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ABSTRACT

Recent legislation has required affirmative action in the hiring practices of educational institutions. In order to ascertain the effects of equal employment laws on community college administration in California, a questionnaire was prepared and sent to 98 California community college districts; it requested administrators to provide information regarding their personal experiences with Notices of Charge of Employment Discrimination. Of the 74 college districts responding, 28 (37.8 percent) had received such notices; the majority were charges of sex discrimination. Written comments added to the questionnaires indicate the administrators' dissatisfaction with the procedures; they claim that they are assumed guilty until proven innocent, that the paperwork involved in defense is monumental, and that the length of litigation is extensive. According to the author, the federal and state "Guidelines" and "Regulations" were written to direct employers who hire workers in large numbers to perform jobs whose outputs can be measured quantitatively; they are thus only vaguely appropriate for educational institutions. Also, because the agencies bringing the charges represent the plaintiff and also act as the judge of the case, they are not neutral fact finders. The various laws, agencies, and problems associated with affirmative action are discussed. (DC)

NOTICE OF CHARGE OF EMPLOYMENT DISCRIMINATION-- PRELUDE TO FACT FINDING OR WITCH HUNT?

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February 1975

INTRODUCTION

Until recently, there were no laws covering discrimination in public education. The Equal Employment Opportunity Act of 1972, expanding Title VII of the Civil Rights Act, covers educational institutions. The Equal Pay Act now covers faculty and administrative positions. Title IX of the Education Amendments of 1972 prohibits sex discrimination against employees and students in all federally assisted programs. Discrimination is now both a legal and a moral issue.

No rational intelligent educator would argue against the need and purpose for equal employment opportunity laws which, of course, are to eliminate discrimination from the employment process on the basis of race, religion, color, national origin, sex and age. The concern of educators focuses on the reality that there are numerous instances in history where well-intended laws have created problems because over-zealous or misdirected bureaucrats have modes of operation that are unwieldy, dogmatic and improper. In some cases, laws have been interpreted more broadly by the enforcers than originally intended by the legislators. There is little justice in designing equal employment laws that create a new tyranny because they are not administered in a fair and just manner. It is the responsibility of every educator to undertake affirmative action programs to assure equal employment opportunities. It is equally important that the academic integrity and independence of our institutions not be surrendered to the government bureaucracy.

Sufficient concern has been expressed by those educators of higher education who have been filed with, and/or investigated by the Division of Higher Education in the Office for Civil Rights of the United States Department of Health, Education, and Welfare (HEW), the United States Equal Employment Opportunity Commission (EEOC), and the California Fair Employment Practices Commission (FEPC) to warrant a study of the problem.

ANALYSIS OF RESPONSES TO A QUESTIONNAIRE--NOTICE OF CHARGE OF DISCRIMINATION

A questionnaire was prepared and sent by the author to ninety-eight California Community Colleges and their administrators were requested to provide information regarding their personal experiences regarding Notices of Charge of Employment Discrimination. Responses were received from seventy-four colleges, which is a 75.5 per cent response.

Dr. Jerry C. Garlock, Coordinator of Research - El Camino College, made an analysis of the data contained in the returned questionnaires which is reported in Research Report OIR 75-5. Information reported in this section of the paper is excerpted from Dr. Garlock's study. (A copy of Research

Report OIR 75-5 is available upon request.)

Of the 74 community college districts responding to the questionnaire, 28 (37.8 per cent) indicated that their college had received a Notice of Charge of Discrimination. Of these 28 colleges having received a Notice of Charge of Discrimination, the following analysis of the data was made. Table 1 indicates the number and per cent of charges emanating from various agencies authorized to make such charges.

