state and the District and Columbia. Forty percent of those individuals responding represented agencies having statewide administrative responsibility for all judicial personnel; 22 percent reported responsibility for administrative supervision of some component of the state system (e.g., supreme and district courts or supreme and general jurisdiction courts); and 24 percent reported responsibility for a single court or agency (see Table II, Appendix B). Forty-eight percent of those interviewed represented jurisdictions in which personnel systems were funded from a combination of state, county and municipal resources, while 42 percent represented totally state-funded jurisdictions (Table III, Appendix B).

REPORTED SOURCES OF COURT FINANCING



Respondents were asked to provide three general kinds of information which were perceived to be reliable indicators of the EEO environment in state courts:

- workforce composition: relative employment status of women and minority groups members within the local judicial environment;
- level of EEO-related activities, including:
 - existence of EEO program, policy or plans;
 - evidence of judicial leadership commitment to EEO;
 - presence or absence of appointed EEO officers;
 - EEO policy communications practices
 - judicial recruitment policy
 - other special problems
 - evidence of public concern over potentially discriminatory court services practices.
- history and level of EEO related litigation involving judicial system personnel.

The following sections provide a summary of survey findings.³¹

ANALYSIS

Workforce Representation

The percentage of women and minorities represented in the court systems workforce in comparison with the relevant labor market is the single most reliable indicator of the extent of equal employment opportunity activity in the judicial environment. Respondents were asked to indicate percentage representation in the courts systems workforce of blacks, women, and other minority groups.

³¹The within analysis was based upon an assessment and cross-correlation of 110 variables and responses from 47 jurisdictions. The details of the statistical analysis are presented below, Appendix C .

In jurisdictions where an EEO program or plan had been implemented, numbers and percentages of workforce representation were readily available, since maintenance of statistical analysis of courts systems workforce is a prerequisite for establishment and implementation of a plan (see below, Chapter IV, p. 61). Most of the agencies visited on-site were able to provide this data; in addition, twelve of the 47 jurisdictions surveyed were able to provide partial data, primarily due to the existence of computer capability for the collection of employment data (see Table IV, Appendix B).

Not surprisingly, however, 76 percent of those agencies polled indicated that such data was either not maintained, or was otherwise unavailable (presumably because of considerations regarding accuracy and reliability of statistics, or because of the agencies' concern about the possible negative implications of the release of such data). In most of such jurisdictions, however, respondents did report the existence (or nonexistence, in some cases³²) of women or minority group representation in the professional and non-professional ranks of the courts systems workforce, although without quantifying the level of representation.³³ (In some jurisdictions, however, the

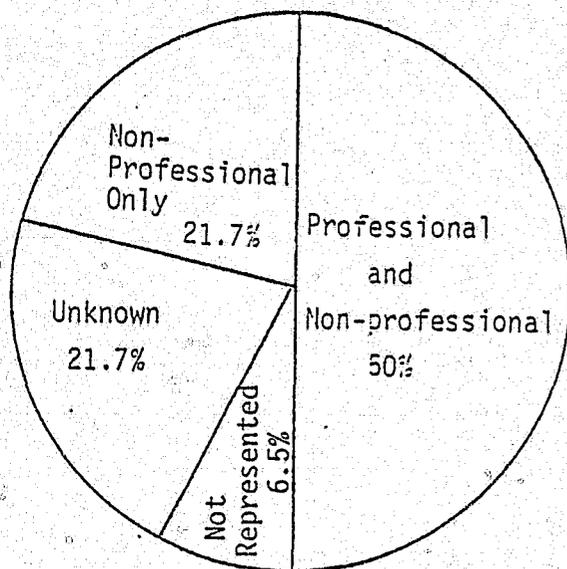
³² 6.5 percent of those agencies polled reported a total absence of minority representation in the agencies workforce, and one agency reported the presence of women in non-professional ranks only. (See Table V.)

³³ 21.7 percent of respondents (representing ten jurisdictions) reported some minority representation in the court systems' non-professional workforce only, while 50 percent (representing 23 jurisdictions) reported some minority representation in both professional and non-professional ranks. (See Table V.)

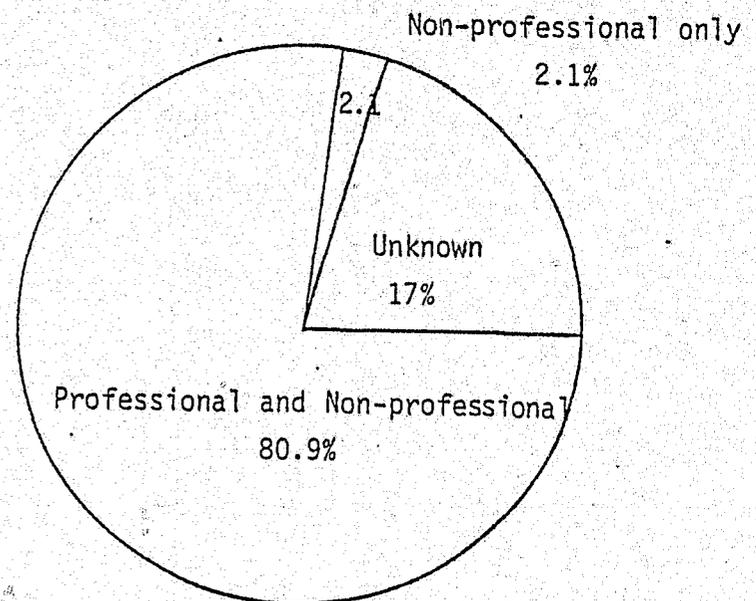
existence of such representation reflected a change from a relatively recent period of total nonrepresentation.

As a result, however, the survey team was unable to quantify an overall picture of minority representation in state court systems workforce, within the limited resources available for this study.³⁴ Furthermore, without reliable percentage data on workforce composition, it was not possible to compare court workforce representation to relevant labor market statistics.³⁵

PERCENTAGE OF MINORITY GROUP REPRESENTATION IN COURT SYSTEMS PROFESSIONAL AND NON-PROFESSIONAL



PERCENTAGE REPRESENTATION OF WOMEN IN COURT SYSTEMS, PROFESSIONAL AND NON-PROFESSIONAL



³⁴The Law Enforcement Assistance Administration has sponsored extensive national surveys of workforce composition for law enforcement and correctional agencies. See, National Manpower Survey of the Criminal Justice System, Vols. II & III; however, a separate national survey of court organization employment composition has yet to be conducted.

³⁵Four percent of all survey respondents cited the limited size of the local minority population as a significant barrier to the implementation of the courts EEO programs, Table XVI, Appendix B.

Nonetheless, we are able to offer some tentative conclusions about the environment which will have to be validated during the next survey phase:

- 1) Minorities appear to be under-represented in the vast majority of state court personnel systems, and women and minorities appear to be similarly under-represented in professional ranks. No statewide agency polled was able to demonstrate a percentage of minority employees equal to their representation in the labor force, although a number of metropolitan courts visited on-site were able to document parity.³⁶
- 2) In those jurisdictions where employment opportunities have clearly opened up to one group, the employment posture of other groups has shown similar increases, indicating at least that no protected groups (in those jurisdictions) appear to be gaining at the expense of other groups.
- 3) Perhaps the most obvious conclusion that may be drawn from this survey of minority group representation is that personnel administration recordkeeping in state judicial systems is woefully inadequate. The fact that 17 states could not provide any demographic data says far more about their personnel recordkeeping resources than about their EEO posture. As stated previously, courts have not developed the internal mechanisms necessary for even the most elementary phase of EEO planning-- a statistical evaluation of their workforce. Although women and minorities are widely reported to be represented in the court systems' workforce, data on the numbers and percentages of women and minorities in relation to the relevant labor market still need to be developed to permit an adequate assessment.

³⁶ Those courts were located in large urban areas in the Midwest and the West Coast, in communities whose population was characterized by a high representation of minority group members.

Level of EEO-Related Activity

A further indicator of the state courts EEO environment is the level of EEO-related activities reported being conducted in the courts, particularly within the context of the operations of the court's nonjudicial personnel systems. Survey respondents were asked to indicate the following:

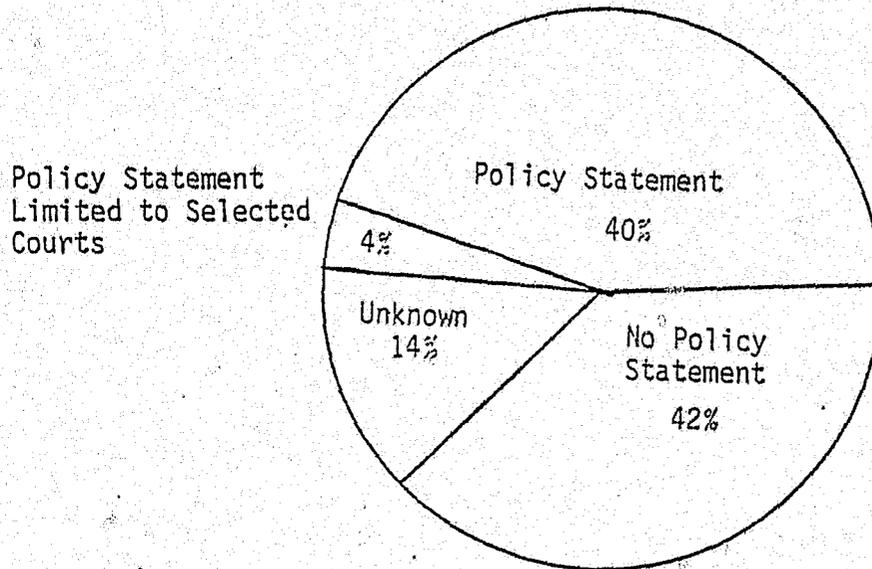
- Existence of EEO program, policy or plans;
- Evidence of judicial system leadership commitment to EEO;
- Presence or absence of appointed EEO officers;
- EEO policy communications practices;
- Judicial recruitment policy
- Other special problems
- Evidence of public concern over potentially discriminatory court services practices.

In contrast to the lack of hard data available on minority group workforce representation, courts were much better able to provide specific answers to questions presented in this topic area. The data discussed below indicates that while a significant amount of EEO activity is occurring in a number of courts, many courts cannot point to any evidence of the existence of an EEO posture or of EEO activity, while a number of agencies candidly conceded that much EEO activity reported is of a token nature in response to externally mandated conditions of eligibility for receipt of federal funds.

Existence of EEO Program, Policy or Plan

Of twenty-two states reporting the presence of a formal EEO Policy Statement for their court system, 16 indicated that this Policy Statement had also been implemented by a written EEO program. (Tables VII and VIII, Appendix B).

PERCENTAGE OF COURTS REPORTING THE
EXISTENCE OF A FORMAL EEO POLICY STATEMENT



Level of Judicial Commitment

Sixteen states indicated there is a strong on-going commitment by the court system to implement this written program from both the judges and court administrators (28%) although 8% of respondents indicated the absence of such commitment. (See Table IX, Appendix B. It is interesting to note, however, that 20% of the states expressed no interest whatsoever in the development of either a formal EEO Policy Statement or a written EEO program. (Table XI, Appendix B.) Furthermore, of the 16 states reporting the presence of a written EEO program, only seven states indicated that the program was binding on court officials. (Table XII, Appendix B.)

Presence of EEO Officers

Eighteen states, or 36% of the respondents, reported an identified EEO officer, with 14 of the 18 officers devoting less than 20% of their time to EEO related activities--an indicator perhaps

of the lack of importance placed on civil rights compliance by court systems. Only two of the identified EEO officers reported devoting 100% of their time to the monitoring and maintenance of EEO programs. (Table XIII and XIV, Appendix B).

EEO Policy Communications Practices

Nineteen states inform non-judicial support personnel of their constitutional rights under civil rights legislation by means of internal and informal procedures such as bulletin boards, letters, memos, etc. (Table XV, Appendix B).

Judicial Recruitment Policy

From information gathered during the project year, one important factor surfaced--as the percentage of women and minority judges increased within a court system, so did the representation of women and minority employees within the system's workforce. Yet the survey questionnaire indicated that only 16% of the states reported any effort, or the existence of any procedures, to recruit qualified women or members of minority groups to serve as judges. (Table XVII, Appendix B). This is an issue that must be addressed directly by those with appointing authority if any meaningful change is to be brought about in the composition of the workforce of both judicial and non-judicial personnel.

Other Special Problems

Other problems identified by respondents in the implementation and maintenance of effective EEO programs included:

- difficulty of control in a decentralized system (4%)
- lack of minority skills (8%)
- small minority population (4%)
- EEO plan is a token program (2%)
- lack of technical expertise (2%)
- union opposition (2%)

(Table XVI, Appendix B.)

Evidence of Public Concern over Potentially Discriminatory Court Services Practices

Although not the major focus of this study, the information gathered relative to courts as providers of benefits or services is of special interest. A question was included in the survey questionnaire designed to identify what specific Title VI³⁷ issues impact on state court systems, but are not related to Title VII employment situations.

Here again, accurate data was difficult to obtain. There was almost a universal absence of records--fewer than those maintained for employment activities. Therefore, the following data should not be interpreted

³⁷Title VI issues will be the subject of further study during Phase II of the EEO in the Courts Project.

as either reliable or conclusive. It may, however, serve to identify trends which are indicative of the increasing awareness and interest shown by the public in the equitable delivery of justice by state courts.

States were queried for information regarding public complaints or dissatisfaction expressed concerning court "services", e.g., pre-trial release program criteria; availability of translators; plea bargaining; composition of juries; and sentencing practices, including probation.

The respondents reported the existence of dissatisfaction, allegations, and complaints of discrimination occurring in the following areas of court-related activities: (Tables XVIII-XXII, Appendix B).

	<u>Not An Issue</u>	<u>An Issue</u>	<u>Unknown</u>
Probation	44%	8%	48%
Translators	36%	14%	50%
Plea Bargaining	42%	12%	46%
Juries	34%	24%	42%
Sentencing	42%	12%	46%

Because affected groups argue that racism--even unconscious racism-- contributes to adverse treatment and more severe sentencing for members of minority groups, the above issues are all proper Title VI questions that state courts should begin to study carefully.

Level of EEO Related Litigation Involving Judicial Personnel Systems

A final question regarding the status of allegations and charges of discrimination, while not on the survey questionnaire, was asked verbally of respondents during the follow-up telephone conversation.

(See Appendix C). The purpose of this inquiry was to assess the litigation environment regarding court systems and Title VII. Understandably, some states declined to respond because of the highly sensitive nature of the question.

Eleven states reported fewer than 10 charges; two states indicated between 11 and 20 charges, while 1 state reported more than 21 pending charges of discrimination. Thirty-six states reported they either did not know or declined to answer. (Table XXIII, Appendix B).

While these statistics are inconclusive, they do demonstrate the potential impact of equal employment opportunity laws and regulations on courts, and underscore the fact that judicial administrators must increase their awareness of and sensitivity to issues involving employment decisions.

In assessing the general contours of the data generated from the questionnaire survey, we must lament that we still see "through a glass darkly". We certainly know more than we did when we began the study, but we also recognize more acutely than before that large gaps of information still exist. The informal nature of the telephone survey enabled us to receive insights and corollary information which could not be computerized, but which was nonetheless very useful and enlightening.

No similar study of courts had previously been undertaken; thus this preliminary research should provide some new insights into the field of court personnel system analysis. Nevertheless, it is

recognized that data access limitations necessarily require that our findings be viewed as the basis for the establishment of hypotheses for future inquiry. (See Chapter VI, Recommendations.)

CHAPTER III

LACK OF EEO COURT SYSTEM CONTROLS

The structural, organizational and political characteristics unique to court systems discussed in Chapter I are of particular significance to this inquiry into the level of EEO activity in courts because of the implications of these characteristics on the issue of judicial personnel system control. The issue of control over essential personnel decision-making functions in courts has, over the past decade, received wide-spread attention from authorities and practitioners in the field,³⁸ although not necessarily in an EEO context. In this chapter, we will take a closer look at each of these factors within the context of the need for judicial system control of personnel system decisions as a basis for supporting EEO activity in courts. The factors to be addressed include:

- Court System Financing and Administrative Control;
- Elected and Appointed Court Officials;
 - Exempt Persons
 - The Patronage Environment
- Unionization in the Courts.

COURT SYSTEM FINANCING AND ADMINISTRATIVE CONTROL

Court Employees

A rational personnel system controlled by the judiciary is an important prerequisite to institutionalization of EEO in the courts.

³⁸ See, for example, System Management Consultants; Trial Court Personnel Management", Trial Court Management Series, American University, Washington, D. C., 1978; and Lawson, et. al., Personnel Administration in the Courts, American University, Washington, D. C., 1978; Courts and Personnel Systems, Institute for Court Management, Denver, Colorado, (1973).

The EEO discipline is basically an auditing and control function within the personnel administration field. Once the EEOP is developed and approved by top management, the program needs to be operated as an integral component of the court's personnel management system.³⁹

However, unlike the executive and legislative branches of government, the courts typically do not control their own personnel systems, principally because they lack authority to appropriate funds to pay for those employees. Leonard D. White emphasizes the inherent dichotomy between the roles of the court as arbiter of disputes and as an employer without authority to control personnel system decisions:

"Courts have historically sat in judgment on deficiencies and inequities in personnel administration. It is strange indeed that the independent third party settling the dispute by applying the law to the legally determined facts . . . experiences little or no control over its personnel system which is administered by another branch of government . . ." ⁴⁰

Management control follows the dollar. Where court systems are financed by local executive branch agencies, court personnel may find that they are formally subject to the personnel regulations of such executive agencies, instead of or in addition to the personnel policies of the judicial branch. Where the court's personnel decision-making process is controlled by an executive branch

³⁹ This is not to say that the EEO office should be administered by the personnel department. Indeed, many authorities believe that it should not be a part of this department because of the conflict of interest caused by the auditing nature of EEO.

