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rule → EW
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Laura Emmett

01/26/98 12:51:24 PM

Record Type: Record

To: Thomas L. Freedman/OPD/EOP

cc:

Subject: OMB mtg. this afternoon re: EEOC reg

Elena wants to make sure that you are going to this. The room # is 472.

----- Forwarded by Laura Emmett/WHO/EOP on 01/26/98 12:51 PM -----



Julie A. Fernandes

01/26/98 10:41:46 AM

.....

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP

Subject: OMB mtg. this afternoon re: EEOC reg

Elena,

As you know, this afternoon at 2pm Sally Katzen is having a meeting (that will include Gen Counsel or Dpty Secy from various agencies) re: proposed EEOC federal sector complaint rule. Sally wants you to know that this will be a decision meeting.

There are several outstanding issues that Sally wants to resolve this afternoon. Her strategy is to try to reach middle-ground compromises on each. The following outlines the current rule, the proposed rule and where Sally wants to try to end up.

1. What happens after an AJ decision?

a. Current

Agency can adopt, modify or reject AJ decision. Either the agency or the complainant can then appeal within the EEOC (OFO).

b. Proposed

AJ decision is final. Agency or complainant can appeal within the EEOC (OFO).

← OK

c. Middle ground?

Sally will likely advocate for a change in the standard of review for EEOC appeals. Currently, there is de novo for facts and law. The EEOC wants to change it to clearly erroneous on the facts. Sally will likely propose substantial evidence for the facts.

2. Reconsideration

a. Current

Agencies can file a formal motion for reconsideration after an adverse decision by the EEOC appellate group.

b. Proposed

No formal process. Commission can reconsider when it believes there is a miscarriage of justice.

c. Middle ground?

Maintain the formal motion for reconsideration, but place a high standard on accepting. Commission will reconsider if they find the prior decision to have been arbitrary or capricious?

Good

3. Pre-complaint attorneys' fees

a. Current

Attorneys fees cannot be awarded for pre-complaint work

b. Proposed

Fees would be permitted for pre-complaint work. EEOC would issue guidance to the AJs about what is reasonable and how to calculate.

OK

c. Middle ground?

Not a lot. Push hard for agency involvement in developing guidance?

According to OMB, both OPM and Treasury have indicated that they intend to seek an OLC opinion on whether EEOC has the authority to take the agency out of the process of reviewing AJ decisions. According to Ellen Vargyas (EEOC Gen Counsel), the EEOC does not think that OLC has the authority to pass on regulations that EEOC promulgates. She has asked us (the WH) to try to intervene to stop the agencies from going to OLC.

The OMB General Counsel takes the position that since OMB has the authority to review the regs promulgated by the EEOC, these rules should not be considered exempt from OLC legal review. Under the OMB Executive Order, one of the parameters for their review is whether the rule is consistent with the applicable statute or law. Thus, the OMB GC is in favor of the OLC review (if the agencies want it) prior to OMB signing off. According to Ellen, the Commissioners may not want to press for this rule if doing so might open up the question of OLC review of their rules generally. Also, Ellen has stated that she is concerned that referral to OLC will delay the promulgation of the rule.

I would not recommend that we intervene to stop the agencies from going to OLC. Ellen's strongest argument for not doing so is rooted in her assertion that an OLC opinion is irrelevant to their authority. However, OMB seems clear on their authority (or that of the agencies) to seek OLC advise on the legality of the rule. Also, if Ellen is right on the substance (that EEOC has the authority to issue this rule) an opinion from OLC confirming that would be helpful (considering the agency opposition). However, if EEOC is without the legal authority, it would not be good for us to go forward.

If we intend on backing the EEOC on their desire to avoid an OLC referral, OMB would like to know before the 2pm meeting. Thanks.

Julie

ISSUE #1 - What happens after an AJ Decision?

	Current Rule	Proposed Rule
Administrative Judge Decision	Agency can adopt, modify, or reject.	Final (agency can appeal to the commission)
Appeal to the Commission (OFO)	Standard of Review = de novo for the facts and the law	Standard of Review = de novo for the law, <u>clearly</u> erroneous for the facts
Reconsideration	Agencies can file a formal motion for reconsideration - standard of review = de novo	Commission can reconsider but there is no formal process; Commission would reconsider in order to avoid a miscarriage of justice

de novo
ab. / error
discovery
- clearly erroneous
systemic grounds

ISSUE #2 - Attorneys Fees

	Current Rule	Proposed Rule
	Attorneys fees or costs incurred prior to filing of formal complaint CANNOT be awarded	Attorneys fees or costs incurred prior to filing of formal complaint CAN be awarded; EEOC to issue guidance for AJs on how to calculate <u>reasonable</u> attorneys fees.