Table 1

NUMBER AND PER CENT OF CHARGES FROM VARIOUS SOURCES

SOURCE OF NOTIFICATION OF CHARGE	NUMBER	PER-CENT
Equal Employment Opportunity Commission	17	60.7
Department of Health, Education, and Welfare, Office for Civil Rights	6	21.4
California State Fair Employment Practices Commission	13	46.4

When these colleges were asked to indicate when these notices were received, it was found that the earliest date that notification was given was June 25, 1971; and the most recent was issued the same month as the questionnaire of the present study.

The preponderance of charges (63.1 per cent) were issued in 1974. For each agency, more than one-half of all charges were issued in 1974. Data from the questionnaires do not indicate the reasons for the high incidence of charges in 1974. At the present point in time, only alternative hypotheses can be suggested, including such examples as colleges have more discrimination in 1974, agencies have greater staffs in 1974, advertising has increased the number of charges, overt encouragement by various agencies, groups, and individuals increased the number of charges, there is increased societal awareness of affirmative action, an indulgent attitude of agencies in attempting to remedy the problem, and a variety of political and social hypotheses.

Sixteen (or 57.1 per cent) of the 28 colleges being charged indicated that the college was visited at least once in a scheduled visitation. More than one-half of the visits were made in 1974 and January 1975.

The basis for discrimination was indicated according to the four categories generally used by the Equal Employment Opportunity Commission--race or color, sex, religion, and national origin. The number and per cent indicating these categories of discrimination are presented in Table 4.

Table 4

NUMBER AND PER CENT OF ALLEGED BASES OF DISCRIMINATION

BASIS	NUMBER	PER CENT
Race or Color	10	35.7
Sex	18	64.3
Religion	1	3.6
National Origin	6	21.4

The per cents are based upon the 28 colleges having received notices. In some cases, more than one category was checked. For example, race or color, and sex may have been checked by the same person. Sex was checked by 18 (or 64.3 per cent), which was the category checked most. This category was followed by race or color (10 or 35.7 per cent), national origin (six or 21.4 per cent), and religion (one or 3.6 per cent). It is interesting to note that there are more filing on the base of sex than for the total of each of the other three categories.

A summary of the questionnaire indicating how the cases were resolved is shown in Table 6.

Table 6

NUMBER AND PER CENT INDICATING HOW THE CASE WAS RESOLVED

RESOLUTION	NUMBER Yes	% Yes	NUMBER No	% No
Still Pending	22	78.6	2	7.1
Guilty of Charge of Non-Compliance	0	0.0	3	10.7
Absolved of Charge of Non-Compliance	3	10.7	1	3.6
Conciliation Agreement Accepted	4	14.3	1	3.6
Action Pending	3	10.7	3	10.7

The data indicate that 22 cases (78.6 percent) are still pending. None was guilty of a charge of non-compliance. Three (10.7 per cent) were absolved of the charge of non-compliance and three have action still pending at the time of the present report. Four (14.3 per cent) had a conciliation agreement accepted.

Observations of Administrators

One of the questions in the questionnaire stated: "Please feel free to provide additional information that you believe will be of interest on an additional page." A sampling of administrative observations are listed as follows:

> "To date, the complaint has generated much paper, very little heat, and no light. It would be helpful, however, if the agencies who were so prompt in responding to the request to investigate the charge would be equally diligent in informing us as to its disposition. I guess 'no news' is 'good news.'"
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> "The particular claim was eventually denied but the concern and hours of work necessary to defend our actions were more than should be necessary. This is a situation where the simple filing of a discrimination charge presumes guilt until you prove your innocence. Certainly individuals need to be protected from discriminatory hiring practices, but the employer also deserves some protection from the sick person who can create such an expensive turmoil."
>
> "In my opinion, the following problem areas make it extremely difficult to cooperate with agencies who investigate the charges:
>
> 1. Agencies make a great burden on the institution by demanding volumes of information to be supplied on very short notice;
> 2. Investigators ask loaded questions, and, in my opinion, are not neutral fact finders. One is left with the opinion that the investigation is conducted to support a position that has already been made;
> 3. Investigators violate the principles of due process by failing to properly involve the accuser contrary to the American concept of law, the accused is assumed to be guilty until proved to be otherwise;
> 4. Investigators do not have adequate experience and/or training to qualify them to second-guess an administrative judgment;
> 5. The institution is placed in double and sometimes triple jeopardy when the same individual and/or groups file charges with Health, Education, and Welfare, the Equal Opportunity Commission and

possibly with the California State Fair Employment Practices Commission. This is costly from the standpoint of the institution in time and money, and is most inefficient in terms of governmental operation."