⁴⁰ Leonard D. White, Recruitment and Selection in the Public Service, J. J. Donovan Co. (1968), p. 573, reported in Courts and Personnel Systems, Institute for Court Management, Denver, Colorado (1973).

agency, efforts by a court to alter its EEO posture will depend upon the extent to which its activities conform to, or at least do not create conflict with, executive agency personnel policies, operations and procedures:

"In many instances, the public's perception of the quality and quantity of the court's professional services is determined by the support staff. A court, just as any other organization, must be responsible for the management of its human resources. A court must control, or at least influence, those core personnel activities upon which it depends to obtain competent and representative numbers of women and minority groups."⁴¹

Administrative authority to regulate court systems and court personnel systems is thus at least a concomitant of financing authority. To the extent that courts are financed from an amalgamation of state and local executive and legislative agencies sources, court personnel systems tend to become simply extensions of the personnel systems of such funding agencies, even though non-judicial personnel may be administratively responsible to a Chief Justice, a Chief Judge, a clerk of court or a court administrator in the performance of their functions. Particularly in non-unified judicial systems, court personnel are most likely to be subject to the same personnel rules and procedures as other executive level agency personnel. As a result, the EEO program of the funding agency or agencies may be posited to include court personnel, although judges or administrators may not deem the provisions of such programs to be binding; indeed, the EEO/AA rules and regulations drawn up by

⁴¹Ibid.

and for executive or legislative branch employees may not in fact address the real needs of employees in the judicial branch of government.

In some court systems, judicial and non-judicial personnel may be compensated from a combination of municipal, county and state sources. Such personnel inevitably find themselves subject to competing personnel rules, policies and practices which may, in addition, be in conflict with administrative policies of the court.

In other instances, different classes of personnel funded entirely from city, county, state or federal government sources may be working side-by-side in the same courthouse facility (e.g., state paid court reporters and county-funded clerks), and may even be sharing responsibilities or functions. In such instances, neither the employees nor the public officials to whom they report can be certain of the officials' degree of supervision and control, while rules and policies guiding the conduct and behavior of one employee may be directly in conflict with those guiding the behavior of another (e.g., differing grievance procedures, leave policies, promotion and transfer policies and, of course, salary schedules.)

In such circumstances, a presiding judge may be either partially or totally responsible for administration of a multiplicity of personnel rules for all employees in the courthouse, although rules covering certain personnel classes may have been promulgated at another level of government to which the judge may have little or no direct (funding) relationship. This fragmentation of administrative authority for supervision of court personnel in a decentralized judicial administrative structure generally results in inconsistent

treatment of court personnel, with certain classes of employees (i.e., those funded at the most administratively remote level of government) tending to receive more preferential (or at least less supervisory) attention.

Non-Court Employees

A number of employees working in the courthouse are, in fact, employees of non-court agencies. Unlike employees of elected clerks over whom the court may have both formal and informal control (see below, p. 41) non-court personnel working in the court may be much less sensitive to the court's EEO initiatives:

"There is little argument over persons such as clerks and reporters, whose work place is the courthouse and whose appointment is often by the judiciary. But what about probation officers, bailiffs, social workers, sheriffs, and the staffs of the prosecutor's office and public defender's office? These persons perform tasks critical to the judiciary, yet their primary loyalty is sometimes in question. In many states, these employees are functionally bound to organizations outside of the judiciary."⁴²

In some instances, in fact, the ancillary court function may be so tightly interwoven into the clerical and administrative fabric of the court that it becomes indistinguishable from the work performed by classified court employees. An example of this would be a federally funded prosecutorial program, e.g., a pre-trial screening program, which is housed in a court and has reporting responsibility to a court staff member. The pre-trial screening program employee may in fact be unaware of this prosecutorial connection and may operate under the assumption that the court is his employer.

⁴²Cole and Wadsworth, "Unionization of State Court Employees: a Growing Movement," Judicature, Vol. 61, December-January, 1978.

The purposes of a judicial system are to provide justice in individual cases and to give the appearance of providing justice in all cases.⁴³ Since the public's perception of the quality and quantity of justice provided is determined at least in part by its perception of the kinds of persons employed and services provided by prosecutors, sheriffs, and court service agencies, the EEO posture of the court depends as much on the personnel policies of the ancillary agencies as on its own.

While there are ample and legitimate reasons for court concern over the EEO posture of agencies functionally tied to courts but whose employees are not strictly classified as court personnel, the fact remains that courts do not have direct administrative control over those ancillary groups and may be able to exercise little influence over their EEO policies. There are, however, a few instances in which courts may influence, or even order EEO reforms and programs for ancillary groups performing services in the courts. In many states, court rules or statutes authorize the court to exercise certain visitorial powers to oversee the operations of certain court services agencies upon whom the court relies to carry out its business. (An example of such a statute appears below, Elected Clerks of Court, n.48.) These rules or statutes may provide a court with leverage to administratively review the EEO posture of agencies providing ancillary services to the courts.

⁴³ Friesen, Gallas and Gallas, Managing the Courts, Bobbs-Merrill Company, 1971, p. 19.

ELECTED AND APPOINTED COURT OFFICIALS

Exempt Persons

Elected and Appointed Judges

Elected officials and their policy-level appointees are exempt from the non-discrimination provisions and protections of Title VII of the Civil Rights Act. Although the issue has not been litigated, there is some basis for believing that elected judges and clerks of court and their policy-level appointees are thus exempt from Title VII (assuming that the application of the Civil Rights Act to state courts is not prevented by separation of powers).⁴⁴ By inference, this apparently also means that appointed judges and their policy-level appointees are not exempt. If this interpretation is correct, the EEO implications for appointing authorities in every instance are substantial: governors, political caucuses, judicial nominating commissions, and other appointing authorities in every state may be obligated to actively recruit women and minorities to fill judicial vacancies,⁴⁵ although an equally compelling argument for exemption of appointed judges could likewise be made:

- (1) For separation of powers reasons, the judiciary was never intended to be covered by the provisions of the Act (the Congressional debate regarding exempt persons, in fact, makes no reference to judges.) See, below, Chapter V, p. 85.

⁴⁴ See below, Chapter V, pp. 68-70.

⁴⁵ U. S. Attorney-General Griffin Bell recently announced that the Justice Department's Affirmative Action Program under Executive Order No. 12097, November 8, 1978, requires that women and minorities receive preference over other equally qualified candidates in the filling of vacancies for the federal judiciary. Issues and Answers, ABC Television, February 11, 1979.

- (2) Even if the state judiciary is subject to the Act, there is no rational basis for differentiating between elected and appointed judges who serve similar functions from jurisdiction to jurisdiction and state to state, but whose method of selection is essentially a matter of jurisdictional accident; whose public trust and responsibilities cannot be distinguished in the same way as can the expectations of elected vs. appointed executive branch officials; and whose relationship to appointing authorities is in no way analogous to the relationship between executive branch officials and policy level appointees;
- (3) Since most state court judges (whether serving in elected or merit selection systems) are initially appointed to the bench, the logical consequence of the non-exemption theory would be the creation of a situation in which most multi-judge courts would always include members who are both exempt and non-exempt, thereby creating considerable personnel system and EEO problems of authority and control, particularly with regard to appointments by such judges. For example, how can the court reporter or law clerk of one judge be exempt while another is not? (See below, Confidential Employees.)

Resolution of this question will require further analysis, and possible federal, legislative, or administrative action.^{45A} However, it seems appropriate to conclude that both elected and appointed state court judges should be treated the same.

Policy Level Appointments by Judges and Clerks of Court:
Confidential Employees

At least with respect to elected judges and clerks of court, certain staff appointments will also be exempt. The exceptions to Title VII include:

"...Any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of that office." (emphasis supplied) 42 U.S.C. 2000c.

Exempt classes of court personnel presumably include court reporters, law clerks, confidential secretaries, legal counsel, court administrators, clerks of court and, perhaps, personal bailiffs, "whose duties require them to work on a personal and confidential

^{45A}See below, Chapter V, p. 86; Chapter VI, p. 97.

basis with individual judges, judicial officers, administrative officials, and professional personnel."⁴⁶ (Examples of exemption definitions from state judicial classification systems are attached herewith as Appendix D.) Note, however, that a designation of exempt status in a judicial personnel classification system may not necessarily mean that the class is exempt for EEO purposes; rather, such designation ordinarily refers to the status of the class as a part of either the court's management or line complement. Indeed, exemption classification may be more a reflection of the court's patronage or collective bargaining environment than its EEO posture.

As indicated in the previous chapter, however, where the judiciary does not control the use of its own funds, the classification and treatment of such persons as exempt will depend, at least in part, on the interpretation given to their status by the personnel agency of the funding unit which provides the salaries of court support personnel in the application of its own personnel system and EEO policies. And, as indicated in the previous section, whether there is any justification for distinguishing between the exempt status of confidential employees who are appointees of elected vs. appointed judges is an issue the resolution of which seems perhaps obvious, but which has yet to be resolved. (See below, Chapter V, pp. 84-86.)

⁴⁶. Section 1.42 (b)(iii), Standards Relating to Court Organization, American Bar Association (1974).

The Patronage Environment

The well known difference between political patronage systems and merit personnel systems turns on the process by which individuals acquire employment status. Patronage limits such employment to those few who have assisted, at least to some degree, the judge (or elected clerk of court) during the electoral process. Job announcement is typically by word-of-mouth and the selection process varies according to personal or immediate circumstances. Thus, the patronage system ignores the EEO process and, for courts, helps to perpetuate a closed society of white male dominance. Employees who attain employment through the power of patronage often receive salaries which are disproportionately higher than those received by other employees similarly situated regardless of job description or classification level.

Furthermore, patronage systems place limits on the upward mobility of employees by rewarding "club members"---without consideration to productivity--over other employees. The result, in many cases, has been a paucity of professionally trained court personnel and a hiring tradition which makes the imposition of a modern personnel management system a most challenging task. This process, known as the "good ole boy" system, too often relegates women and members of minority groups to the status of non-club members. The effect of "non-membership" is that we find minorities and women overwhelmingly over-represented in the lower-paying and powerless ranks of judicial employment. One of the serious impediments to change is the reluctance of power figures who themselves have benefited from the "good ole boy" network to open channels of access to a wider and more diverse clientele.

Elected Clerks of Court

Elected clerks of court serve at least some trial courts in 37 states. Critics of the elected clerk concept charge that the political and administrative division of responsibility between the clerk and the court for caseflow processing activities creates unnecessary management problems for courts.⁴⁷ Those who defend the system generally point to its continuing vitality as a component of the local political process, and to a history of cooperation with the court.

As a product of the political process, however, the elected clerk concept can significantly impact a court's EEO posture. Elected clerks may operate personnel systems independent of the courts and, as elected officials, may choose to fill staff vacancies through the patronage process (as, of course, may the courts). Although the court may have statutory authority to supervise the operations (and, presumably, to influence personnel policies) of the clerk's office,⁴⁸ as a constitutionally elected official, the clerk may resist unwarranted incursions by the court into areas peculiarly within the clerk's budgetary province.⁴⁹

⁴⁷E. Friesen, "Internal Operating Procedures of Courts",

State Courts: A Blueprint for the Future, National Center for State Courts, Publication No. R0038, 1978, p. 195; Friesen, Gallas & Gallas, Managing the Courts, Bobbs-Merrill Co., 1971, p.162.

⁴⁸See, e.g., Maryland Const., Art. IV, Sec. 10, which provides in part that:

" . . . the office and business of said Clerks, in all their departments, shall be subject to the visitorial power of the judges of their respective Courts, who shall exercise the same, from time to time, so as to insure the faithful performance of the duties of said officers; and it shall be the duty of the judges of said Courts respectively, to make, from time to time, such rules and regulations as may be necessary and proper for the government of said Clerks, and for the performance of the duties of their offices, which shall have the force of law until repealed, or modified by the General Assembly." (Emphasis supplied).

⁴⁹City of Parma v. Shipka, ___ Ohio S. Ct. ___ (1976).

UNIONIZATION IN THE COURTS

Unionization of court employees can also have a significant effect on the implementation of EEO and AA laws. Generally, union contracts specify employee rights and may, in some cases, require an EEO plan as a condition for negotiation. Typically, however, legislation to regulate public sector labor-management relations has been accomplished by a "Public Employment Relations Act" (PERA). This Act delegates to the executive the power to regulate the labor relations of state, county, and municipal employees. Usually, such laws do not directly address the regulation of judicial employees. Many courts are now debating the issue of who can regulate these relations for judicial employees.⁵⁰

The response by the judiciary has been mixed. Cole and Wadsworth report that:

"In some states, the judiciary has accepted the regulation of its employees by the executive as a fait accompli (Hawaii, Minnesota, Rhode Island, and Wisconsin). In other states, the judiciary, usually at the trial level, has challenged the applicability of the states's PERA to the courts. They have argued that the constitutional separation of powers precludes executive infringement on the courts. Such infringement, they argue, could lead to intolerable situations."⁵¹

⁵⁰ Cole and Wadsworth, "Unionization of State Court Employees: A Growing Movement", Judicature, Vol. 61, December-January, 1978. Court personnel are currently engaged in collective bargaining agreements with courts or county agencies in 15 states.

⁵¹ Ibid.

The management implications for courts in the unionization environment again turn on the issue of control: who is the employer-- the court or the executive? If the employer defined by statute or union contract is the local funding unit (e.g., the county), the court may be faced with the problem of trying to manage a personnel system whose elements are being dictated by the executive, and the executive may be willing to make (particularly non-budgetary) concessions which may not be in the court's best interest.

Other issues of control concern the authority of the legislature to stipulate the conditions under which judicial employees may be organized, and the authority of executive branch agencies to sit in judgment on alleged acts of court personnel system discrimination. Such issues are only now beginning to be raised by courts and the implications of their resolution for courts and EEO are yet to be determined. To the extent that such issues are resolved in favor of the positions of non-judicial branch agencies, however, the ability of courts to manage their own personnel systems will likely be further eroded.

CHAPTER IV

GUIDE TO EEO PLANNING IN STATE COURTS

Needs expressed by court agency representatives interested in initiating EEO activity in court systems were for information regarding the specific requirements of federal legislation as they relate to state courts, as well as for practical assistance in the planning and development of EEO programs and plans. This chapter was designed to address these needs by providing court organizations with a general overview of the operative provisions of the EEO-related federal regulations, as well as a series of guidelines to assist courts in planning for the establishment of EEO programs. This material is presented under the following subheadings:

- Federal EEO Requirements;
- Personnel Staffing Requirements
- Organizing the EEO Structure
- Methodology for Written EEO Programs

FEDERAL EEO REQUIREMENTS

A variety of federal laws prohibit employment discrimination by state agencies,⁵² including the Equal Pay Act of 1963; the State and Local Fiscal Assistance Act (Revenue Sharing); the Civil Rights Act of 1964; the Rehabilitation Act of 1973; the Age Discrimination Act; 42 U.S.C. 1983; the Omnibus Crime Control and Safe Streets Act; and

⁵²The Fair Labor Standards Act, once thought to apply to states, has recently been held inapplicable. National League of Cities v. Usery 426 US 833 (1976)(infra, pp. 71-72).

the Juvenile Justice and Delinquency Prevention Act, among others. These laws make it illegal for an employer to hire, fire, pay, promote, train, discipline or take other action based on an employee's race, color, sex, religion, national origin, age or mental or physical handicap. The provisions of some of these laws are directed at specific instances of job bias, but all are designed to insure equal treatment in the workforce for what lawmakers have identified as "protected classes"--groups of people who have been victimized historically by discrimination. Currently these groups include Blacks, women, Hispanics, Asians, Pacific Islanders, American Indians, Alaskan natives, older persons, and persons with mental or physical handicaps.

General Jurisdiction

Assuming that courts are state agencies subject to federal law⁵³, the provisions of these laws may be applied to most courts⁵⁴ either because:

- Jurisdiction over state agencies is provided for by law (for example, Title VII of the Civil Rights Act of 1964); or because
- The court is a direct or indirect recipient of federal funds⁵⁵ (e.g., Title VI of the Civil Rights Act of 1964; the State and Local Fiscal Assistance Act; the Crime Control Act or the Juvenile Justice Act) "in whole or in part"⁵⁶.

⁵³ i.e., constitutional issues of exemption, sovereign immunity, and separation of powers aside. See below, Chapter V, pp. 68-75.

⁵⁴ See below, "Jurisdictional Limitations", p. 46.

⁵⁵ A court is an indirect recipient of federal funds where it receives funds from a unit of state or local government or an administratively superior court which has in turn received such funds as part of a program of federal assistance to the states.

⁵⁶ A court is considered to have received funds "in part" when it has been allocated a portion of funds received by another agency. For example, a local court may be subject to the EEO provisions of the federal revenue sharing legislation if it can be shown either that any part of the local funding agency's allocation was used for court purposes, or that such revenue sharing funds have been co-mingled with the general fund of the local governmental unit.

Jurisdictional Limitations

Not all state courts are subject to the provisions of all such federal laws, however; Congress and the federal agencies responsible for the administration of such laws have established limitations on the jurisdictional scope of the acts:

- A court agency which is not a direct or indirect recipient of federal funds is subject to the provisions of federal legislation such as Title VII of the Civil Rights Act if it can be demonstrated that the court has a workforce of 15 or more employees.⁵⁷ A bargaining unit of a court with 15 or more members is likewise covered.
- A court which is a direct or indirect recipient of federal funds (e.g., under the Crime Control Act or the Juvenile Justice and Delinquency Prevention Act) is not subject to the enforcement and compliance provisions issued by LEAA unless the court has 50 or more employees and has received cumulative LEAA grants or subgrants of \$25,000 or more since 1968. A court agency which has received any amount of revenue sharing funds is subject to the EEO provisions of the State and Local Fiscal Assistance Act, however, without regard to the size of the agency's workforce.

Enforcement Agencies

The Equal Employment Opportunity Commission (EEOC) is charged with the responsibility for enforcement of most EEO-related federal legislation. In addition, most federal agencies which administer federal assistance programs maintain their own internal civil rights compliance divisions responsible for monitoring and enforcement of guidelines and regulations issued under the EEO provisions of the acts creating such agencies. The Office of Civil Rights Compliance (OCRC) of the Law Enforcement Assistance Administration is responsible for monitoring and compliance of agencies

⁵⁷ 29 CFR 1601-1611. Even where a court agency has less than 15 employees, however, the enforcement agency (in this case, EEOC) may exercise jurisdiction if it can establish that the court agency involved is a component of a larger governmental unit (e.g., such as a city or county) over which the enforcement agency likewise has jurisdiction.

receiving Crime Control Act or Juvenile Justice Act funds.

