U.S. Equal Employment Opportunity Commission

Policy Guidance on Veterans' Preference Under Title VII

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Despite their potential for adversely affecting the employment opportunities of women, veterans' preferences accorded pursuant to statute are not subject to challenge under Title VII by virtue of the exception provided in Section 712 of the Act.[6] That section states:

> Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

42 U.S.C. § 2000e-11 (1982).

In light of Section 712, both the Commission and the courts have found no Title VII violation where a statutory basis exists for an employment preference granted to veterans, even though the preference disadvantages women. For example, in Bannerman v. Department of Youth Authority, 436 F. Supp. 1273, 16 EPD ¶ 8145 (N.D. Cal. 1977), *aff'd per curiam*, 615 F.2d 847, 22 EPD ¶ 30,772 (9th Cir. 1980), the court upheld the defendants' practice of awarding veterans additional points to increase their oral interview scores in making hiring selections for parole agent positions, a practice which competitively disadvantaged female plaintiffs. Under state law, a veteran who receives a passing score on an entrance examination for a civil service position is allowed a credit of 10 points (15 points in the case of disabled veterans) to enhance the rank he achieved. The court held that Section 712 precludes the plaintiffs from attacking the state veterans' preference under Title VII. Nevertheless, the court took judicial notice of the fact that, although the statute was neutral on its face, in practical effect it benefitted male applicants more frequently than female applicants since males have served in the armed forces in disproportionately greater numbers than females. Consequently, when veterans' points were counted, the differences between the scores of men and women were statistically significant. 436 F. Supp. at 1279.

Similarly, in Skillern v. Bolger, 725 F.2d 1121, 33 EPD ¶ 34,064 (7th Cir.), *cert. denied*, 469 U.S. 835, 35 EPD ¶ 34,663 (1984), the court affirmed the involuntary dismissal of the plaintiff's complaint brought under Title VII and the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* (1982), where the plaintiff's inability to obtain employment as a janitor with the Post Office resulted from a federal law that restricts Post Office hirings for custodial positions to veterans as long as veterans remain available, the plaintiff was not a veteran, and the Post Office had a surfeit of applications from veterans. Finding that Section 712 precluded the plaintiff's Title VII challenge of the defendant's hiring practices, the court proceeded to hold that section also precluded recovery under the Rehabilitation Act, even though the latter did not specifically adopt Title VII's veterans' preference provision.[7] The court reasoned that, since the Rehabilitation Act incorporated the rights and remedies provided under Title VII, failure to impute Section 712 to actions brought under the Rehabilitation Act would expand the reach of that Act beyond that of Title VII, a result the court concluded that Congress did not intend. 725 F.2d at 1123.

Like the courts, the Commission has relied on Section 712 in upholding otherwise discriminatory employment preferences for veterans. *See* Commission Decision Nos. 74-64 and 80-21, CCH EEOC Decisions (1983) ¶¶ 6419 and 6812, respectively. In Commission Decision No. 74-64, the Commission concluded that a state employment agency's policy of referring veterans first when filling job orders was not subject to the coverage of Title VII where the policy was based on a combination of both federal and state law, the federal law conditioning the receipt of federal assistance on the state agency's acceptance of certain veterans' preference provisions and the state law incorporating those provisions. Likewise in Commission Decision No. 80-21, the Commission held that Section 712 foreclosed a sex discrimination challenge to the state personnel

agency's utilization of an additional credit of 20% of a veteran's total score on a civil service examination where the veterans' preference points were invoked pursuant to state law.

Voluntary Preferences

In contrast to the foregoing, however, where an employment preference is conferred upon veterans on the employer's own initiative and is not mandated by statute, the discriminatory impact of the preference is not shielded from scrutiny under Title VII. As the language of Section 712 makes clear, the deference provided by that section applies only to veterans' preferences that are created by law and not to those that are voluntarily accorded to veterans by employers. Falling outside the terms of Section 712, voluntary preferences are subject to Title VII adverse impact analysis.

Based on recent national statistics,[8] it is the Commission's position that voluntarily adopted veterans' preferences have an adverse impact on women. Accordingly, in charges raising this issue, the Commission will presume the existence of adverse impact. The presumption may be rebutted, however, where an employer shows that the preference does not adversely affect female applicants or employees based on either more narrowly drawn statistics (e.g., regional or local statistics) or its own applicant flow data/workforce statistics.[9]

Voluntary veterans' preferences have been invalidated on the basis of adverse impact by both the Commission and the courts.[10] For example, in Krenzer v. Ford, 429 F. Supp. 499, 14 EPD ¶ 7514 (D.D.C. 1977), the court concluded that the Veterans Administration's policy of appointing only veterans to positions on the Board of Veterans Appeals violated Title VII where the policy was not founded on any statute, had a disproportionate impact on female attorneys and female physicians, and was not sufficiently job-related to constitute an absolute precondition to appointment despite its impact on women.