Educational Institutions as Employers

The influences of the Equal Opportunity Act of 1972 have been noticeable in the effect they have had on educational institutions. These institutions must interpret numerous Federal and State Guidelines and Regulations to gauge the fairness of their employment practices. Educators who are confronted with the problem are critical of these Guidelines and Regulations because it is apparent that they were written to direct employers who hire workers in large numbers to perform jobs whose output can be measured quantitatively.

Allegations of discrimination against educational institutions are increasing and it is predicted that "we haven't seen anything yet." In higher education alone the EEOC currently has on file more than 1,600 job bias complaints. Of concern to administrators is the reality that the burden of proof rests with the accused, rather than with the accuser. This is clearly another departure from the American legal system that assumes innocence until proved guilty.

An interesting sideline rests with the active involvement of faculty senates in faculty screening and selection. The question can be asked candidly, how well informed are faculty members about all that is involved in complying with the Act? Innocence is no excuse in the eyes of the law, and administrators must ask how far they are willing to go in taking the brunt of decisions over which they have little or not control. Faculty must be aware of their legal responsibilities in courts of law when they participate in the development of professional standards. Some of the important questions that are involved are:

Should the Ph.D which measures ability to do research have validity for a position that is teacher oriented?

How much weight should be given to teacher evaluation?

Can the policy "publish or perish" survive?

What are fair criteria for salary placement? Are longevity on the job, degrees held, retention of students, or some other measure of productivity valid criteria for selection?

Should faculty have authority for selection of staff when they do not have the commensurate responsibility for affirmative action?

Reasonableness and fairness must be a factor in developing guidelines. The question is: Do mores and traditions in higher education stand the measure of these criteria? Considerable dialogue between members of the educational community and federal agencies is necessary to bridge the gap between the guidelines that exist and those which should apply.

THE NEED FOR LEGAL COUNSEL

During the past decade numerous laws have been passed at the national, state and local levels that have increased the liability of institutions and those who administer and govern the colleges. Equal employment laws would have to be high on the list. New law has brought new areas of specialty for the legal profession. It is not reasonable to expect the educator to understand fully the nature, character, and function of the laws, let alone the statutes and Executive Orders of the President that are too broadly stated to defy lay interpretation.

Notable examples of federal laws and regulations that have an impact on equal employment opportunity on the campuses of private and public colleges are worthy of mention. The Equal Employment Opportunity Commission (EEOC) was established under the Civil Rights Act of 1964. Executive Order 11246 issued in 1965, decreed that contractors doing business with the federal government must agree not to discriminate in employment against any employee because of race, color, religion or national origin. The decree was amended on October 13, 1967, by Executive Order 11375 to prohibit discrimination because of sex. Universities and colleges that are recipients of government contracts in excess of $10,000 are subject to Executive Orders.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Act of 1972, now covers all educational institutions with fifteen or more employees, whether or not they are the recipients of federal monies.

Prior to the Equal Employment Opportunity Act of 1972 the EEOC was limited to investigation, conciliation, filing of Amicus Briefs and assisting with legal expenses. After passage of the act, the EEOC was granted the authority to bring suit against private employers suspected of violating the Civil Rights Act of 1964. The Attorney General was empowered to bring suits against public employees.

The Attorney General's authority to file employment discrimination suits against private employers, labor organizations and employment agencies has now lapsed as required by the 1972 amendments to Title VII of the 1964 Civil Rights Act. EEOC now has exclusive authority in this area.