In certain instances, EEOC and OCRC will have concurrent jurisdiction. For example, a court agency with 50 or more employees which has received an LEAA grant in excess of \$25,000, and which has been charged with a violation of Title VII of the Civil Rights Act would be subject to the investigative and enforcement powers of both agencies. To reduce problems of overlapping jurisdiction, EEOC and LEAA have executed a memo of understanding to the effect that, in such circumstances, only one of the two agencies will be responsible for processing the matter. EEOC has entered into memos of understanding with most other similarly-situated federal agencies.

EEO Programs and Plans

An EEO plan is a document which describes an agency's intention to improve employment opportunities in the agency's workforce for women and minorities. EEO plans are of two types:

- Voluntary plans: A voluntary plan is one which an agency develops on its own volition because it wishes to articulate some formal statement of EEO posture, although it is not required to do so by federal law or regulation (see below, Mandatory Plans). A voluntary plan may be the most effective mechanism for reducing a court's vulnerability to charges and complaints of discrimination by assuring, through standardized procedures, the equality of opportunity for women and members of minority groups. Voluntary plans are typically adopted by court agencies which receive federal funding (other than from LEAA, which mandates the preparation of a plan) under such programs as federal revenue sharing. Revenue sharing regulations "encourage" recipients to correct any imbalance in workforce composition in order to address the effects of historical discrimination.
- Mandatory Plans: Mandatory EEO programs are required either as a precondition to receipt of federal funds (e.g., from LEAA), or as part of a conciliation agreement worked out with EEOC or OCRC stemming from a finding of discrimination, or if ordered as a remedy by a federal court.

Elements of a Plan

Although federal agencies use different terms to refer to plans required under their guidelines (e.g., LEAA requires the filing of an "equal employment opportunity program" (EEOP); while the Equal Employment Opportunity Commission uses the term "affirmative action program" (AAP), the terms are used interchangeably, and the basic elements of an EEOP or an AAP are essentially the same.⁵⁸

- A self-evaluation of an agency's posture as an employer;
- Identification of barriers which preclude full and equal participation in the agency's workforce by women and minorities;
- Necessary steps and methods proposed to eliminate such barriers, presented in both outline and narrative form;
- Goals and Timetables^b (see, below)

Goals and Timetables:

In some cases, the EEO plan must also include statistical goals, presented in the form of federal job categories, for the correction of underutilization of women and members of minority groups, as well as both intermediate and long-term timetables for the achievement of these goals. Statistical goals and timetables provide a data base for monitoring an agency's compliance with its EEO plan.

EEOPs filed with LEAA as a precondition to the receipt of federal funds are not required to include goals and timetables; however, LEAA may require the imposition of goals and timetables as a corrective measure resulting from either compliance review of a court or as part of a conciliation agreement stemming from a charge of discrimination. Likewise, all mandatory plans filed with EEOC would by definition include statistical goals and timetables. Inclusion of goals and timetables in voluntary plans is, of course, optional.

⁵⁸ A procedural guide for the development of a court's EEO program is provided below, pp. 59-64.

"Quotas" Distinguished

From time to time, as part of negotiated settlements of litigation involving employment discrimination, employers have been mandated to hire or promote specific numbers or ratios of women and minority persons where it has been found that such groups have been excluded as a result of unlawful discrimination.⁵⁹ Voluntary quotas, on the other hand, which discriminate against males and/or members of the majority in hiring and/or promotion, cannot be undertaken without court sanction.⁶⁰

EEO Requirements: Summary

The key legal requirements outlined herein are summarized in the following chart:

FEDERAL NONDISCRIMINATION LAWS AND REGULATIONS AFFECTING STATE COURTS

State courts, as employers, are obligated by law to provide equality of employment opportunity to all members of the communities they serve. It is therefore illegal for a court to hire, fire, pay, promote, train, discipline, or take other actions based upon an employee's race, color, sex, religion, national origin, age and, in some cases, mental or physical handicap. The following federal laws which impact most directly on state courts proscribe judicial administrators from taking such actions: The Civil Rights Act of 1964, as amended; the Omnibus Crime Control and Safe Streets Act, as amended; and the Juvenile Justice and Delinquency Prevention Act, as amended. The provisions, requirements and sanctions of these laws are set forth below:

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

RELEVANT LAWS AND REGULATIONS OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION UNDER THE CRIME CONTROL ACT AND JUVENILE JUSTICE ACT, AS AMENDED

WHO IS COVERED:

Courts with a workforce of 15 or more employees; also bargaining units of courts with 15 or more members.

Courts meeting the following criteria:
- having 50 or more employees, and
- having received cumulative LEAA grants or subgrants of \$25,000 or more since 1968.

⁵⁹Castro v. Beecher, 495 F 2nd 725 (1972)

⁶⁰Weber v. Kaiser Aluminum and Chemical Corp., 415 F Supp. 761 (D. La. 1976).

TITLE VII OF THE CIVIL RIGHTS ACT
OF 1964, AS AMENDED

RELEVANT LAWS AND REGULATIONS OF THE
LAW ENFORCEMENT ASSISTANCE ADMINI-
STRATION UNDER THE CRIME CONTROL ACT AND
JUVENILE JUSTICE ACT, AS AMENDED

WHAT ARE THE EXEMPTIONS, IF ANY?

State and local elected public officials, and appointed public officials with policy-making responsibility.

Additionally, sex-based classification is permitted within the very narrow and limited circumstances where it can be shown to be a bona-fide occupational qualification (BFOQ).

State and local elected or appointed public officials and their confidential employees.

Same BFOQ exemptions for sex.

WHO ENFORCES THESE PROVISIONS?

The Equal Employment Opportunity Commission (EEOC).

The Office of Civil Rights Compliance (OCRC), Law Enforcement Assistance Administration.

WHAT ARE THE PROVISIONS,
REGULATIONS AND GUIDELINES?

The implementing guidelines are codified as 29 CFR 1601-1611.

The implementing guidelines are codified as 28 CFR 42.201, 28 CFR 42.301, 28 CFR 42, and 28 CFR 50.14.

The Rehabilitation Act of 1973, as amended, Section 504.

WHAT COURTS MUST WRITE,
IMPLEMENT, AND MAINTAIN A
WRITTEN EEO PLAN?

A written EEO plan may be part of a conciliation agreement worked out by EEOC, stemming from a charge(s) of discrimination, or it may be ordered as a remedy by a federal court.

Courts meeting the following sets of criteria must develop a written EEO plan:

- For minority persons and women
 - having 50 or more employees
 - having received cumulative grants or subgrants since 1968 of \$25,000 or more
 - having a service population with a minority representation of more than three percent

TITLE VII OF THE CIVIL RIGHTS ACT
OF 1964, AS AMENDED

RELEVANT LAWS AND REGULATIONS OF THE
LAW ENFORCEMENT ASSISTANCE ADMINIS-
TRATION UNDER THE CRIME CONTROL ACT
AND JUVENILE JUSTICE ACT, AS AMENDED

The guidelines for writing such a plan are set forth in Revised Order No. 4, 41 CFR 60-2. The written program is referred to as an "Affirmative Action Program" (AAP).

WHAT ARE THE FILING REQUIREMENTS
FOR WRITTEN EEO PLANS?

Affirmative Action Programs must be filed with EEOC and other interested public agencies.

• For women only

- having 50 or more employees;
- having received cumulative grants or subgrants since 1968 of \$25,000 or more; and
- having a service population with a minority representation of less than three percent.

The guidelines for writing such a plan are set forth in 28 CFR 42.301 et. seq., Subpart E. The written program is referred to as an "Equal Employment Opportunity Plan" (EEOP).

Courts receiving:

- less than \$25,000 cumulative grants or subgrants since 1968 must file a certification or statement of equal employment opportunity compliance with their state planning agencies.
- more than \$25,000 but less than \$250,000 in grants or subgrants must file a certification of state-ment of equal employment opportunity compliance with the state planning agency as well as maintaining, on file, the written EEOP available for inspection by authorized govern-ment agencies.
- more than \$250,000 in a single grant or a subgrant must file their EEOP with the state planning agency and the Office of Civil Rights Compliance, Law Enforcement Assistance Admini-stration.

TITLE VII OF THE CIVIL RIGHTS ACT
OF 1964, AS AMENDED

RELEVANT LAWS AND REGULATIONS OF THE
LAW ENFORCEMENT ASSISTANCE ADMINIS-
TRATION UNDER THE CRIME CONTROL ACT
AND JUVENILE JUSTICE ACT, AS AMENDED

WHO MAY FILE A CHARGE OF
DISCRIMINATION?

Complaints may be filed by an
aggrieved individual, a class
of individuals, a third party
on behalf of others, or a
commissioner of EEOC.

Complaints may be filed by individuals,
a group of individuals, a third party
on behalf of others, organizations,
state planning agencies, Fair Employ-
ment Practices Commissions, and Human
Rights agencies. OCRC also receives
allegations through referrals from
certain federal agencies or depart-
ments, e.g., Department of Labor,
Health Education and Welfare, Office
of Revenue Sharing, etc.

MAY AN INVESTIGATION OR AN ON-SITE
COMPLIANCE REVIEW BE CONDUCTED
WITHOUT A FORMAL WRITTEN COMPLAINT
OF DISCRIMINATION?

No. A complaint must be filed
with EEOC before it may conduct
an investigation(s).

Yes. The Office of Civil Rights
Compliance (OCRC) is obligated by law
not only to investigate complaints of
discrimination, but also to conduct a
yearly number of on-site compliance
reviews of LEAA-funded criminal
justice agencies under its juris-
diction. (See above, "WHO IS COVERED".)

WHAT ARE THE REMEDIES AND/OR
SANCTIONS THAT MAY BE IMPOSED?

Among the remedies available are
reinstatement, hiring, promotion,
back-pay (limited to a two year
period), increased fringe
benefits and orders enjoining
future discrimination. Attorney's
fees may be given to the pre-
vailing party. Additionally, an
Affirmative Action Program
may be required as part of a
conciliation agreement worked out
by EEOC, or it may be ordered by a
federal court.

Upon a finding of discrimination, OCRC
may order similar remedies. Further,
it may require the development of an
Equal Employment Opportunity Program
containing relevant and corrective
goals and timetables for the equi-
table utilization of minorities and
women within the workforce of the
court. If all attempts at conciliation
fail, LEAA funds may be suspended
and/or terminated. (28 CFR 42.201
et. seq., Subpart D.)

PERSONNEL STAFFING REQUIREMENTS

Planning requires a professional staff to provide the expertise, coordination, and analysis necessary to develop procedures for policy-makers and to implement and monitor planning policies. Furthermore, planning involves hard and consequential choices and requires constant monitoring that only a professional administrative staff can provide.

One of the single most significant barriers to the implementation of EEO planning in courts is the absence of technical expertise necessary to the critical internal examination or realistic evaluation of judicial employment practices. The accuracy with which this evaluation is accomplished will fundamentally affect the preparation and content of the programs designed to include nondiscriminatory merit principles. This presents a dilemma that must be addressed by courts.

The implementation of nondiscriminatory personnel practices requires more than administrative directives. It requires a creative application of policies and procedures to the often complex task of removing the many existing and inherent barriers which have traditionally resulted in: 1) a disproportionate number of women occupying the lower strata of organizations--both public and private--and, 2) the under-representation by members of minority groups--both male and female--within the judicial system workforce. Hence, administrative policies and directives alone are not adequate without the additional technical expertise needed to translate policies into definite procedural directions.

EEO administration is a recognized discipline or function similar to other areas of expertise, e.g., personnel, data processing, etc. It requires a working knowledge of a combination of disciplines--law,

governmental policies, administration, personnel, as well as a high degree of communication and human relations skills. An EEO officer must interface with all levels of court personnel, including judges, in activities such as employee orientation, motivation and morale-building. This must be accomplished in such a way as to carry out required functions as effectively and efficiently as possible.

Someone must be responsible for the design, implementation, and monitoring of the EEO program even if the scope of this responsibility does not warrant the full time of one person. There are no regulations regarding the requisite size of an EEO administrative staff. This is a pragmatic decision dictated by the size of the court, the resources available, and the demographic makeup of the community it serves. In smaller court systems, it may be preferable for the overall program to be implemented by the chief administrator or the personnel officer. Conversely, in larger systems, a person should be assigned fulltime, where possible, to this function. The often random assignment of EEO responsibility to a minor staff member or to a "token" minority person lacking the technical expertise, will seldom, if ever, result in an effective EEO system.

Another ancillary problem to effective staffing is the attitudinal preference of the judiciary for administrative personnel with law degrees. Many judges seem to think only lawyers can manage judicial systems. Consequently, courts have been unreasonably slow in recruiting non-lawyers with relevant management and public administration skills. Courts need to utilize more effectively the expertise of other professionals in solving court problems. Furthermore, because of the limited availability

of female or minority lawyers, recruitment of non-legal professionals can only provide the court with a greater opportunity to incorporate additional members of protected groups into its workforce.

In summary, an EEO program by its very nature is a dynamic, action-oriented process which examines how a court system utilizes its human resources and manages its ministerial functions. Depending on the size of the court, an effective program will require the services of a professional individual as well as sufficient clerical support.

Summary of EEO Officer's Responsibilities

The Equal Employment Opportunity Officer shall act as the director's staff assistant for the administration of the EEO program, and as the manager of the Equal Employment Opportunity Office.

The EEO Officer shall be responsible for:

1. Assisting the management staff in resolving problems relative to any requirement or provision of the program.
2. Developing and implementing audit and reporting systems designed to:
 - a) continually measure the effectiveness of the program and its parts;
 - b) identify deficiencies and needs for remedial action; and
 - c) determine degree to which goals and objectives have been reached.
3. Conducting periodic audits of hiring and promotion patterns to insure that provisions of the EEO program are being implemented and that the goals and objectives are being met.
4. Conducting a periodic review of the EEO program and developing recommendations for improvement where applicable.
5. Serving as liaison between the court and enforcement regulatory agencies, minority organizations, and community action groups.
6. Keeping those responsible for court administration and departmental management informed of the latest developments in the equal opportunity area.

7. Assisting in the identification of problem areas and establishing specific corrective goals and objectives.

ORGANIZING THE EEO STRUCTURE

From the start, the commitment of a court to EEO is indicated by the individual placed in charge of program responsibility and by the authority and accountability such a position carries. Many EEO plans are programmed for failure because the person designated does not have sufficient status, authority, time or support staff. A rational EEO program structure within a court system is necessary to provide for the orderly accountability of program responsibility and for proper definition of the relationship between these responsibilities and other components of the judicial system.

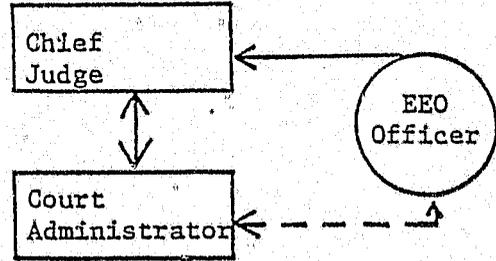
Structural patterns of courts are characterized by diversity in size, responsibility, resources, etc. Most judicial systems, however, fall into one of the following structural examples:

- Unified or state-funded system;
- Non-unified system; or a
- Combination of the above.

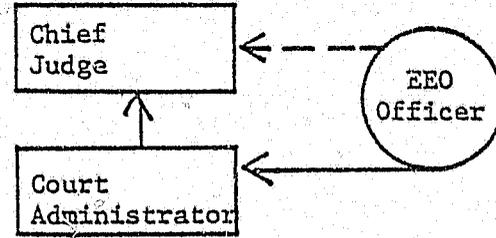
Within the parameters of such a predetermined framework, the EEO office must define and establish an operating structure that will function rationally within the system, and provide the continuity necessary to fulfill its responsibility.

Examples of organization structures identified during this study demonstrate a wide variety of EEO accountability and reporting procedures, some of which are effective. A discussion of these procedures will be illustrated by an accompanying organizational diagram.

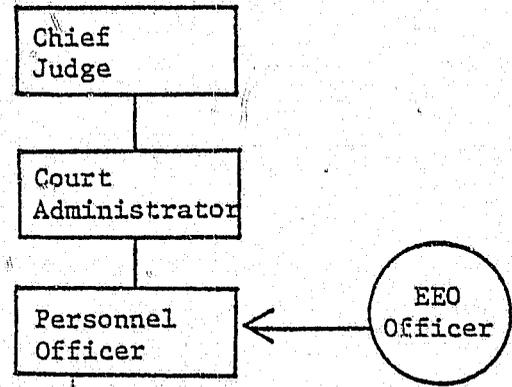
- EEO staff reporting to Chief Judge yet indirectly responsible to chief administrative officer.



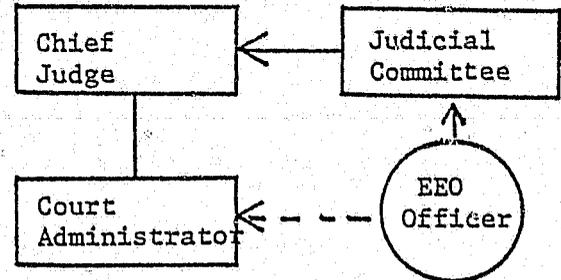
- EEO staff reporting to chief administrator indirectly responsible to chief judge.



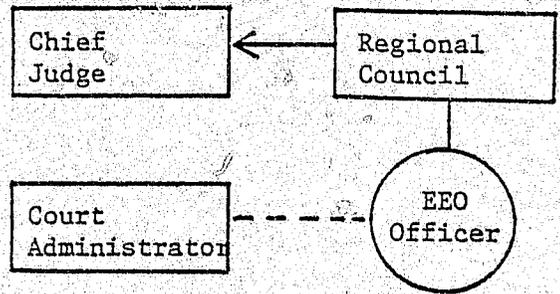
- EEO staff reporting to personnel officer.



