CHAPTER 2
A Summary of Discrimination Laws

The law envisions that employment decisions will be made without regard to nonmerit factors. If successful, the government as an employer will show neither bias against nor preference toward anyone based on his or her protected class. The mission is indisputably admirable, and the goal is one to which everyone should aspire.

The challenges to engage and utilize the growing diversity of our nation are real. During the writing of this handbook, the Census Bureau was conducting its 2010 census, but, according to the 2005 Census report, the African-American population as of July 1, 2005, was 39.7 million. This figure represents an increase of half a million more than the year earlier representing 13.4% of the population. Latinos were 42.7 million, increasing 3.3% from the previous year, representing 14 percent of the population. In 2005, the nation's minority population totaled 98 million or 33% of the country's population. The Census Bureau predicts that by 2030, the nation will be 19.4% Latino and 14.1% African-American. By 2050, it is predicted that the nation will be 24.3% Latino and 14.7% African-American. Some predictions include that by 2050, whites will be the new minority in the United States.

The increasing diversity of the nation and, consequently the workplace, is a daunting challenge to manage, especially in an EEO context. But in creating their diversity plans, some agencies misunderstand the basic concept that use of a Title VII factor, no matter how well-intended, is generally still unlawful, absent some specific lawful and limited purpose.

As managers, you have heard the term "affirmative action" and you may be asking what the role of affirmative action plans are in the workplace today. The EEOC's Compliance Manual of Race and Color Discrimination (2006) notes:

> In order to open the American workplace to historically excluded groups, some employers use diversity and affirmative action programs. Diversity and affirmative action are related concepts, but the terms have different origins and legal connotations. Workforce diversity is a business management concept under which employers voluntarily promote an inclusive workplace. Employers that value diversity create a culture of respect for individual differences in order to "draw talent and ideas from all segments of the population" and thereby potentially gain a "competitive advantage in the increasingly global economy." Many employers have concluded that a diverse workforce makes a company stronger, more profitable, and a better place to work, and they implement diversity initiatives for competitive reasons rather than in response to discrimination, although such initiatives may also help to avoid discrimination.
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> Title VII permits diversity efforts designed to *open up opportunities* to everyone. For example, if an employer notices that African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force, the employer could adopt strategies to expand the applicant pool of qualified African Americans such as recruiting at schools with high African American enrollment. Similarly, an employer that is changing its hiring practices can take steps to ensure that the practice it selects minimizes the disparate impact on any racial group. For example, an employer that previously required new hires to have a college degree could change this requirement to allow applicants to have a college degree or two years of relevant experience in the field. A need for diversity

> efforts may be prompted by a change in the population's racial demographics, which could reveal an underrepresentation of certain racial groups in the work force in comparison to the current labor pool. (Emphasis added.)

The EEOC points out that Congress drafted the statute broadly to cover race or color discrimination against *anyone*—Whites, Blacks, Asians, Latinos, Arabs, American Indians and Alaska Natives, Native Hawaiians and Pacific Islanders, persons of more than one race, etc.

In practice, although there are exceptions such as efforts to hire persons with disabilities (under the Rehabilitation Act, Section 501 and Executive Order 13163, dated July 26, 2000) and special hiring authorities for some appointment types such as veterans, most employment authorities are competitive in nature. Under current law, in most cases when an employer hires an employee using race, color, sex, or national origin as a reason for the decision, it is a violation of law, absent a valid affirmative action plan. To have a valid affirmative action plan, the plan typically must satisfy three criteria: there must be a *manifest imbalance* in the relevant workforce; the plan must be temporary, seeking to eradicate traditional patterns of segregation; and the plan cannot "unnecessarily trammel the rights" of non-beneficiaries. Such plans have to be narrowly tailored and carefully used in order not to violate the rights of others.

Restated, just as it is illegal *not to* hire, promote, fire someone based on protected bases (sex, national origin, etc.), it is generally illegal *to favor* (hire, promote) an individual because of his or her membership in a protected class.

Understanding the laws and guidance under which this system operates and digesting its evolving case law is a full-time job for persons with analytical abilities, legal training, and significant on-the-job experience. This handbook will not make you an expert in discrimination law, but it is designed to help you understand the basics of the legislation and how it is supposed to work.

Case law decisions and EEOC guidance are in abundance and there is no attempt to reproduce it all here. The EEOC's website is extensive and contains considerable information at http://www.eeoc.gov. Much of the material in this handbook is based on guidance and samples from the EEOC's website, in shortened or reorganized form. A second and comprehensive resource for information is Ernest Hadley's *A Guide to Federal Sector Equal Employment Law & Practice*, which is updated and published annually by Dewey Publications, Inc.

The EEOC has enforcement authority over federal sector discrimination complaints. The EEOC's authority comes from three main pieces of legislation: the Title VII of the 1964 Civil Rights Act, as amended; the Age Discrimination in Employment Act of 1967; and the Rehabilitation Act of 1973, as amended. Other legislation exists and most of it will be mentioned, but knowing about the principal statutes will help you understand how the laws apply and to whom they apply. What you learn will also provide insight into the theories of discrimination. You will also gain more understanding of how those theories might be proven by a complainant or rebutted by agency representatives if the case is litigated rather than settled.

I have not attempted to cover all EEO laws or guidance. It cannot be that detailed, or it would not be a handbook. This handbook is not an authoritative review. It is designed to help management explain its position in EEO cases and to give a foundation upon which to do more research. Knowledge being a powerful tool, it is hoped that the following introductory course equips you with a better understanding of EEO law and goals. Use this knowledge in conjunction with your agency's resources.

I. THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 protects everyone. At the time of its creation, the employment portion of the Civil Rights Act was aimed at ending discrimination against African Americans. However, everyone is presumably of a race, color, sex, religion (or not religious), and has a national origin. With very few exceptions, such factors cannot be the basis for employment decisions. The exceptions, called *bona fide* occupational requirements (BFOQs), are narrowly applied. By law, BFOQs do not apply to race and color but only apply in very limited circumstances to a person's religion, national origin, sex or age.

A. RACE

The term "race" is broadly construed under EEO laws. The EEOC issued guidance on race and color discrimination in its Compliance Manual, Number 915.003, dated April 19, 2006. This comprehensive guidance is on the EEOC's website and is utilized as a basis to describe race and color discrimination in this handbook. Under the guidance, "race" generally encompasses ancestry, physical characteristics, race-linked illnesses, culture, perception, or association with others of a particular race.

Case Study

Jason is interviewed by telephone for a position in New York City. A central duty of the position is to give tours to visitors. Jason is from Alabama and has a fairly heavy accent that sounds "Black." He is otherwise extremely well-qualified for the job and is a highly successful tour guide at museums in the South. The agency does not select him. Notes taken during the interviews show the reason he was not selected was because the selecting official was concerned that Jason would not make a good impression on the myriad of tourists he would guide because of his "Ebonic accent." This is an example of race discrimination as it has roots in Jason's culture.

Keep in mind that race is mostly based on self-identification, and distinctions among races can be difficult to make. The EEOC doesn't bother with differentials and neither should you, because once the employee claims to be of a particular race, it is then incumbent upon that complainant to prove that his or her particular race was a factor under the applicable burdens of proof. Be aware of your own biases and work to overcome them in employment decisions.

B. COLOR

Color and race clearly overlap, but they are not the same. Every shade and complexion is covered under the definition of "color."