Also, after the 1972 law was enacted, and Executive Order 11375 was implemented, the Department of Labor set up affirmative action regulations to broaden the employment opportunities for women and minorities and to eliminate discriminatory employment practices. The Office of Civil Rights of the Department of Health, Education, and Welfare (HEW) was charged with the responsibility of enforcing these regulations at institutions of higher education. HEW guidelines require institutions to submit analysis of their work forces and if practices and policies which discriminate are found, institutions must take actions to reverse the impact of such policies in order to continue to receive federal funding.

To further complicate the problem, a complaint of discrimination can be filed with HEW, EEOC, FEPC, or all three. The overlapping jurisdiction of these and other agencies places an institution in a position of having to defend against a single complaint in several agencies. The institution not

only is faced with the loss of federal grants, but the administrators also may be named as defendants in litigation.

An institution is placed at a distinct disadvantage in attempting to defend itself against charges because of the lack of procedures within the Office for Civil Rights and similar organizations governing the investigation and determination of complaints filed with these offices. It is common knowledge that institutions have made repeated complaints that agencies (1) make excessive demands for data, (2) adhere to dubious standards of proof in establishing the existence of discrimination, and (3) do not respond to analysis and plans institutions submit. Institutions have been forced to defend themselves in court cases to a variety of federal investigators as several state and federal agencies share jurisdiction over anti-discrimination. Obviously, there must be some existing models for improved procedure.

Chairman James G. O'Hara of the House Special Subcommittee on Education at a recent hearing of the committee stated that the aim of Title VII of the 1964 Civil Rights Act was to provide equal employment opportunity, not to grant federal agencies authority to order preference in hiring for members of minority groups and women. He also stated that, "only an expanded job market with affirmative action programs can begin to solve the problems." During the question and answer period following Congressman O'Hara's address before the Annual Meeting of the American Council on Education in San Diego he acknowledged that regulations, guidelines and operating policies of some federal agencies are going beyond what Congress intended.

One of the common complaints about the mode of operation of EEOC, HEW and FEPC is that they act in the dual role of prosecutor and judge. It is alleged that procedures of fact finding reveal bias and that the agency is in fact an advocate of the complainant--they are suspect as neutral fact finders. Exposure to such procedures can in no way foster trust and confidence in the agency and those who are charged with the responsibility of administering the laws. Impartiality in fact finding is basic to our concept of justice. Also fundamental to justice is the opportunity to be confronted by the accuser. The accomplishment of the goals of equal employment can, and should be attained in an atmosphere of mutual respect and cooperation. Intimidation should not play a prominent role in the process. Until the laws are clear and the rules for their administration are fair and uniformly enforced the administrator of the college would be foolhardy to deny himself the advice of legal counsel.

In effect, it is believed that the guidelines or rules for anti-bias are too vague to provide guidance to colleges and universities yet broad enough to allow different interest groups to press their respective demands. The dilemma has been called "A lawyer's dream but a client's nightmare." It has been predicted that there will be a decade of litigation over the guidelines.

CONCLUSION

Affirmative action is here to stay. The stories of its demise are highly exaggerated. The government commitment can best be evaluated by its increased budget requests for such programs. Federal and state laws cannot, nor should not be easily discarded. Affirmative action will be around for a long time

and it is essential that the agencies and those institutions they regulate work together to improve the investigatory process and the administration and staffing of the agencies.

A democracy is established and only flourishes when individuals and their institutions are self-critical. Invariably, institutions become healthier and individuals grow in wisdom during the process of self-improvement and self-evaluation. Nature being what it is, the government has a role and a responsibility to help direct the process and stimulate action. We cannot survive as democratic institutions if we surrender our obligations or responsibilities to "the policy of government." The consequence of such action invariably results in dogmatic modes of independent decision making and results in tyranny.