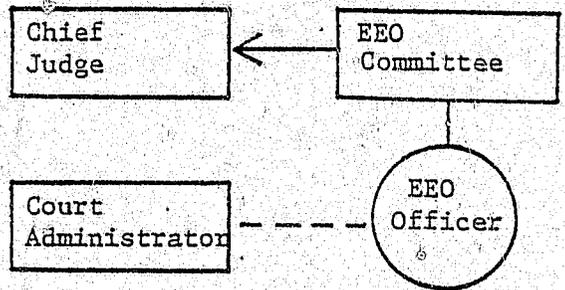
- EEO staff reporting to a judicial committee who is, in turn, responsible to chief judge.



- EEO staff reporting to a regional council responsible for EEO in various regions.



- EEO staff reporting to an EEO committee sometimes found in unified systems.



- Complete lack of accountability often found in "token" programs.

Finally, there is more to EEO responsibilities than the writing and administration of a written program. EEO encompasses not only all terms and conditions of employment, but also ancillary factors found in a court environment such as employee orientation, motivation, morale, counseling, interpersonal relationships, etc. It is important that a work atmosphere be free from present or potential discriminatory attitudes by court staff. Sensitivity to negative attitudes and human relations is an important part of the organizational duties of an EEO officer.

For these reasons, the relationship of the EEO Officer to all the various components of the court necessitates not only the open cooperation of all staff, but also requires access to many confidential records

regarding personnel activities, employment decisions and salaries.

Because of the sensitive nature of such responsibilities, it is apparent that this position requires not only a certain degree of independence to avoid any undue pressure but access to top management as well.

METHODOLOGY FOR WRITTEN EEO PROGRAMS

To date, many EEO programs have been rendered ineffective by their inherent failure to identify and address critical employment problems within the organization. A program that will function effectively for one organization might prove ineffective for another. Such diversity must be kept in mind when designing a written program. Issues that surface in one jurisdiction may be absent in another; therefore, there is no "model program"--each court must define and evaluate the policies and procedures of its own individual management system and, where indicated, institute changes and/or modifications designed to provide equal opportunity in a fair and equitable manner to the community served. "Borrowing" or "appropriating" an EEO plan of one jurisdiction will seldom be successful if superimposed on the problems of another jurisdiction.

The discussion earlier in this section stated that an EEO program should conform to the requirements of the relevant regulatory federal agency, e.g., Revised Order No. 4 used by the Equal Employment Opportunity Commission and 28 CFR 42.301 et. seq., Subpart E used by LEAA and the Department of Justice for criminal justice agencies who are recipients of federal funds. Because of the function of courts within the criminal justice system, these are perhaps the more appropriate regulations to use

for EEO program compliance. The following methodology is set forth pursuant to these regulations. For a detailed checklist of Subpart E Regulations, see Appendix E.

This report is not intended to answer all possible questions that surface during the course of EEO program development, nor is it expected that all of the elements contained herein will apply to every judicial system. Such variables as the type of court, its size, location, demography, and its resources will affect the manner in which each court establishes its own program.

Procedural Steps for Writing an EEO Program

Step 1 - Statement of Management Commitment

Commitment is the most important ingredient in the design and implementation of an EEO program--it can spell success or failure. No program or policy can succeed in a hostile environment or in one of benign neglect.

It has been estimated that more than one billion dollars will be spent this year alone by employers, both public and private, in the development and implementation of EEO plans and programs. A definitive commitment by judicial administrators could reduce this figure substantially:

- For example, one court in California, which is located in a community comprised of more than 50% minority group persons, has seen its workforce composite change from zero minority persons to a current workforce of 63% minority persons in the past 10 years. Additionally, five of eight judges; three of five commissioners; the court administrator; and the chief deputy are members of minority groups. It is interesting to note that this was accomplished through judicial and administrative commitment rather than through a paper process of written plans, policies, goals, or timetables.

- By contrast, several courts with written EEO plans were unable to document meaningful change in the composition of their workforce. In most instances, their programs had been drafted pursuant to federal funding requirements. Upon cessation of the funding cycle, these plans had been left in a state of limbo--ignored by most, yet not terminated as policy statements by the court. In most instances, the courts maintained that they not only had an EEO program, but one that was available for internal or external inspection. Such programs were rendered useless by benign neglect because of lack of commitment.

Once this commitment is articulated, it is then set forth on paper, signed by the policy-makers of the court, and called the "Policy Statement" or "Statement of Management Commitment". (A sample policy statement is attached as Appendix F.)

Step II - Data Collection

A basic and important step in evaluating the effect of a court's employment practices is the collection, summarization, charting, and analysis of data demonstrating the present representation of women and members of minority groups in the court's workforce.⁶¹ This basic data as to the employees' sex and minority group representation is usually a part of the court's personnel records.

⁶¹28 CFR 42.304 (a-e).

The charting of this data may be done in any of several forms, as long as it presents complete information in a manner that is clear and allows for evaluation. (Sample charts are attached as Appendix G). It is important to note, however, that none of the charts or data collection forms are, in themselves, required by any federal or state agency. Rather, they are a suggested way of reviewing, analyzing, and reporting on a court system's personnel practices. A court may use any form it wishes as long as the workforce is fully and accurately represented.

If a court system is large and operates separate major divisions, branches or offices, it is recommended that a separate analysis of the workforce be conducted for each individual component to permit a more complete analysis of the status of women and members of minority groups.

Step III - Statistical Comparison of Census Data

A statistical comparison of census data⁶² will then be required to enable the court to determine if the percentage of representation of protected group persons at all levels of its workforce is reasonably consistent with the distribution of such groups in the target population (the available labor force in the court system's geographic employment market). LEAA will consider a significant disparity to exist if the percentage of a minority group in the employment of the court is not at least 70 percent of the percentage of that minority in the target population.

There is no recommended procedure for evaluating the adequacy of female representation in the workforce of a court. However, it is recommended that among the facts to be taken into consideration in evaluating female percentages would be information as to the distribution

⁶²28 CFR 42.304(f)

of women within the workforce and the rate of employment in relation to males.

Step IV - Analysis and Evaluation⁶³

The basic intent of an analysis and evaluation is to provide the policymakers of a judicial system with a systematically-developed picture of its EEO posture. This will enable the court to document problem areas and questionable or negative personnel practices and thereby plan for and implement action steps to bring about improvement.

This evaluation includes not only an analysis of the composition of the current workforce of the court, but also an analysis of specific personnel activities taken by the court during the last 12 months, such as:

- advertising and recruitment
- selection procedures
- wage and salary structure
- training
- disciplinary actions
- terminations.

Step V - Narrative Summary of Findings

The findings developed during the above action steps are set forth in a narrative summary for each set of statistics provided.

Step VI - Report of Planned Action (EEO or Affirmative Action Plan)

The final written program will summarize all data collected during this process in a narrative form to include:

- Summary statement of each finding;

⁶³A detailed narrative statement describing existing employment policies and practices, with analysis of their effect on the employment of minority persons and women. 28 CFR 42.304(g).

- Summary statement of objectives based on each finding;
- Narrative statement of planned affirmative action to correct each deficiency identified and/or documented;
- A specific time-frame for each affirmative action step to begin and end;
- Designation of responsible official(s) to carry out each affirmative action step;
- Procedures for the internal and external dissemination of the written program.⁶⁴

Maintenance of an EEO Program

Once nondiscriminatory merit principles have been developed and implemented, the self-monitoring procedure is a fairly simple process since the essential gauge of its success is quantitative--the increased employment and/or promotion of women and members of minority groups.

An imperative of any effective management system is an adequate and on-going internal reporting and monitoring system to identify problem areas before they reach a critical stage. Neither the judges nor court administrators will want to be surprised by complaints of discrimination, litigation or disputes with regulatory agencies. The reporting system will require periodic review. Designing and implementing this system is a key responsibility of the EEO officer. Periodic reports should be prepared based on data reflecting all personnel activity so that those with administrative responsibility can accurately evaluate the effectiveness of the program and identify areas where changes or improvements are needed.

⁶⁴ 28 CFR 42.304(h).

CHAPTER V

APPLICABILITY OF FEDERAL EEO LAWS TO STATE COURTS

The earliest efforts to eliminate discrimination in employment were aimed against public, as opposed to private, employers. The Thirteenth Amendment to the U.S. Constitution, which prohibited slavery and involuntary servitude, has been interpreted since its enactment in 1865 as also prohibiting all aspects and vestiges of slavery. The Civil Rights of 1866, enacted under the enabling clause of the Thirteenth Amendment, provides that all persons shall have the same right to make and enforce contracts; employment contracts are clearly within the purview of this legislation.

The Fourteenth Amendment, which prohibits a state from denying any person the equal protection of its laws, was ratified in 1868. Pursuant to its enabling clause, the Civil Rights Act of 1871 was passed. It provides a right to sue any person who, under the color of state or local law, causes the deprivation of another's rights, privileges, or immunities secured by the Constitution, and/or federal laws.

Neither these constitutional amendments nor statutes received much attention as a means of dealing with discrimination in employment until relatively recently. Since they have been recognized as vehicles for filing discrimination in public employment, however, they have been the basis for most lawsuits charging discrimination. This was due to a lack of federal legislation dealing directly with the problem of discrimination in employment until the enactment of the Civil Rights of 1964.

Even after the enactment of Title VII of the Civil Rights Act of 1964, public employers were not covered until 1972. This fact, in combination with the length of time it takes the EEOC to process charges of discrimination filed with it, explains why, until recently, 42 U.S.C. §1981 and 1983 have been utilized most frequently in public employment discrimination cases.

Legal debate over the applicability of EEO laws to courts continues. In this chapter, we will examine the nature and assess the viability of such arguments.

Issues which will be examined include:

- I. Does Title VII CRA apply to State Courts?
 - A. Does the doctrine of separation of powers preclude legislative establishment of standards for or executive branch enforcement of judicial agency employment activities?
 - B. Do the Tenth and Eleventh Amendments exempt or immunize from the operating provisions of federal legislation the activities of state agencies not expressly subject to the provisions of such laws?
 - C. Does the doctrine of judicial immunity exempt courts from the application of Title VII for alleged acts of employment discrimination?
- II. What are the limitations on the Application of Title VII to Courts?

--What classes of employees are or should be exempt?
- III. What employment practices of courts are prohibited by Title VII?

I. DOES TITLE VII APPLY TO STATE COURTS?

The general principle on which Title VII⁶⁵ is based is section 703:

⁶⁵ Title VII of the Civil Rights Act of 1964 §701-16, U.S.C. §2000e-2000e-15 (1970), as amended, 42 U.S.C. §2000e-2000e 17 (Supp. II, 1972).

- (a) It shall be an unlawful employment practice for an employer--
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Passage of this legislation and the 1972 amendments extending coverage to public employers⁶⁶ persuasively indicated that Congress was establishing a national policy against discrimination in employment on the grounds of race, color, religion, sex, and national origin.

The judiciary has always been sensitive to legislation which might compromise its ability to function as a separate and independent branch of government. Because Title VII affects the manner in which courts manage their employment systems, it has been perceived by some to pose such problems. Consequently, some judicial scholars have argued that Title VII may be unconstitutional because: it violates the doctrine of separation of powers; courts are excepted by

⁶⁶As a result of including state and local governments as employers subject to Title VII, more than 10 million additional employees were afforded the protection of Title VII; H.R. Rep. NO 239, 92nd Cong., 1st Sess. 17 (1971).

the Tenth and Eleventh Amendments; or the doctrine of judicial immunity exempts judges from prosecution. The following is an analysis of these arguments.

A. Separation of Powers

Deeply rooted in judicial thinking is the doctrine of separation of powers.⁶⁷ Described by Madison as "a sacred maxim of free government,"⁶⁸ separation of powers is a theoretical assumption that governmental powers should be limited and thus divided among co-equal branches of government. Initially used to describe the relationships between agencies of the federal government, it has long since been applied to and adopted by state governments as well.

Notwithstanding the fact that separation of powers is a legitimate issue to raise concerning many of the intergovernmental problems facing courts, its application regarding Title VII is probably inappropriate. Two reasons support this conclusion. First, although separation of powers is surely a critical and legitimate issue at the state level, it has no applicability in the context of federal regulation of state activity. Since Title VII is a federal effort to regulate state activity, the appropriate analytical framework

⁶⁷ For an excellent analysis, see M. Vile, Constitutionalism and the Separation of Powers, ; See also, Miller, "Separation of Power: An Ancient Doctrine Under Modern Challenge", *Administrative Law Review*, 28: 299-325, Summer 1976.

⁶⁸ John Madison, *The Federalist*, No. 47,

is the applicable constitutional provisions⁶⁹ concerning federal and state power, not separation of powers. Secondly, separation of powers is an intra-governmental issue and not a framework for analyzing federal/state relations. Where separation of powers is an issue involving governmental agencies, it is confined to and arises in the context of distinct spheres of government, either federal or state.⁷⁰ No case was found where an agency of state government successfully

⁶⁹ Under the Commerce Clause - see Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. Unified States, 379 U.S. 241 (1964); United States v. Sullivan, 332 U.S. 689 (1948); Wickard v. Filburn, 317 U.S. 111 (1942).

Under the 14th Amendment, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); ExParte Virginia, 100 U.S. 339 (1880); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Mitchum v. Foster, 407 U.S. 275 (1972).

⁷⁰ Cases dealing with separation of power do so at either the state or federal levels, but never as an issue between these two major levels of government. No case was found where separation of powers was a federal/state issue.

Cases illustrating a separation of powers conflict at the federal level include:

Kilbourn v. Thompson, 103 U.S. 168 (1880);
Meyers v. United States, 272 U.S. 52 (1926);
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 72 (1952);
United States v. Brown, 381 U.S. 437 (1965);
New York Times v. United States, 403 U.S. 713 (1971);
United States v. Nixon, 418 U.S. 683 (1974).

Cases illustrating a separation of powers conflict at the state level include:

In re Juvenile Director, 87 Wash. 2d 232, 552 P. 2d 163 (1976);
Zylstra v. Piva, 85 Wash. 2d 743, 539 P.2d 832 (1975);
State ex rel. Brotherton v. Blankenship, W. Va., 214 S.E. 2d 467 (1975);
Leek v. This, 217 Kan.784, 539 P.2d 304 (1975);
Department of Natural Resources v. Linchester Sand and Gravel Corp., 274 Md. 211, 334 A. 2d 514 (1975);
McManus v. Lowe, 197 Colo 218, 499 P. 2d 609 (1972);
Sweet v. Pennsylvania Labor Relations Board, 457 Pa. 456, 322 A. 2d 362 (1974);
Costigan v. Local 696, AFSCME, 426 Pa. 425, 341 A.2d 456 (1975);

Other Pennsylvania cases include:

Ellenboger v. County of Allegheny, No. 117, March term (1977);
Board of Judges of Bucks County v. Bucks County Commissioners, No. 367 and 368, January term, 1977.

claimed a violation of separation of powers by an agency of the federal government (or vice versa). Thus, separation of powers, although a legitimate and critical issue for courts to raise in the proper context, is not an appropriate framework for addressing an issue involving federal regulation of state activity.

B. Tenth and Eleventh Amendments

The Tenth⁷¹ and Eleventh Amendments⁷² reflect concern for the sovereignty of states within a federal system. They attempt to strike some compromise between the powers of the federal and state governments. The Tenth Amendment is designed to prevent the states from being unduly regulated by the federal government. The Eleventh Amendment is a limitation on the exercise of federal judicial power and has been interpreted as a grant of immunity to state governments from lawsuits by citizens.⁷³ Because Title VII subjects the internal employment practices of state (court) agencies to substantial federal regulation and makes them liable for money damages, some scholars contend that these amendments may provide possible defenses to the applicability of Title VII to state courts. Although the

⁷¹ U. S. Const. Amend X states: The powers not delegated to the United States by the Constitution, nor prohibited by it to states, are reserved to the states respectively, or to the people.

⁷² U.S. Const. Amend. XI states: The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another state, or by citizens or subjects of any foreign state.

⁷³ Sovereign immunity relates to the immunity of government from lawsuits and is a judicially developed doctrine. Ex Parte New York 256 U.S. 490 (1921); Haas v. Louisiana 134 U.S. 1 (1890); The Eleventh Amendment is a concept reflecting concern for the sovereignty of states within a federal system. See, Tribe, "Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Power Issues in Controversies about Federalism", 89 Harv. L. Rev. 682 (1976).

application of the Tenth and Eleventh Amendments may be valid defenses in other contexts⁷⁴, they are probably inapplicable to the question of the application of Title VII.

Under Section 1 of the Fourteenth Amendment, Congress has the power to pass legislation to secure the guarantees of the Amendment.⁷⁵ In doing so, Congress has the discretion to decide what laws are appropriate in order to secure the Amendment's guarantee of equal protection to citizens of the United States. Moreover, Section 5 of the Fourteenth Amendment gives Congress enforcement power to execute Section 1.^{75A} This exercise of power under the Fourteenth Amendment may restrict state activity.

Conversely, states can raise Tenth and Eleventh Amendment arguments of immunity. Although initially successful in holding down federal action impacting on states,⁷⁶ the Tenth Amendment has since lost

⁷⁴ The Tenth Amendment was relied upon in National League of Cities v. Usery, 426 U.S. 833 (1976) (*infra*, n. 78).

The Eleventh Amendment was relied upon in Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)

⁷⁵ U.S. Const. Amendment XIV

Sec. 1. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

^{75A} Sec. 5. The Congress shall have power to enforce by appropriate legislation the provisions of this Article.

⁷⁶ Collector v. Day, 11 Wall. 113 (State judges income exempt from federal taxation.)