- Current* *Proposed*
- ① - *dismissal basis* → *helps agency*
 - ② - *discovery*
 - ③ *Att'y fees.*



Farah Fawcett



Elton John



December 19, 1997

*Equal Opp.
Exec. Order
GWR*

MEMORANDUM TO THE PRESIDENT

FROM: FRANKLIN RAINES
BRUCE REED

SUBJECT: Proposed Executive Order Entitled "Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government"

SUMMARY: This memorandum forwards for your consideration a proposed Executive Order that was prepared by the White House Office of Domestic Policy. The proposed order would provide a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation, to the extent permitted by law.

BACKGROUND: Current law prohibits discrimination in employment because of race, color, religion, sex, nation origin, handicap, or age. The law is applied to federal government employment through Executive Order 11478, which is entitled "Equal Employment Opportunity in the Federal Government."

It is the policy of this Administration to also prohibit discrimination in employment because of sexual orientation. Most federal agencies have taken actions, where possible, to prohibit discrimination because of sexual orientation in the employment of their personnel. To ensure that there is a uniform policy regarding sexual orientation in federal employment, the proposed order would add sexual orientation to the list of categories for which discrimination is prohibited in Executive Order 11478.

This amendment to the executive order merely clarifies and makes uniform Administration policy, and does not create any new enforcement mechanism. In addition, this proposed change does not affect any policy in the uniformed military or in the provision of health benefits to federal employees.

None of the affected agencies objects to the proposed Executive Order.

RECOMMENDATION: We recommend that you sign the proposed Executive Order.

Attachments.

Executive Order

FURTHER AMENDMENT TO EXECUTIVE ORDER 11478, EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

By the authority vested in me as President of the United States by the Constitution and the laws of the United States, and in order to provide a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation, it is ordered that Executive Order 11478, as amended (“Order”), is further amended as follows:

Section 1. The first sentence of section 1 of the Order is amended by substituting “age, or sexual orientation” for “or age.”

Sec. 2. The third sentence of section 1 of the Order is amended by adding at the end of the sentence “, to the extent permitted by law.”

United States Code, other than sections 4102, 4111(b), and 4112; and designate any such agency or part thereof, or any employee or employees therein previously excepted, as again subject to chapter 41 of Title 5, United States Code, or any provision of that chapter.

(b) The authority under section 4111(a) of Title 5, United States Code, to fix by regulation the extent to which the contributions, awards, and payments referred to in that section may be made to and accepted by employees.

[Sec. 401 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 402. The authority vested in the President by section 4101(6)(B) of Title 5, United States Code, to designate a foreign government or international organization or instrumentality of either as eligible to provide training, is hereby delegated to the head of each agency for his employees except that each such designation shall be made only after the agency head concerned has obtained and given due consideration to the advice of the Department of State thereon prior to the first use of such training facility and thereafter periodically but not less often than every three years.

PART V—REVOCATION OF PRIOR ORDER

SEC. 501. Executive Order No. 10800 of January 15, 1959, is hereby revoked.

Executive Order 11478—Equal employment opportunity in the Federal Government

SOURCE: The provisions of Executive Order 11478 of Aug. 8, 1969, appear at 34 FR 12985, 3 CFR, 1966–1970 Comp., p. 803, unless otherwise noted.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

[Preamble deleted and sec. 1 amended by EO 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer

such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

SEC. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

[Sec. 3 amended by EO 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

SEC. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

[Sec. 4 amended by EO 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

SEC. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

[Sec. 5 amended by EO 12106 of Dec. 28, 1978, 44 FR 1053, 3 CFR, 1978 Comp., p. 263]

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

SEC. 8. This Order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970.

December 19, 1997

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SUBJECT: Proposed Executive Order Entitled "Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government"

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BACKGROUND: Current law prohibits discrimination in employment because of race, color, religion, sex, nation origin, handicap, or age. The law is applied to federal government employment through Executive Order 11478, which is entitled "Equal Employment Opportunity in the Federal Government."

It is the policy of this Administration to also prohibit discrimination in employment because of sexual orientation. Most federal agencies have taken actions, where possible, to prohibit discrimination because of sexual orientation in the employment of their personnel. To ensure that there is a uniform policy regarding sexual orientation in federal employment, the proposed order would add sexual orientation to the list of categories for which discrimination is prohibited in Executive Order 11478.

This amendment to the executive order merely clarifies and makes uniform Administration policy, and does not create any new enforcement mechanism. In addition, this proposed change does not affect any policy in the uniformed military or in the provision of health benefits to federal employees.

None of the affected agencies objects to the proposed Executive Order.

RECOMMENDATION: We recommend that you sign the proposed Executive Order.

Attachments.

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[Sec. 401 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

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Chapter 5—Federal Civilian Personnel

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(LW)

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