United States v. Baltimore and Ohio R.R. 17 Wall 322 (1872)
(federalism position of tax on interest received by a city on railroad bonds denied.)

much of its vitality in the area of federal regulation, particularly with regard to interstate commerce.⁷⁷ Except for a recent ephemeral revival of the concept in the Supreme Court's decision in National League of Cities v. Usery,⁷⁸ the ability of the Tenth Amendment to neutralize most congressional regulation, particularly under the Fourteenth Amendment, has been largely eroded.⁷⁹ The Eleventh Amendment, however, which provides a shield to states from suits under the doctrine of sovereign immunity, is in direct conflict with Title VII's provision of a private right of action against states in federal courts.

⁷⁷Wickard v. Fillburn, 317 U.S. 111 (1942); NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937); Houston L. & W. Texas Ry v. United States, 23 U.S. 342 (1914); Champion v. Ames 188 U.S. 321 (1903); U. S. v. Darby, 312 U. S. 100 (1941); Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937); Katzenbach v. Mc Clung, 379 U.S. 294 (1964); Heart of Atlanta Motel Inc. v. United States, 379 U. S. 241 (1964); United States v. Sullivan, 332 U.S. 689 (1948).

⁷⁸426 U.S. 833 (1976): Application of Fair Labor Standards Act to non-supervisory municipal and state employees, including police and firemen. Held, by U.S. Supreme Court, to be violation of 10th Amendment. However, National League of Cities has since been given the narrowest interpretation possible by being limited to its facts. See Usery v. Dallas Independent School District. Moreover, the reasoning in National League of Cities applied only to Congress' power exercised under the Commerce Clause. No such analysis was made regarding the 14th Amendment.

⁷⁹Justice Stone described the Tenth Amendment as "a truism that all is retained which has not been surrendered". United States v. Darby 312 U.S. 100, 124 (1941). Professor Paul Brest, Associate Professor of Constitutional Law, Stanford University, suggests that in cases involving federalism, the Supreme Court's decisions would have been the same even if the Tenth Amendment did not exist. (See, Tilly, "An Affirmative Constitutional Right: The Tenth Amendment and the Resolution of Federalism Conflicts", San Diego L. Rev. 13: 876-98, July, 1976.

The question at this point is whether the power of Congress to pass legislation under the Fourteenth Amendment is superior to state power under the Tenth and Eleventh Amendments. In Fitzpatrick v. Bitzer,⁸⁰ the United States Supreme Court answered in the affirmative. In that case, the Court was faced squarely with the conflicting issues of state immunity under the Eleventh Amendment and federal action under the Fourteenth Amendment. Plaintiffs, after succeeding on the merits of a sex-based Title VII suit, sought an award of retroactive retirement benefits as compensation for losses caused by the state's discrimination, as well as attorney's fees. The District Court held that such payments would constitute recovery of money damages from the state treasury and thus were precluded by the Eleventh Amendment. On appeal, the Court of Appeals reversed the attorney's fee portion on the theory that such award would have only an "ancillary effect" on the state treasury and affirmed the non-payment of retroactive damages as violative of the Eleventh Amendment as "not a constitutionally permissible method of enforcing Fourteenth Amendment rights."

The Supreme Court ruled that where state authority under the Constitution conflicts with the exercise of congressional authority under the Fourteenth Amendment, the Fourteenth Amendment will prevail. The Court's reasoning focused on the power of Congress, under the Fourteenth Amendment, to significantly limit state authority even if to do so would conflict with state power under another constitutional amendment:

⁸⁰427 U.S. 445, at 447. See, also, Ex Parte Virginia, 100 U.S. 339 (1880).

"But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. In that section, Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority."⁸¹

The Court went on to hold expressly that Congress, acting under the Fourteenth Amendment, may provide for private suits against states:

"When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority.

We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts."⁸²

Fitzpatrick, then, stands for the general proposition that Congress, acting under the Fourteenth Amendment, has plenary authority "to intrude into the judicial, executive and legislative spheres of

⁸¹ Id., at 456.

⁸² Id., at 456.

autonomy previously reserved to the states." ⁸³

The implications for Title VII are clear. Since the 1972 Amendments to the CRA extended coverage of the law to the public sector under the Fourteenth Amendment, the defense of sovereign immunity would not appear to be viable. ⁸⁴ Although the Tenth Amendment was not specifically at issue in Fitzgerald, it is at least arguable that the provisions of the Fourteenth Amendment would likewise overrule the exemption protection of that Amendment.

C. Common Law Defenses to Title VII: Judicial Immunity and Quasi-Judicial Immunity

Another major question presented by Title VII is whether state court judges or court-related personnel can invoke the defense of judicial immunity in the face of such suits. This section will examine these issues and determine if such defenses are valid.

Judicial Immunity

The doctrine of judicial immunity cannot be successfully invoked in Title VII suits brought against a judge acting in his capacity as administrator of a court personnel system, unless it can be shown

⁸³ 427 U.S. 445, at _____

⁸⁴ There is no dispute that in enacting the 1972 amendments to Title VII to extend coverage to the states as employers, Congress exercised its power under §5 of the Fourteenth Amendment. See, H.R. Rep. No. 92-238, p. 19 (1971); S. Rep. No. 92-415, pp. 10-11, (1971); Cf. National League of Cities v. Usery, 426 U.S. 833 (1976). Other federal courts have followed Fitzpatrick. See Kutska v. California State College, 564 F. 2d 108 (CA-3 1977); Parker v. Califano, 561 F. 2d 320 (D.C. 1977); Gates v. Collier, 559 F. 2d 241 (CA-5 1977); MacBonde v. Exon, 358 F. 2d 443 (CA-8 1977) and Seais v. Quarterly County Court of Madison County, Tennessee, 562 F. 2d 390 (CA-6 1977).

that the alleged act of discrimination in question was judicial in character. A judicial act is one which occurs within the court's function as arbiter of a legal dispute. However, judicial immunity does not extend to acts of a ministerial nature involving, for example, certain day to day aspects of court administration.

The leading case regarding judicial immunity in a judge's capacity as jurist is Stump v. Sparkman.⁸⁵ Here, the plaintiff sued a circuit court judge in federal court alleging a violation of her civil rights under 42 U.S.C. 1983, charging that the judge had approved a petition submitted by plaintiff's mother, seeking approval to perform, without plaintiff's knowledge, a tubal ligation. The United States Supreme Court ruled that, because there was "no clear absence of all jurisdiction", the doctrine of judicial immunity would apply even if the judge's approval of the sterilization petition had been in error. This decision followed a long series of Supreme Court cases, beginning with Bradley v. Fisher,⁸⁶ upholding the principle that a judge is immune from a suit for damages brought against him for decisions made concerning parties before the court.

The purpose of the doctrine of judicial immunity is to protect the judge from possible suits by disgruntled litigants who appear before the court, to free the judge to make decisions, even erroneous

⁸⁵ 98 S.Ct. 1099 (1978).

⁸⁶ 13 Wall 335 (1872); See, also, Pierson v. Ray 386 U.S. 547 (1967); Gregory v. Thompson, 500 F. 2d 59 (CA. 9 1974).

ones, without fear of reprisal. When a judge acts solely in an administrative capacity, however, no such protection is required, and judicial immunity will therefore not apply.⁸⁷

The leading case regarding unprotected "ministerial" acts of a judge is Ex Parte Virginia.⁸⁸ Here, in invalidating the judicial immunity claim of a state court judge who excluded names of blacks in selecting a jury, the United States Supreme Court flatly ruled that judicial immunity does not apply to a judge's acts which are ministerial in nature:

" . . . Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc. Is their election or their appointment a judicial act?"⁸⁹

Thus, if the act in question can be performed without invoking judicial authority, such act can be deemed ministerial. In view of this analysis, it would appear that for a judge performing personally or by delegation administrative responsibilities of the court,

⁸⁷ Pudsett v. Skin, 406 F Supp. 287 (M.D. Pa. 1975); Doe v. County of Lake, 399 F. Supp. 553 (N.D. Ind. 1975).

⁸⁸ 100 U.S. 339 (1880).

⁸⁹ Id. at 348.

including hiring, firing, collective bargaining, recruiting, and testing, judicial immunity will be no defense in the event of a Title VII suit. This conclusion is consistent with the fact that federal courts have consistently rejected judicial immunity as a defense in equitable actions involving civil rights cases.⁹⁰

Quasi-Judicial Immunity

The doctrine of judicial immunity has been extended to court-related personnel, including court clerks, court reporters and bailiffs who execute judicial directives,⁹¹ essentially under common law agency theory.⁹² Judicial immunity has been held to apply to such non-judicial personnel acts as the filing of papers or docketing of proceedings;⁹³ filing an order for commitment;⁹⁴ or refusing to furnish plaintiff with a portion of a state criminal trial transcript.⁹⁵ Although these

⁹⁰ Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976).

⁹¹ Johnson v. Reagon, 524 F. 2d 1123 (C.A. 9 1975); Cruz v. Skelton, 502 F. 2d 1101 (C.A. 5 1974); Silver v. Dickson, 403 F. 2d 642 (C.A. 9 1968), cert. denied, 394 U.S. 990 (1969); Meyer v. Curran, F. Supp. 512 (E.D. Pa. 1975).

⁹² Robichaud v. Ronan, 351 F. 2d 533 (CA-9 1965).

⁹³ Ginsburg v. Stein, 125 F. Supp. 596 (W.D. Pa. 1954).

⁹⁴ Rhodes v. Heuston, 202 F. Supp. 724 (N.D. Neb. 1962).

⁹⁵ Stewart v. Minnick, 408 F. 2d 826 (C.A. 9. 1969)

tasks are based upon judicial acts, because they are essentially ministerial on the employee's part, requiring no exercise of discretion or judgment, they have been interpreted to be merely mechanical extensions of the court's judicial acts and, as such, have been extended a grant of immunity.

Note, however, that for the cloak of quasi-judicial immunity to be afforded to court-related personnel in executing directives of a judge, the acts of such personnel must have been conducted in connection with a case before the court. For example, in Sherwood v. Farrar,⁹⁶ a court administrator's plea of judicial immunity was held invalid in a sex discrimination suit. The court ruled that the defendant's dismissal of plaintiff was an "administrative act" performed not in the course of or incident to the actual decision of a case before the court.

Thus, judicial immunity afforded judges is also extended to court personnel in executing directives of the court. However, such immunity will not apply to either judges or court personnel for acts which are not in the course of or incident to a court decision. Thus, if a judge or court administrator is faced with a Title VII action for discriminatory employment practices within a court system, a plea of judicial or quasi-judicial immunity will not bar the action.

II. LIMITATIONS ON THE SCOPE OF TITLE VII: EXEMPT EMPLOYEES

The 1972 Amendments to the Civil Rights Act exempt elected officials and a narrow class of persons whom such officials might

⁹⁶ 9 EPD §10,202 (W.D. Mich 1975).

appoint from the provisions of Title VII. This section will examine such exemption provision as it applies to both elected and appointed officials and will seek to assess how such application may affect state courts.

The Exemption Provision

The exemption provision states:

"The term employee means an individual employed by an employer, except that the term employee shall not include any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level, or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a state government, governmental agency or political subdivision." ⁹⁷

The Act provides an express exemption for elected officials. ⁹⁸

Also exempted are an elected official's immediate high level advisors including:

- A person chosen to serve on his personal staff;
- An appointee on a policy-making level, and
- An immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

This narrow class of persons are those who work in a personal and confidential relationship in advising elected officials on how to proceed in addressing their political as well as executive or legislative functions. Exemption of these types of persons from the provisions

⁹⁷ 42 U.S.C.A. §2000(e)-(f).

⁹⁸ A major reason for including this exemption provision appears to have been a belief, at least in part, that the election process in state government would otherwise be exposed to potential litigation alleging voter prejudice. See, 118 Cong. Rec. 4493 (1972), discussion between Senators Ervin and Williams on how the EEO Act without amendment might affect state/federal relations.

of the Act was intended to allow elected officials to have absolute discretion in choosing their select advisors. However, as the Senate debate indicated, this provision was intended to be construed narrowly, and was to apply only to an elected official's immediate first line advisors, and not to persons working for such advisors.⁹⁹

Elected Officials

Whether an employee is exempt will depend upon whether such person is deemed to be an employee or appointee, and will be largely determined by the facts of each individual case.¹⁰⁰ In making such determination, the courts will look to several factors:

- 1) State law;
- 2) Nature of the job in relation to an elected official;
- 3) Political nature of the position in question.

State laws carry great weight in assisting courts in deciding who is an exempt employee. If state laws outline the nature of the relationship between an elected official and his appointee, the court will examine thoroughly what that relationship is. For example, in the Kyles case (supra, n.100) where a former deputy sheriff sued his former employer alleging employment discrimination, the court held that Louisiana law clearly indicated that the relationship between a sheriff and his deputies was that of appointor/appointee. Accordingly,

⁹⁹ See, 118 Cong. Rec. 4496-97 (1972). Discussion between Senators Ervin, Williams, and Javits on the scope and intention of the proposed (exemption) amendment by Senator Ervin.

¹⁰⁰ Only four cases have addressed 42 U.S.C.A. §2000(e)(f):

Howard v. Ward County, 418 F. Supp. 495 (1976); Kyles v. Calcasieu Parish Sheriff's Department 395 F. Supp. 1307 (1975); Wall v. Coleman, 393 F. Supp. 826 (1975); and Gearhart v. State of Oregon, 410 F. Supp. 597 (1976).

the sheriff had complete freedom in making appointments. Deputies served at his discretion and had to rely on a personal relationship with the sheriff in order to retain their jobs. Moreover, the court observed that deputies were, by law, public officials rather than public employees, further indicating that the position did not fall into a conventional employer/employee context. For these reasons, the court concluded that deputy sheriffs in Louisiana were members of the sheriff's personal staff and were therefore exempt.

Likewise, in Wall v. Coleman (supra, n.100), where a female attorney sued alleging sex discrimination, Georgia state law was cited by the court as the basis for its finding that the relationship between the county attorney and his assistants was also that of appointor/appointee. Assistants stand in the shoes of the county attorney in that they are his official representatives. Moreover, hiring, firing and promotions are within the complete discretion of the county attorney and are not subject to state or local administrative restrictions.

The Howard case (supra, n.100), however, reached a contrary conclusion. In that case, a female deputy sheriff in North Dakota alleged sex discrimination. Defendant claimed that she was an exempt employee as a member of the sheriff's personal staff. However, unlike the situation in Kyles and Wall where the relationship to the elected official was by law that of appointor/appointee, North Dakota law specifically established that sheriff's deputies were employees of the county, not the sheriff. Thus, the county had the power to determine the number of deputies the sheriff could employ and their rate of pay. Because the sheriff's discretion in selecting and retaining deputies

was so limited by county administrative control, the relationship was found to be that of employer/employee, rather than appointor/appointee, and the employee's action was permitted to proceed.

The nature of the job in relation to the elected official is another major factor utilized by the court in determining whether an employee is exempt. In Gearhart (supra, n.100) a deputy legislative counsel sued alleging sex discrimination. Plaintiff's employer (the senate's legislative counsel) contended that plaintiff was an exempt employee because she did legislative research and drafting for members of the legislature. The court ruled that she was not an exempt employee because her job was technical and research-oriented and was not the type of position Congress was trying to exempt when it excepted close policy-making advisors deemed vital to assisting elected officials from the scope of the Act. Although she worked indirectly for legislators in drafting bills and conducting research, she had not, in fact, been appointed by an elected public official. The legislative counsel hired, directed, and supervised her.¹⁰¹ Consequently, her working relationship with an elected official was remote.

Appointed Officials

The express exemption in the Act for elected officials and their appointees does not extend to appointees of such exempt appointees. Nor, obviously, does it extend to other appointed officials or to appointees of such officials, either by express or implied reference.

¹⁰¹ Plaintiff was appointed to her job by an official who himself was appointed. Therefore, based on the standards for appointive officials, plaintiff could not have been exempt (infra, n. 102).

An interpretive memorandum from EEOC indicates that appointments by any appointed official, regardless of whether or not the appointing official is himself/herself exempt, are not covered by the exemption provision of Title VII:

"In no case is any person exempt who is appointed by an appointed official whether or not the latter is himself exempt."¹⁰²

Preliminary Conclusions

Thus, in determining whether an employee is exempt, a court will most likely assume the following:

- 1) An individual who works for an elected official is not necessarily exempt (Howard case).
- 2) The more political (no administrative restriction) the nature of the appointment, the more likely the position will be exempt (Kyles and Ward).
- 3) The closer the working relationship between the elected official and the person appointed, with regard to confidential sensitive and highly political matters, the more likely the position will be exempt (Kyles and Ward).
- 4) The more distant the working relationship between the elected official and the appointee, the more likely the position will not be exempt (Gearhart and Howard).
- 5) No one is exempt who is appointed by an appointed official, whether or not the latter is himself exempt. (EEOC Form 164)

Application to State Courts

In courts, judges are the principal persons to whom the exemption provision will apply. Assuming for the moment that Congress intended to include the state judiciary within the coverage of the 1972 amendments, including the exemption provision, an elected judge would obviously

¹⁰²

EEOC Form 164, State and Local Government Information (EEO-4) 1976, pp. 2-3.

CONTINUED

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fall within the exemption provision and would be free to make exempt appointments as provided by the provision. A law clerk, confidential secretary, clerk of court, personal bailiff, court reporter or court administrator, for example, might be exempt positions. Precisely what staff persons or how many an elected judge may appoint will depend on how the factors outlined in this analysis apply specifically to the judge's individual situation. Note, however, that the exemption provision will be narrowly construed.

Whether appointed judges are or should be exempt is another matter. At least from a strict interpretation of the language of the Act, it would appear that appointed judges and their appointees would not be exempt. However, the practical consequences of such interpretation challenge its validity.

Judges perform the same functions, notwithstanding the manner in which they reach the bench. Their manner of selection bears no rational relationship either to their functions or to their need for or manner of selecting confidential employees. Moreover, in many states and localities, judges within the same jurisdiction are both elected and appointed. A strict application of the exemption provision would require a conclusion that the appointees of some judges would be exempt while appointees to the same positions by other judges on the same bench would not. If Congress intended to include the state judiciary within the coverage of the Act,¹⁰³ it apparently failed to account for the unique characteristics of the judicial selection processes among the

¹⁰³ No reference to the impact of the exemption provision on the judiciary appears in the congressional debate on this question. supra, n. 99.

various states.¹⁰⁴

Assuming again, however, the intention of Congress to include state courts under the Title VII mandate, it might be appropriate to amend the exemption provision to include appointed judges. Such amendment would not restrict, alter or limit the thrust of Title VII or change the courts' legal responsibilities under the Act. Nor would it extend the exemption provision in a manner Congress presumably did not intend.

III. EMPLOYMENT PRACTICES LAW APPLICABLE TO STATE COURTS

If it may be assumed, as concluded elsewhere herein, that Title VII applies to state courts, those employment practices of other employers prohibited under federal case law will likewise be prohibited of state courts. While case law regarding proscribed employment practices in court system settings is relatively limited, a review of decisions regarding employment practices in the public and private sectors generally may be instructive. The following section provides a summary listing of such decisions.

¹⁰⁴It is, of course, possible that Congress did not, in fact, intend to exempt appointed judges. On the other hand, it is at least as reasonable to assume that Congress either did not intend to include the judiciary at all or that, for separation of powers or Tenth Amendment reasons, it did not believe that it was empowered to regulate the state judiciary. For a summary of arguments pro and con regarding application of the exemption provision to appointed judges, see above, Ch. III, pp. 37-38.

Overt Discrimination

Overt discrimination is a deliberate and explicit refusal by an employer to recruit, hire, promote or transfer an individual or group because of race, color, sex, religion or national origin. Discrimination of this type is absolutely forbidden by Title VII and where such a violation is proven, the defendant may be subject to damages, attorneys fees and other equitable relief. While this form of discrimination is not as prevalent as it previously had been, on occasion it still occurs and is still illegal. The following cases declare such overt discrimination illegal:

United States v. Bethlehem Steel, 446 F. 2d 652 (C.A. 2, 1971) (restricting blacks to least desirable jobs).

Weeks v. Southern Bell Telephone and Telegraph Co., 408 F. 2d. 228 (C.A. 5, 1967) (refusal to consider to hire women for jobs as switchmen).

United States v. Ironworkers Local 86, 443 F. 2d 544 (C.A. 9, 1971) (cert. denied, 404 U.S. 984 (refusal to admit minorities into union membership)).

Vogler and United States v. Asbestos Workers, Local 53, 407 F. 2d. 1047 (C.A. 5, 1969) (refusal of union to refer minorities to work).

United States v. Plumbers Local 73, 314 F. Supp. 160 (D.C. Ind. 1969) (refusal to admit minorities into apprentice programs).

Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio, 1968) (deliberate use of test to discourage black applicants from union membership).

United States v. Lee Way Motor Freight Co., 7 EPD 9066 (W.D. Okla. 1973). (refusal to hire blacks, lower rates of pay for blacks).

Information on pp. 87-94 derived from the LEAA Civil Rights Compliance Project report, Principles of Employment Discrimination Law (March 1977), pp. 13-20. The project was conducted by University Research Corporation.

Effects Discrimination: Acts Which are Fair in Form but Discriminatory in Operation

Title VII proscribes not only overt discrimination but also prohibits practices that have a discriminatory effect. If an allegedly neutral employment practice excludes minorities and cannot be shown to be related to job performance, the practice is prohibited. [Griggs v. Duke Power Company, 401 U.S. 424 (1971)]. The Supreme Court said in Griggs:

"The Act proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice will be prohibited." 104A

What follows are examples of some apparently neutral recruitment and hiring standards practices which have been held unlawful by the courts, either because they had a disproportionate impact upon minorities and women or were not job-related:

● Recruitment

Where a workforce is all or substantially all white, reliance upon word-of-mouth dissemination of information about work opportunities is unlawful because it tends to provide information only to the friends and relatives of present employees. Similarly, it is unlawful to give false or misleading information to minority group persons or to fail or refuse to inform them of work opportunities and the procedures for obtaining them. Methods that do not inform minorities and women about work opportunities with the same effectiveness with which whites are informed are illegal. (Examples: word-of-mouth recruitment, employee referrals, reliance on walk-ins, etc.). United States v. Georgia Power Co., 474 F. 2d 906 (C.A. 6 1973), held that lack of advertising and word-of-mouth recruitment are illegal.

104A 401 U.S. 424, at _____

The following cases held illegal the use of employee recommendations and referrals and acceptance of walk-in applicants:

United States v. Sheet Metal Workers, Local 36, 416 F. 2d 123 (C.A. 8, 1969).

United States v. Ironworkers, Local 86, 443 F. 2d 544 (C.A. 9, 1971) cert. denied, 404 U.S. 984 (1972).

Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969), aff'd 437 F. 2d 959 (C.A. 5, 1971).

Lea v. Cone Mills, 301 F. Supp. 97 (M.D.N.C. 1969), aff'd 438 F. 2d 86 (C.A. 4, 1971).

Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (C.A. 8, 1970).

United States v. Lee Way Motor Freight, 7 EPD 9066 (W.D. Okla. 1973).

Wade v. Mississippi Cooperative Extension Service, 372 F. Supp. 126 (N.D. Miss. 1974).

● Hiring Standards

Qualifications which are fair in form but which disproportionately exclude minorities and women have generally been found to be illegal, where such criteria could not be shown to be job-related.

Examples:

- Educational Requirements;
- Tests;
- Relatives Preference;
- Height, Weight, and Physical Characteristics;
- Arrest Records;
- Discharge Due to Garnishment;
- U.S. Citizenship;
- Background Investigations;
- Promotion From Within.

• Educational Requirements

Where it can be shown that minority groups are less likely to possess educational qualifications required by an employer and where such qualifications are not job-related, courts will strike down the use of such criteria:

Griggs v. Duke Power Company, 401 U.S. 424 (1971) (High school diploma requirements discriminated against blacks.)

Armstead v. Starkville Municipal School District, 325 F. Supp. 560 (1971). (Public school board unlawfully discriminated against blacks by requiring specific scores on Graduate Record Examinations that had not been validated as predictors of job performance.)

Roman v. Reynolds Metals Co., 368 F. Supp. 47 (S.D. Tex. 1973) (High school diploma requirement discriminated against Mexican-Americans.)

United States v. Lee Way Motor Freight, 7 EPD 9066 (W.D. Okla. 1973) (Requirement of college degree for management trainee positions discriminated against blacks.)

Frontera v. Sindell (C.A. 6 1975), 44 USLW 2122 (1977). (Fourteenth Amendment's Equal Protection Clause does not require city to administer civil service examination in Spanish to Spanish-speaking applicants.)

• Tests

Tests utilized by employers which disproportionately screen out minorities and women and which are not job-related will be deemed unlawful:

Griggs v. Duke Power Company, 401 U.S. 424 (1971) (Wonderlick tests given all job applicants).

United States v. Georgia Power Co. 474 F. 2d 906 (C.A. 5, 1973) (Personnel Test for Industry, Mechanical Comprehension, and Revised Minnesota Paper Form Board Tests).

Chance v. Board of Education, 458 F. 2d 1167 (C.A. 2, 1972) (New York City teacher promotion exam).

United States v. Jacksonville Terminal, 451 F. 2d 418 (C.A. 5, 1971) (Company constructed promotional exam for position of supervisor in mail room.)

Castro v. Beecher, 459 F. 2d 725 (C.A. 1, 1972). (Massachusetts State Civil Service Police Entrance Exam.)

Walston v. Nonsemond County School Board, 492 F. 2d 919 (C.A. 4, 1974) (National Teacher's examination for selecting teachers.)

Boston Chapter v. Beecher, 371 F. Supp., 507 (D. Mass. 1974) aff'd 8 EPD 9678 (C.A. 1, 1974). (Firefighter test found insufficiently job-related even though it barely met EEOC job validation standards.)

LULAC v. City of Santa Ana, 11 EPD 10818 (1976) (Test height requirements.)

Washington v. Davis, 426 U.S. 229 (1976). (Personnel test which excluded a disproportionately large number of black applicants for police officer was held not violative of due process of Fifth Amendment to U.S. Constitution; more rigorous Title VII standard was held to be inapplicable in reviewing alleged acts of invidious discrimination.)

Shield Club v. City of Cleveland, 8 EPD 9606 (N.D. Ohio 1974) (Exam for promotion to police sergeant had some content validity, but was unlawful because it had adverse impact on blacks and Hispanics and there wasn't a substantial relationship shown between test score and job performance.)

- Relatives Preference

Giving preference to relatives of incumbent employees with respect to employment opportunities is unlawful if said incumbents are substantially non-minority:

Asbestos Workers, Local 53 v. Vogler and United States, 407 F. 2d 1047 (C.A. 5, 1969).

- Height, Weight, and Physical Characteristics

Physical characteristics such as height and weight which have an adverse impact upon minority groups or women are unlawful unless they can be shown to be job-related.

Smith v. City of East Cleveland, 363 F. Supp. 1131, 6 EPD 8831 (N.D. Ohio 1973) (Held that 5'8" and 150 lb. minimum height and weight requirements for police officers unlawfully discriminate against women).

Meadows v. Ford Motor Company, 7 EPD 9103 (W.D. Ky. 1973) (Held that minimum weight requirements of 150 lbs. for positions on assembly lines discriminated against women).

Laffey v. Northwest Airlines, Inc., 7 EPD 9277 (D.D.C. 1974) (Stewardesses' height and weight requirements and ban on eyeglasses held unlawful and ordered remedied).

Dothard v. Rawlinson, ___ U.S. ___, 97 S. Ct. 2720 (1977) (Height and weight requirements for state police and correction officers invalidated.)

Smith v. Troyan (C.A. 6 1975) 44 U.S.L.W. 2050 [(affirming in part and reversing in part, Smith v. City of East Cleveland 363 F. Supp. 113 (N.D. Ohio 1973)]. (Municipality's minimum height requirement of 5'8" for its police officers is rationally related to job and therefore does not unconstitutionally discriminate against women, even though such requirement excludes 95 percent of all women from eligibility.)

- Arrest Records

The use by an employer of an arrest record as a per se disqualification, if it is shown to have a disproportionate impact, is unlawful:

Gregory v. Litton Industries, 316 F. Supp. 401 (C.D. Cal., 1970) aff'd 472 F. 2d 631 (C.A. 9, 1972).

NOTE: In Butts v. Nichols, 8 EPD 9740 (D. Iowa 1974), it was held that a ban on hiring convicted felons for virtually all civil service jobs violates the Equal Protection Clause of the Fourteenth Amendment.

- Discharge Due to Garnishment

The firing of a minority whose wages are required to be garnished is illegal unless it can be shown to be required by business necessity, because a disproportionately higher number of minorities are subjected to garnishment procedures:

Johnson v. Pike, 332 F. Supp. 490 (N.D. Cal. 1971).

Wallace v. Debron Corp. 494 F. 2d 674 (C.A. 8, 1974).

- U.S. Citizenship

While Title VII of the 1964 Civil Rights Act does not prohibit discrimination on the basis of citizenship or alienage [Espinoza v. Farah Manufacturing Co., Inc. 414 U.S. 86, (1973)], the same type of discrimination has been found illegal in other circumstances:

Sugarman v. Dougall, 6 EPD 8682 (U.S. 1973). (The Fourteenth Amendment's equal protection guarantee is abridged where a statute denies aliens the right to hold positions with state governments.)

Wong v. Hampton, 7 EPD 9101 (C.A. 9, 1974) cert. granted, U.S. ___ (1974). (A U.S. Civil Service Commission regulation which indiscriminately excluded all aliens from all positions was found to violate the Due Process Clause of the Fifth Amendment).

Guerra v. Manchester Terminal Corp. 498 F. 2d 641 (C.A. 5, 1974). (Suit may be brought to challenge discrimination by a private employer based on alienage under Section 1981).

NLRB v. Local 1581, International Longshoremen's Assn., 489 F. 2d 635 (C.A. 5, 1974). (Violation of the National Labor Relations Act for a union to induce an employer to give preference to U.S. citizens in job referrals).

Norwich v. Nyquist (S.O.N.Y. 1976) 45 U.S.L.W. 2049. (New York law that bars aliens from employment as public school teachers unless they have applied for U.S. citizenship violates Equal Protection Clause of Fourteenth Amendment.)

- Background Investigation

A number of cases have held general background checks or screening procedures unlawful because some or all of their elements adversely affected minorities and were not shown to be job-related.

Smith v. Olin Chemical Corp. (CA 5 1976) 45 U.S.I.W. 2054
(Complaint challenging as racially discriminatory employer's disqualification for manual labor of workers who suffer from bone degeneration, which is condition commonly resulting from sickle cell anemia disease that affects blacks almost exclusively, sufficiently raises both "intent" and "effect" claims under Title VII of 1964 Civil Rights Act.)

Shield Club v. City of Cleveland, 8 EPD 9614 (N.D. Ohio, 1974)
(personal history interview, background investigation, medical exam, psychological exam, and polygraph test).

United States v. City of Chicago, 549 F. 2d 415 (C.A. 7, 1977)
(police department). (Inquiry into applicant's social status, financial position, family history and military background).

SUMMARY

An adequate legal basis exists for concluding that Title VII applies to state courts. Although some scholars have argued that the enactment and enforcement against courts of Title VII violate the doctrine of separation of powers or abridge the guarantees of the Tenth and Eleventh Amendments, these arguments lack decisional support. Similarly, the judicial immunity argument as a bar to application of Title VII will not apply to non-judicial acts of judges, nor will the cloak of quasi-judicial immunity extend to court personnel in litigation alleging discriminatory employment practices.

Although Congress provided an exemption provision for publicly elected officials and certain of their appointees, a fair and practical application of the provision to the state judicial selection environment may not be feasible. Remedial legislation may be needed to exempt all state court judges and their policy-level appointees from the application of Title VII. Courts will nonetheless continue to be subject to the prohibitions of the Act against improper recruitment, hiring and related employment practices in the administration of non-judicial personnel systems.

CHAPTER VI

FINDINGS AND RECOMMENDATIONS

"Absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a workforce more or less representative of the racial . . . composition of the population . . . from which employees are hired."¹⁰⁵

Although the concepts of EEO and AA have been widely adopted and applied to employment situations in both the public and private sectors, recognition and application of these concepts to judicial system personnel administration have been slow to develop, with few notable exceptions. This report has attempted to quantify and qualify the level of activity and to identify the reasons for this limited level of activity. In this section we will present a summary of our findings and conclusions as well as a series of policy recommendations designed to address the problems described.

Findings

Major problems faced by state courts in the EEO area include the following:

- 1) There is a virtual absence of reliable and accurate data available to court systems and to researcher regarding court system workforce composition and other critical indicators of EEO activity.

¹⁰⁵Teamsters v. United States, 431 U.S. 324, 349, n. 20 (1976)

- 2) There appears to be a significant lack of commitment to EEO/AA activity in some state court systems, attributable in part to continuing legal debate regarding the applicability of Title VII and related legislation to state court systems, as well as to a perceived lack of involvement and initiative in the EEO area by the judicial system leadership in most courts. This lack of commitment is reflected in:
 - the limited number of EEO programs currently in operation in courts;
 - reported underutilization of women and minorities in court systems workforces;
 - underrepresentation of women and minority group members among the state judiciary
- 3) The continuing vitality of certain external institutional factors outside the courts' control inhibit the extent and type of administrative authority which courts can exercise. These include:
 - system of court system financing;
 - fragmented authority for court system personnel administration involving agencies within and without the court systems;
 - tradition of patronage employment; and
 - the nature of the judicial selection process.
- 4) Court systems lack adequate fiscal and human resources to support the development and maintenance of EEO programs in courts, including the absence of a mechanism to effect transfer of EEO technology among courts; and,
- 5) There are fundamental legal questions regarding the applicability of Title VII to courts, including uncertainty regarding the implications of separation of powers, Tenth and Eleventh Amendments, judicial immunity and Title VII exemption provisions.

Recommendations

In response to the findings of this study, a series of recommendations have been developed which were designed both to expand the state-of-the-art of our knowledge about EEO in the Courts environment and to encourage and promote the growing commitment of state court systems to the adoption of EEO programs and policies. These recommendations are presented within the context of a strategy for change which, it is proposed, could be reviewed and evaluated by key public policy decision-makers within and outside the courts in assessing priorities for commitment of future resources to the resolution of the problems identified herein:

1. The state judicial systems should sponsor a comprehensive nation-wide survey of workforce composition in state court systems;
2. An appropriate agency of the Department of Justice, such as the Office of Civil Rights Compliance of LEAA, should develop definitive guidelines on the practical application of EEO laws to state courts, in consultation with the leadership of the state judiciary, in the following areas:
 - The application of the exemption provision of Title VII to appointed judges and their appointees;
 - A working definition of or criteria for determining confidential employees status; and
 - Identification of court service functions which are or should be subject to the provisions of Title VI of the Civil Rights Act.

3. The leadership of each state judicial system should establish a program to promote recruitment of women and minority judges through the cooperative development of EEO policies with state and local bar associations; judicial nominating commissions; state judicial conferences, councils and planning committees; and judicial and executive branch agency appointing authorities.
4. The state court systems judicial leadership should adopt programs designed to encourage and promote the recruitment, training and utilization of women and minority group members in the workforce of the court systems under their jurisdiction. In the development of such programs, courts should:
 - Identify the parameters which inhibit the implementation of EEO concepts;
 - Develop and disseminate a policy statement of EEO commitment (see Appendix F) which is signed by the presiding judge and/or chief administrative official;
 - Collect and evaluate workforce data by race and sex (Appendix G) to determine the EEO posture of the court system and to identify areas in need of corrective action;
 - Cooperate with non-court agencies in the combined development of effective EEO policies and procedures affecting personnel not directly under the court's control;
 - Where appropriate, oversee the operations of certain ancillary court and non-court agencies upon whom the court relies for the effective delivery of justice system services.
5. National judicial organizations representing judges, court administrators, clerks of court and court system planners should consider the development and establishment of model EEO policy statements for their respective membership and constituencies.

6. A National Conference on Equal Employment Opportunity in the Courts should be held in the near future. The purpose of such Conference would be to bring together judges, administrators, attorneys, legal scholars, and legislative and executive agency representatives to discuss major barriers to the implementation of EEO programs in state courts, and to develop a series of program priorities for the next decade.
7. A series of regional seminars for judges and administrators should be held, under the sponsorship of the state court systems judicial leadership, both to promote judicial commitment to EEO, as well as to provide practical advice and training to court personnel system administrators and EEO officers regarding the adoption and maintenance of EEO programs in courts.
8. Programs to encourage state and local court systems to obtain adequate funding and staff support for EEO programs in courts should be developed, including the development of internal EEO planning capabilities such as:
 - Personnel systems and salary classification plans;
 - Procedures to provide for active recruitment of qualified minority candidates and for the development of promotional opportunities for women and minority employees;
 - Design and improvement of personnel recordkeeping techniques; and
 - Development of effective procedures for monitoring EEO compliance
9. A mechanism to promote transfer of EEO expertise and technology from court to court should be established and administered with the cooperation and support of state appellate and trial court administrative personnel, and should be designed to primarily utilize the expertise of such administrative personnel.

Conclusion

This study has attempted to raise the issue of EEO within the judiciary, and to provide a framework for analyzing and understanding the role of relevant federal laws and regulations as they impact upon the judicial branch of government. It is not intended to be a "how-to" manual nor is it offered as a definitive treatment of the subject of EEO in the Courts. Further study is of utmost importance.

Because of the lack of precise data, this report may have drawn certain conclusions with which some may disagree. However, there can be no rational denial that state courts systems appear to exclude from their operations and decision-making process, women and members of minority groups. It is not the intent of this report to condemn specific individuals or groups of individuals, but rather a system that has operated, often unknowingly or unintentionally to the disadvantage of certain identifiable groups in our society.

All who are familiar with employment discrimination problems recognize that litigation is often necessary to force the adoption of requisite remedial measures; however voluntary compliance and affirmative action, hopefully, will reduce substantially the need for such litigation. Furthermore, voluntary efforts by courts will both enhance the integrity of the justice process and serve to eradicate the existence of institutional barriers which have operated to exclude or limit the equitable utilization of women and members of minority groups from meaningful employment opportunities within state court systems.

GLOSSARY OF EEO TERMS

Adverse Impact: The result of practices which produce a selection or benefit rate for members of any racial, ethnic or sex group at a lower rate than members of other groups, or which produce discharge or other sanctions of members of any racial, ethnic or sex group at a greater rate than members of other groups.

Affirmative Action: In employment law, specific actions in recruitment, hiring, upgrading and other areas of employment practices and procedures which are designed and taken for the purpose of eliminating the present effects of past discrimination. One such effect is often underrepresentation of minorities or women.

Affirmative Action Plan: The written plan by which a federal contractor, subcontractor, or employer found unlawfully to have discriminated, must set forth the specific affirmative actions by which it will eliminate and remedy past discrimination against or underutilization of minorities and women.

Affirmative Action Program: Generally used interchangeably with affirmative action plan. A distinction, however, is sometimes made between a "plan" (the undertaking on paper) and a "program" (the actual, on-going efforts).

Affirmative Recruitment: Special recruitment efforts undertaken to assure that qualified minorities and women are well represented as applicants for positions in which they have been excluded or substantially underutilized. Such efforts may include contacting organizations and media with known constituencies of minorities or women, and similar actions. Open job-posting, advertising, and "equal opportunity employer" statements may be necessary in many situations simply as a matter of non-discrimination, rather than as measures of affirmative recruitment.

Compliance Agency: In equal employment opportunity law generally, any local, state, or federal government agency which administers laws or regulations in the EEO field. Under EEO requirements for courts, the compliance agency will ordinarily be LEAA or EEOC.

Discrimination, Unlawful: In equal employment opportunity law, actions taken which adversely affect the employment opportunities of one or more individuals who are members of protected classes whether or not such adverse effect is intentional.

Discrimination, Reverse: Used popularly in reference to exclusion of whites or males in favor of minorities or women.

Discrimination, Systemic: An organizational method of operation which by design is not intended to discriminate, but results in a practice which has a discriminatory impact.

Disparate Effect: The tendency for a test, job qualification, or other employment practice to screen out or otherwise limit the employment opportunities of minorities or women at a greater rate than members of the majority.

Disparate Treatment: Employment practices such as the use of tests or educational requirements which are fair and neutral on their face, but which are applied or administered in an unfair manner.

EEO Officer: In courts, the EEO Officer is an official designated to oversee all matters relating to equal employment opportunity in the organization. The position of an EEO Officer may or may not be full-time.

EEO Program (EEOP): Generally the same as an affirmative action plan or program, except that the latter must contain goals and timetables under Revised Order No. 4, while the EEOP may not. A distinction is also sometimes made between a "plan" (the undertaking on paper) and a "program" (the actual, on-going efforts).

Equal Employment Opportunity: A system of employment practices under which individuals are not excluded from any participation, advancement, or benefits because of their race, color, religion, sex, national origin, or other factor which cannot lawfully be the basis for employment actions.

Equal Employment Opportunity Commission (EEOC): The federal government agency mandated to enforce Title VII of the Civil Rights Act of 1964, as amended. The Commission has five members, each appointed to a five year term by the President of the United States with the advice and consent of Congress.

Exempt Positions: (1) Elected officials and a narrow class of appointees of such officials who have a close personal and confidential relationship with such officials. Such positions are exempt from the enforcement and protection provisions of Title VII. (2) In merit personnel systems, persons considered to be part of management, for collective bargaining and related purposes. Persons classified as exempt in a personnel classification system are not necessarily exempt from Title VII.

Fair Employment Practice Commission (FEPC): A state or local government agency which administers state or local laws, regulations, or ordinances prohibiting employment discrimination on the basis of sex, minority status and/or other factors. Sometimes referred to a human relations commission or human rights agency.

Goals and Timetables: Objectives fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available, which should be achieved within a reasonable time frame.

Guidelines: Documents published by various compliance agencies for the purpose of clarifying provisions of a law or regulation and indicating how an agency will interpret its law or regulation. For court systems, the most relevant guidelines are those promulgated by LEAA, and codified as 28 CFR 42.301, et. seq., subpart E.

Job Analysis: A detailed analysis of the important knowledge, skills and functions which constitute job performance in a particular job.

Job Category: A grouping or aggregation of job classifications for purposes of analysis or official reporting. Examples: officials and managers, professional, technical, para professional, office and clerical, etc.

Job Classification: The specific position designation for jobs with certain functions and responsibilities. Examples: Secretary I, Clerk-Typist III, Administrative Assistant, Security Guard, Assistant Professor. The term Job Title is sometimes used interchangeably with Job Classification, but the latter term implies a greater degree of analysis of particular jobs and of the methods by which job titles are assigned.

Job Description: Description of the actual work to be performed by the incumbent in a particular position. Written job descriptions are necessary to establish comparability of various positions to determine pay, eligibility for promotion and other matters. Job descriptions are generally subject to change as individuals are given new tasks to perform or relieved of others.

Job Qualifications: Requirements of education, experience, minimum age and other factors to be considered in determining if employed or potential employees should be hired, transferred, or promoted into a particular job. Job qualifications which have the effect of screening out minorities or women at a greater rate than others must be validated, i.e., proven by the employer to be closely related to job performance in the particular job to which the qualifications apply.

Merit Principles: The underlying philosophy on which most public personnel systems are established. Under the Intergovernmental Personnel Act of 1971, these principles are: 1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment; 2) providing equitable and adequate compensation; 3) training employees, as needed, to assure high-quality performance; 4) retaining employees on the basis of the adequacy of their performance, correcting inadequate performance and separating employees whose inadequate performance cannot be corrected; 5) assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens; and 6) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official

authority for the purpose of interfering with or affecting the result of an election or nomination for office.

Minority: For EEO official reporting purposes, and for purposes of the workforce analysis, the term "minority" includes male and female Blacks, Hispanics, Asians, Pacific Islanders, American Indians, and Alaskan natives. LEAA Guidelines 28 CFR 42.302(e) further specifies that Hispanics include those of Latin American, Cuban, Mexican, Puerto Rican or Spanish origin; and American Indian includes Eskimos and Aleuts.

Nondiscrimination: Equal employment opportunity as it was generally defined in the initial phases of development the law of equal employment opportunity: Either overt and intentional discrimination or absence of affirmative action to eliminate the effects of past discrimination, whether intentional or not. The "Nondiscrimination Clause" required in federal government contracts has been expanded through later regulations (Revised Order No. 4) to include the requirement for written affirmative action plans with goals and timetables.

Parity: Generally, in EEO matters, the employment of women and minority group members in various job categories at rates approximating the rates at which qualified members of those groups are available for employment in those job categories. Contrary to some widely held misconceptions, there is no federal law or regulation requiring achievement of parity (see also GOALS and TIMETABLES, and QUOTAS).

Pattern or Practices of Discrimination: An act or series of actions which consistently result in a disproportionate impact on female and/or minority applicants or employees. Most patterns and practices of discrimination are the result of processes which have evolved over time, and are considered neutral although they still produce the effect of past discriminatory practices.

Protected Classes: As popularly used, the term refers to minority groups whose members have been subject to large scale employment discrimination in recent years, and to women. Title VII, however, protects any person--including a white male--who is discriminated against because of his or her race, color, religion, sex, or national origin.

Quotas: In employment law, court-ordered hiring and/or promotion of specified numbers or ratios of minorities or women in positions from which a court has found they have been excluded as a result of unlawful discrimination. Quotas which discriminate against males and/or members of the majority in hiring or promotions cannot be undertaken by an employer without court sanction. Quotas are not the same as goals and timetables.

Ratio Hiring: Under a court ordered quota-hiring formula, a system by which separate eligibility lists are established for whites and/or males on one hand and minorities and/or women on the other hand, where an employer is required to select candidates from each list in a specified ratio for a given period of time or until a given representation of minorities and/or women is achieved in the positions covered by the court order. Voluntary ratio hiring is unlawful.

Relevant Labor Market: In estimating the availability of minorities and women for jobs in particular categories, the labor market from which candidates are normally drawn for those jobs. For courts, this would include the jurisdictional boundaries of a court system.

Rule of Three: A rule, maintained in many civil service systems, under which the appointing agency must first make a job offer to one of the three top ranking candidates on an eligibility list before moving down the list. Ranking usually involves a test score and assignment of veterans' preference points. It may also include a scoring system for education, experience, and similar factors, depending on the laws and regulations of the particular jurisdiction. In some civil service systems, there is a Rule of Five, in some even a Rule of One.

Selection Procedure: Under the Uniform Guidelines on Employee Selection procedures:

"Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests and physical, educational and work experience requirements through informal or casual interviews and unscored application forms."

Sex Discrimination: In employment, exclusion or disparate or unfavorable treatment of an individual because of his or her sex.

Statistically Significant: Of numerically or other mathematically sufficient quality to make a judgment based on statistical analysis. If, for example, 40 of 100 Blacks and 90 out of 100 whites taking a pre-employment test pass it, the numbers are statistically significant enough to establish "disparate effect".

Upward Mobility: Creation of conditions in which minorities and women can achieve advancement from lower positions to higher positions from which they have been excluded in the past. This is generally accomplished through efforts to eliminate discriminatory barriers and through training programs co-sponsored by employers and the government.

Utilization Analysis: An analysis conducted by an employer to determine whether or not minorities and women are employed in each major job classification (see JOB CLASSIFICATION and JOB CATEGORY) at a rate consistent with the availability of validly qualified minorities and women in the relevant labor market for the positions covered by each job category. A utilization analysis is a required element of any EEO program.

Workforce Analysis: ". . . a listing of each job title as it appears in applicable collective bargaining agreements or payroll records (not job group) ranked from lowest paid to highest paid within each department or other similar organizational unit including departmental or unit supervision." Such an analysis, required under Revised Order No. 4, must be set forth in a manner showing the normal lines of progression as well as the sex and minority status of the incumbents in all positions.

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APPENDIX A

APPENDIX A

STATE _____

DATE _____

EEO IN THE COURTS PROJECT -- TELEPHONE SURVEY

GENERAL INFORMATION

1. Name, title of person being interviewed

2. Identify office, address

Scope of administrative authority

3. Administrative scope of state court administrator's office

4. How are employees paid?

_____ total state _____%

_____ county _____%

_____ city _____%

5. How many employees does the court have (excluding judges)

6. Do you know the approximate number or percentage of employees who are:

_____ Black

_____ Oriental

_____ White

_____ Native Indians

_____ Spanish Speaking

At what levels of the workforce do you have:

minority representation

female representation

7. Is the Court's ability to attract minority employees prevented by any of the following:

- is suitable housing available in reasonable proximity to the work site?

- is suitable transportation (public or private) available to the work site?

8. Are computers used to compile employment statistics?

JUDICIAL/POLITICAL STRUCTURE

9. Approximate number of judges in your state _____

_____ % minority composition _____ % female composition

10. How are judges selected?

_____ elected

_____ executive appointment

_____ combination of above

Term of Office

If appointed, by whom and under what procedure?

Are qualified minority and women recruited to serve as judges? _____

Explain

STATUS OF JUDICIAL PERSONNEL POLICIES

11. Does the management system for court employees include the following:

	Supreme	Appellate	General Juris.	Local Juris
<input type="checkbox"/> written job descriptions				
<input type="checkbox"/> job classification plans				
<input type="checkbox"/> salary administration plan				
<input type="checkbox"/> performance evaluation procedures				
<input type="checkbox"/> internal grievance procedures				
<input type="checkbox"/> formal recruiting for new employees (as opposed to word of mouth)				
<input type="checkbox"/> In house training available for upward mobility of employees				
<input type="checkbox"/> External training available for upward mobility of employees				

EEO/AFFIRMATIVE ACTION STATUS

12. Excluding judges, is there an affirmative action POLICY for employees of the courts?

If yes:

- o Issued by whom (name/office)
- o When adopted
- o Who is covered

If not, do you know of any local judicial EEO policies?

- o _____ approximate percentage of jurisdiction with such a policy
- o issued by (name/office)
- o when
- o coverage

NOTE-If there is no EEO Policy--skip to Question 22

13. Under the judicial organization plan, what is the effect of such a policy?

- o Is it binding?
- o Who implements it?

14. Is there a written EEO Plan?

- Status (pending, approved, etc.)
- Drafted by
- May we have a copy?
- Who is responsible for its administration?
- Who does she/he report to?
- Name, location of other EEO/personnel officers

15. What statutory authority was used for writing the EEO Plan

16. Are EEO policy decisions binding on other court officials?

- Any exclusions?
- How are policy decisions communicated (reports, letter, verbal, other)
- Separate from the written commitment, is there in fact, on-going support to translate this EEO program into reality?

If so, how and by whom (e.g., Judges, court administrators, etc.)

ROLE OF THE EEO OFFICER

17. Do you have an identified EEO Officer?

What percentage of time is spend on EEO activities? _____

18. Does the EEO Officer's responsibilities include reviewing decisions made concerning:

- | | | |
|---|---|---------------------------------------|
| <input type="checkbox"/> recruitment | <input type="checkbox"/> testing | <input type="checkbox"/> interviewing |
| <input type="checkbox"/> selection | <input type="checkbox"/> promotion | <input type="checkbox"/> transfers |
| <input type="checkbox"/> pay increases | <input type="checkbox"/> terminations | <input type="checkbox"/> benefits |
| <input type="checkbox"/> disciplinary actions | <input type="checkbox"/> grievance procedures | |
| <input type="checkbox"/> participates in labor negotiations | | |
| <input type="checkbox"/> development of public relations geared to AA | | |
| <input type="checkbox"/> other | | |

19. Many jurisdictions experience difficulty in administering EEO programs. What are the special problems you have encountered?

20. Is there specific training for EEO Officers?

APPENDIX B

APPENDIX B

SURVEY TABLESTABLE I : TITLE OF RESPONDENT

	ABSOLUTE FREQ	ADJUSTED FREQ (Pct)
Personnel Officer	14	31.1
State Court Administrator	11	24.4
Deputy State Court Admin.	5	11.1
Executive Assistant	5	11.1
Judicial Planner	4	8.9
Assistant Director	1	2.2
Other	5	11.1
No answer	5	Missing
	<hr/>	<hr/>
TOTAL	50	100.0
Valid Cases	45	Missing Cases
		5

TABLE II: SCOPE OF ADMINISTRATIVE AUTHORITY OF ABOVE OFFICE

		ABSOLUTE FREQ	RELATIVE FREQ (Pct)
All Courts		20	40.0
*SCA Office		3	6.0
SCA and/or Sup. Ct.		7	14.0
SCA and Judicial Council		1	2.0
Supreme Court, District Court, or General Juris- diction Courts		8	16.0
Other		5	10.0
No answer		6	12.0
	TOTAL	50	100.0
Valid cases	44	Missing cases	6

TABLE III: REPORTED SOURCES OF COURT FINANCING

		ABSOLUTE FREQ	RELATIVE FREQ (Pct)
(State) Total state		21	42.0
(City) Total City		2	4.0
Mixed		24	48.0
Don't know		1	2.0
		2	4.0
	TOTAL	50	100.0
Valid cases	48	Missing Cases	2

*State Court Administrator will be abbreviated as SCA in all following charts.

TABLE IV: USE OF COMPUTERS TO COMPILE EMPLOYMENT STATISTICS

			ABSOLUTE FREQ	RELATIVE FREQ (Pct)
Yes			12	24.0
No			34	68.0
No answer			4	8.0
		TOTAL	50	100.0
Valid cases	46	Missing cases	4	

TABLE V: PROFESSIONAL AND NON-PROFESSIONAL MINORITY GROUP
REPRESENTATION IN COURT SYSTEMS

			ABSOLUTE FREQ	ADJUSTED FREQ (Pct)
Non-Professional only			10	21.7
Professional and Non-Professional			23	50.0
Don't know or incomplete data			10	21.7
None			3	6.5
No answer			4	Missing
		TOTAL	50	100.0
Valid cases	46	Missing cases	4	

TABLE VI: PROFESSIONAL AND NON-PROFESSIONAL FEMALE REPRESENTATION
IN COURT SYSTEMS

		ABSOLUTE FREQ	ADJUSTED FREQ (Pct)
Non-professional only		1	2.1
Professional and Non-professional		38	80.9
Don't know		8	17.0
No answer		3	Missing
	TOTAL	50	100.0
Valid cases	47	Missing cases	3

TABLE VII: PRESENCE OF AN EEO POLICY

		ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Yes		20	40.0
2. No		21	42.0
3. Limited to selected courts		2	4.0
Missing cases		7	14.0
	TOTAL	50	100.0
Valid cases	43	Missing cases	7

TABLE VIII: PRESENCE OF A WRITTEN EEO PROGRAM

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Yes	16	32.0
2. No	10	20.0
3. Don't know	12	24.0
4. No answer	1	2.0
5. Missing cases	11	22.0
	<hr/>	<hr/>
TOTAL	50	100.0
Valid cases	39	Missing cases 11

TABLE IX: IS THERE SUPPORT TO IMPLEMENT AN EEO PROGRAM?

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Yes	16	32.0
2. No	4	8.0
3. N/A	15	30.0
4. Missing cases	15	30.0
	<hr/>	<hr/>
TOTAL	50	100.0
Valid cases	35	Missing cases 15

TABLE X: WHO PROVIDES SUPPORT TO THE EEO PROGRAM?

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Judges	4	8.0
2. Court administrators	6	12.0
3. Combined judge/SCA	4	8.0
4. N/A	15	30.0
5. Missing cases or no response	21	42.0
	<hr/>	<hr/>
TOTAL	50	100.0
Valid cases 29	Missing cases 21	

TABLE XI: HAS YOUR COURT DEMONSTRATED AN INTEREST IN THE DEVELOPMENT
OF AN EEO POLICY OR PROGRAM?

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Yes	12	24.0
2. No	10	20.0
3. Not App.	19	38.0
4. Missing cases	9	18.0
	<hr/>	<hr/>
TOTAL	50	100.0
Valid cases 41	Missing cases 9	

TABLE XII: IS THE EEO POLICY AND/PROGRAM BINDING ON COURT OFFICIALS

		ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Yes		7	14.0
2. No		8	16.0
3. Sometimes		8	16.0
4. N/A		16	32.0
5. No answer		1	2.0
6. Missing cases		10	20.0
	TOTAL	50	100.0
Valid cases	40	Missing cases	10

TABLE XIII: IS THERE AN IDENTIFIED EEO OFFICER?

		ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Yes		18	36.0
2. No		13	26.0
3. N/A		1	2.0
4. Missing cases or no response		18	36.0
	TOTAL	50	100.0
Valid cases	32	Missing cases	18

TABLE XIV: WHAT PERCENTAGE OF TIME DOES THE EEO OFFICER SPEND ON EEO ACTIVITIES?

		ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1.	Less than 20%	14	28.0
2.	Between 41 and 100%	3	6.0
3.	Don't know	2	4.0
4.	N/A	14	28.0
5.	Missing cases or no response	17	34.0
TOTAL		50	100.0
Valid cases	33	Missing cases	17

TABLE XV: HOW ARE EMPLOYEES INFORMED OF THEIR RIGHTS AND RESPONSIBILITIES PURSUANT TO EEO LAWS?

		ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1.	Bulletin boards	4	8.0
2.	Newsletters	1	2.0
3.	Internal communication	7	14.0
4.	All of above	7	14.0
5.	Don't know	1	2.0
6.	N/A	9	18.0
TOTAL		21	42.0
TOTAL		50	100.0
Valid cases	29	Missing cases	21

TABLE XVI: SPECIAL PROBLEMS TO IMPLEMENTATION OF EEO

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. None	5	10.0
2. Difficulty of control in decentralized systems	2	4.0
3. Small minority population	2	4.0
4. Lack of minority skills	4	8.0
5. EEO plan is token	1	2.0
6. Lack of EEO technical expertise	1	2.0
7. Union opposition	1	2.0
8. Other	5	10.0
9. N/A	12	24.0
Missing cases	17	34.0
TOTAL	50	100.0
Valid cases	33	Missing cases 17

TABLE XVII: ARE QUALIFIED WOMEN AND MINORITY GROUPS RECRUITED
TO SERVE AS JUDGES?

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. Yes	8	16.0
2. No	29	58.0
3. Don't know	8	16.0
4. No answer	5	10.0
TOTAL	50	100.0
Valid cases	45	Missing cases 5

TABLE XVIII: FORMAL OR INFORMAL COMPLAINTS REGARDING PROBATION

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. No	22	44.0
2. Yes but unknown number	3	6.0
3. Yes, greater than 4	1	2.0
4. Don't know	13	26.0
5. Missing cases	11	22.0
	<hr/>	<hr/>
TOTAL	50	100.0
Valid cases	39	Missing cases
		11

TABLE XIX: FORMAL OR INFORMAL COMPLAINTS REGARDING THE AVAILABILITY OF TRANSLATORS

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. No	18	36.0
2. Yes but unknown number	5	10.0
3. Less than 4	1	2.0
4. Greater than 4	1	2.0
5. Don't know	13	26.0
6. Missing cases	12	24.0
	<hr/>	<hr/>
TOTAL	50	100.0
Valid cases	38	Missing cases
		12

TABLE XX: FORMAL OR INFORMAL COMPLAINTS REGARDING PLEA BARGAINING

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. No	21	42.0
2. Yes but unknown number	5	10.0
3. Yes, less than 4	1	2.0
5. Don't know	12	24.0
6. Missing cases	11	22.0
	50	100.0
TOTAL		
Valid cases	39	Missing cases 11

TABLE XXI: FORMAL OR INFORMAL COMPLAINTS REGARDING DISCRIMINATION
IN COMPOSITION OF JURIES

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)
1. No complaints	17	34.0
2. Yes but unknown number	7	14.0
3. Yes, less than 4	3	6.0
4. Yes, greater than 4	2	4.0
5. Don't know	11	22.0
6. Missing cases	10	20.0
	50	100.0
TOTAL		
Valid cases	40	Missing cases 10

TABLE XXII: FORMAL OR INFORMAL COMPLAINTS REGARDING DISCRIMINATION
IN SENTENCING

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)	
1. No	21	42.0	
2. Yes but unknown number	5	10.0	
3. Yes, less than 4	1	2.0	
4. Don't know	12	24.0	
5. Missing cases	11	22.0	
	<hr/>	<hr/>	
TOTAL	50	100.0	
Valid cases	39	Missing cases	11

TABLE XXIII: APPROXIMATE NUMBER OF FORMAL CHARGES OF DISCRIMINATION

	ABSOLUTE FREQ	RELATIVE FREQ (Pct)	
1. 1-10	11	22.0	
2. 11-20	2	4.0	
3. 21-30	1	2.0	
4. N/A	26	52.0	
5. Missing cases	10	20.0	
	<hr/>	<hr/>	
TOTAL	50	100.0	
Valid cases	40	Missing cases	10

APPENDIX C

The primary research tool utilized by project staff was a questionnaire (See Appendix A) administered to representatives of 51 state court administrative offices. Questionnaire responses were verified through follow-up telephone contact with the state court administrator of each jurisdiction and/or the administrator's representative (see Appendix B, Table 1). Complete or partial responses were received from 47 jurisdictions. In addition, project staff identified some 15 additional state and local judicial personnel systems which had indicated or were reported to be particularly active in the EEO area, in part to validate survey findings, but also to assess the approaches being used in those jurisdictions to respond to EEO/AA requirements. Although the resources of the project did not permit a complete survey of all statewide and local court systems, project staff endeavored to obtain a representative sample of responses from unified and non-unified court systems; rural and urban court systems; state-funded and locally funded systems; merit and patronage systems; as well as court systems operating in every state and the District of Columbia.

Respondents were asked to provide three general kinds of information which were perceived to be reliable indicators of the EEO environment in state courts:

- workforce composition: relative employment status of women and minority group members within the local judicial environment;
- level of EEO-related activities, including:
 - evidence of judicial leadership commitment to EEO;
 - existence of EEO officer;

- existence of EEO programs, policies or plans;
- evidence of public concern over potentially discriminatory court services practices;
- o history and level of EEO related litigation involving judicial system personnel.

STATISTICAL METHODOLOGY

Frequency distributions were computed for each set of variables for which an adequate number of responses were received. These frequency distributions constituted the primary basis for analysis of the 110 variables utilized. Data were analyzed in terms of absolute, relative and adjusted frequencies. Absolute frequency refers to a numerical figure which reflects the aggregate number of answers received from respondents to each question, or sets of questions; relative frequency is the conversion of these numbers into percentage rates, with 100% representing the total number of respondents in the questionnaire survey, including those who did not answer a specific question or set of questions; adjusted frequency is the conversion of these same numbers into percentage rates, with 100% representing the total number of respondents in the questionnaire survey less those who did not respond to a specific question or set of questions.

In addition, Fisher exact probability and χ^2 analysis tests were applied to 35 sets of paired variables; however, the results were not deemed to be statistically significant.*

*Twenty-three sets of paired variables were not significant at the .05 probability level.

APPENDIX D

Many courts identify certain employees as confidential because the nature of their responsibilities place them in a close and confidential working relationship with a specific judge. Such employees are usually selected personally by the judge in question and outside of, or "exempt" from the normal merit selection process. Examples of job positions so identified by the personnel rules of three states are:

- (12) "Special employee" is an employee directly responsible to a Justice or Judge or State Court Administrator and appointed by him. Special employees are secretaries and law clerks at the Supreme Court level and the Court of Appeals level; secretary, court reporter, and bailiff at the district court level; and secretary and deputy director at the Administrative Office of the Courts level.

"Judicial System Personnel Rules and Classifications", New Mexico, (1974)

Judicial Appointments. All staff directly attached to a judicial department are employed directly by the Judge, who establishes all conditions of employment. This specifically pertains to courtroom clerks, bailiff-secretaries, and court reporters.

"Personnel Policies for Employees of the Circuit Court, Multnomah County", (Oregon, 1973)

Confidential Employees. (1) The confidential employees of a justice or a judge shall be appointed by the justice or judge.

(2) Confidential employees of each justice of the supreme court and judge of the court of appeals shall include a secretary and a law clerk.

(3) Confidential employees of a district judge may include reporter, division clerk, and either a bailiff or a bailiff-law clerk and none other.

(4) Confidential employees of a county judge in a multi-judge county court may include a reporter, division clerk, and either a bailiff or a bailiff-law clerk and none other, except that if mechanical recording equipment is used, the employee shall be a clerk-stenographer rather than a reporter.

"Judicial System Personnel Rules", (Colorado, 1970)

APPENDIX E .

"S U B P A R T E"

C H E C K L I S T

SUBPART E

SEC. 42.303 - EVALUATION OF EMPLOYMENT OPPORTUNITIES

(c) Specific analyses: (required by Sec. 42.304 (g) (1))

(1) An analysis of present representation of women and minority persons in all job categories;

(2) An analysis of all recruitment and employment selection procedures for the preceding fiscal year, including:

1. position descriptions
2. application forms
3. recruitment methods
4. recruitment sources
5. interview procedures
6. test administration
7. test validity
8. educational prerequisites
9. referral procedures
10. final selection methods

(3) An analysis of seniority practices and provisions:

1. upgrading
2. promotional procedures
3. transfer procedures
 - lateral
 - vertical
4. training programs
 - formal
 - informal

(4) A reasonable assessment to determine whether minority employment is inhibited by external factors such as:

1. access to suitable housing
2. suitable transportation
 - public
 - private
3. other

SEC. 42.304 - WRITTEN EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

- (a) A job classification table or chart which clearly indicates for each job classification or assignment the number of employees within each respective job category classified by race, sex and national origin:
1. principal duties
 2. rates of pay
 3. auxiliary duties or more than one rate of pay because of:
 - length of service
 - other factors
 4. shifts of duty
 - various locations
- (b) The number of disciplinary actions taken against employees by race, sex, and national origin within the preceding fiscal year:
1. suspension indefinitely
 2. suspension for a term
 3. loss of pay
 4. written reprimand
 5. oral reprimand
 6. other
- (c) The number of individuals by race, sex, and national origin.....
1. applying for employment
 2. offered employment
 3. actually hired
- (d) The number of employees in each job category by race, sex, and national origin who made application for promotion or transfer:
1. applied for promotion
 - promoted
 2. applied for transfer
 - transferred
- (e) The number of employees by race, sex, and national origin who were terminated - identify by race, sex, and national origin which were:
1. voluntary terminations
 2. involuntary termination

(f) Available community and area labor characteristics within the relevant geographical area including total population, workforce and existing unemployment by race, sex, and national origin:

1. Bureau of Labor Statistics, D.C.
2. State and local services
3. Other

(g) A detailed narrative statement setting forth the recipient's existing employment policies and practices defined in Sec. 42.202(b) Subpart D.

1. Statement should include the recipient's detailed analysis of existing employment policies, procedures, and practices as they relate to employment or minorities and women (see Sec. 42.303) and where improvements are necessary, the statement should set forth in detail the specific steps the recipient will take for the achievement of full and equal employment opportunity. (See pg. 1 of check-list, Sec. 42.303(c)).

2. The recipient should also set forth a program for recruitment of minority persons based on an informed judgment of what is necessary to attract minority applications--

- (i) dissemination of posters
- (ii) advertising media patronized by minorities
- (iii) minority group contacts
- (iv) community relations programs
- (v) other

(h) Plan for dissemination of the applicant's Equal Employment Opportunity Program to all personnel, applicants and the general public.

(i) Specific personnel to implement and maintain EEOP.

APPENDIX F

_____ COURT

EQUAL EMPLOYMENT OPPORTUNITY PROGRAM
POLICY STATEMENT

It is the Policy of _____
to provide equal employment opportunities without regard to race, color, religion, sex, age, national origin or handicapped status, except when a bona fide occupational qualification. (Include additional state or local protected classes for your area). This policy applies to all phases of personnel administration including, but not limited to, recruitment, selection, placement, promotion, demotion, transfer, lay-off, recall or termination, rates of pay or other forms of compensation and selection for training, to the use of all facilities and participation in all court-sponsored employee activities.

Furthermore, failure of any employee to perform in a manner consistent with this policy shall constitute grounds for reprimand, suspension, demotion, or dismissal from the employment of the court.

This court submits this plan to assure its commitment to a program that provides an Equal Employment Opportunity to all persons on the basis of merit.

ADOPTED BY THE _____ ON _____, 19

Chief Judge

SAMPLE POLICY STATEMENT USED BY THE SUPREME COURT OF FLORIDA

SUPREME COURT OF FLORIDA
EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

Statement of Policy

It is the policy of the Supreme Court of Florida to comply with current applicable state and federal statutes in recognition of its obligation to provide equal employment opportunity and public services on a nondiscriminatory basis. No person shall, on the basis of race, religion, marital status, age, creed, color, sex, national origin, or status with regard to disability or handicap be excluded from participation in, be deprived of the benefits of, or be subjected to discrimination under any programs or services provided by the Supreme Court of Florida. The Supreme Court of Florida reaffirms its continued commitment to affirmative action to ensure equal opportunity in all areas of employment, and to provide employment opportunities based on individual merit.

(signature, Chief Justice)

Supreme Court of Florida

APPENDIX G

EEO Assessment by ORGANIZATIONAL UNIT - Criminal Division, Civil, etc.

FROM _____ TO _____

DATE _____

JOB CATEGORY	MALE						FEMALE					
	White	Black	Span. Sur. Amer.	Asian Amer.	Amer. Indian	Other	White	Black	Span. Sur. Amer.	Asian Amer.	Amer. Indian	Other
Officials/ Administrators												
Professionals												
Technicians												
Protective Service												
Para-Professional												
Office/Clerical												
Skilled Craft												
Service/ Maintenance												

TOTAL

WORKFORCE ANALYSIS BY RACE AND SEX

DATE _____

DISTRIBUTION BY JOB CATEGORY

Job Categories Established by EEOC	Total Employ.	Total Males	White	Black	S.S.A.	Asian Amer.	Amer. Indian	Other	Total Females	White	Black	S.S.A.	Asian Amer.	Amer. Indian	Other
Officials/ Administrators															
%															
Professionals															
%															
Technicians															
%															
Protective Service															
%															
Para-Professionals															
%															
Office/Clerical															
%															
Skilled Craft															
%															
Service/ Maintenance															
%															
TOTAL WORKFORCE															
%															

CONVERSION OF COURT JOB TITLES TO FEDERAL EEO JOB CATEGORIES

OFFICIALS AND MANAGERS

Court Administrators
Directors
Clerks of Court (non-elected)

PROFESSIONALS

Attorneys	Analysts
Law Clerks (degreed)	Personnel Technicians
Supervisors (general)	Law Librarians
Court Related Counselors	Law Librarian Assistants
Masters, law trained	Systems Analysts
Magistrates, law trained	Psychologists
Justices of the Peace, law trained	Psychiatrists
Commissioners	Statisticians
Referees, law trained	Accountants
Court Planners	Budget Officers
Continuing Legal Education	

TECHNICIANS

Court Reporters	Programmers
Computer Operators	Microfilm Processors/Developers

PROTECTIVE SERVICE

Security Guards	Marshals
Bailiffs	Process Servers

PARA PROFESSIONALS

Law Clerks (non degreed)	Magistrates (non degreed)
Research Assistants	Appraisers
Justice of the Peace (non degreed)	Examiners
Referees (non degreed)	Assignment Officers
Masters (non degreed)	Legal Secretaries

OFFICE/CLERICAL

Deputy Clerks of Court	Clerk Typists
Court Transcribers	Stenographers
Criers	Secretaries
Bookkeepers	Statistical Clerks
Office Machine Operators	EDP Clerks
Microfilm Clerks	Key Punch Operators
Personnel Aides	

SKILLED CRAFTS

Mechanics
Repair Workers
Maintenance Supervisors
Building Operators

SERVICE/MAINTENANCE

Library Aides
Drivers/Chauffeurs
Maintenance Workers
Janitorial Personnel

Storekeepers
Stock Clerks
Groundskeepers

END