Similarly, the court in Bailey v. Southeastern Area Joint Apprenticeship Committee, 561 F. Supp. 895, 31 EPD ¶ 33,604 (N.D. W.Va. 1983), found that defendant's screening mechanism for selecting apprentice boilermakers, which included awarding applicants points on the basis of prior military service, had a disparate impact on women in general and the two female plaintiffs in particular, and that the defendant had not met its burden of showing a legitimate business necessity for the practice. In so holding, the court stated:

> Title VII, unlike various other statutes and government regulations which have been enacted since World War II, does not accord veterans any employment preferences. Rather, Title VII seeks to secure equality of employment opportunity for members of certain protected classes. Inasmuch as veterans are not a protected class under Title VII, the statute leaves no room for a veteran preference which has a disparate impact on a protected class, e.g., women.

561 F. Supp. at 912.[11]

At issue in Brown v. Puget Sound Electrical Apprenticeship & Training Trust, 732 F.2d 726, 34 EPD ¶ 34,338 (9th Cir. 1984), cert. denied, 469 U.S. 1108, 35 EPD ¶ 34,854 (1985), was the defendant's extension of a veterans' age credit adopted in good faith reliance on policies promulgated and endorsed by the U.S. Department of Labor. Although nonveteran applicants to the defendant's apprenticeship program were considered eligible only from age 18 to 26, veterans were allowed to deduct one year from their age for each year of military service, up to a maximum of four years. Noting that the defendant's reliance on Section 712 was misplaced

since no law created the veterans' age credit, the court stated: "The [defendant's] age credit was adopted by a non-governmental private organization. The fact that it was encouraged to do so by an agency that is part of the executive branch of the federal government cannot convert the veterans' age credit into an act of Congress." 732 F.2d at 730-31.

In a divided decision in Brown, the Ninth Circuit nonetheless reversed the district court's holding that the age credit violated Title VII, finding that the credit did not have a discriminatory impact on nonveterans. The majority reasoned that the age credit had no adverse effect whatsoever on women since it provided no preference for veterans but, rather, only allowed some veterans the same amount of time (i.e., eight years) to apply for apprenticeship training as was available to nonveterans, compensating veterans for the time spent in military service during which they were unable to apply for apprenticeship training. *Id.* at 731-32. The dissenting opinion argued, however, that the age credit did have a disparate impact on women since, in the area covered by the program, 8% of males and only 0.2% of females were Vietnam or post-Vietnam veterans and since the effect of the age credit was that, of all applicants aged 26 through 29, only veterans were eligible for apprenticeships. The dissent concluded that, because the preferential treatment had a disparate impact on women, the age credit violated Title VII. Id. at 732-33.

Applying an adverse impact analysis, the Commission invalidated voluntary veterans' preferences in Commission Decision Nos. 77-27 and 77-40, CCH EEOC Decisions (1983) ¶¶ 6577 and 6591, respectively. In Commission Decision No. 77-27, an employer, an international union, and a local union were held jointly responsible for a training program procedure of awarding Vietnam-era veterans a 10% bonus on their test scores in selecting new and inexperienced applicants for entry into the elevator constructor trade. The Commission held the veterans' bonus unlawful in that case since it benefitted men far more often than women and since there was no business justification for it.

By the same token, in Commission Decision No. 77-40, the Commission found a Title VII violation in the respondent's practice, pursuant to an agreement with a teachers association, of granting experience credit for up to three years of military service in determining an employee's starting salary, resulting in the female charging party's being paid less than a male employee performing the same work. Since there was no law in operation that would bring Section 712 into play, the Commission noted that, because the agreement entered into by the respondent was purely voluntary, the respondent was responsible for any unlawfully discriminatory impact it might have. After reviewing the history of restrictions placed on women's access to military service, the Commission concluded:

> The impact of any employment policy favoring veterans of the armed services is clear; women have far fewer opportunities to become veterans. In this case, the blanket, neutral policy of according veterans credit for military experience, irrespective of whether that experience is related to the job in question, operates to discriminate against women generally.

Commission Decision No. 77-40, CCH ¶ 6591 at 4462.

The Commission's position on this issue remains as set forth in Commission Decision Nos. 77-27 and 77-40. Where an employer *voluntarily* accords veterans any form of employment preference, without statutory authorization, the protections contained in Section 712 are inapplicable. Consequently, where the evidence shows that the veterans' preference has an adverse impact on female employees or applicants for employment, the preference constitutes sex discrimination violative of Title VII unless the employer can show

that the preference serves, in a significant way, the legitimate employment goals of the employer. *See* Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 50 EPD ¶ 39,021 (1989), citing Griggs v. Duke Power Co., 401 U.S. 424, 3 EPD ¶ 8137 (1971).

In this regard, the Commission takes administrative notice of the fact that veterans' preferences, by their very nature, have historically placed women as a class at a disadvantage. As the cited statistics show, that disadvantage continues to date. Therefore, it is the Commission's view that such preferences have an adverse impact on women for Title VII purposes. Further, where a preference operates to totally exclude women from employment, an employer's burden of showing business justification for the preference is an especially heavy one.[12]

Preference as Pretext

In closing, the Commission notes that, even in circumstances under which a veterans' preference is authorized by law and the provisions of Section 712 apply, the preference may still run afoul of Title VII where the evidence shows disparate treatment in its application, transforming a valid preference into a pretext for unlawful discrimination. *See* Commission Decision No. 74-64, CCH EEOC Decisions (1983) ¶ 6419 (veterans' preference governed by law is covered by Section 712 where "there is no evidence that it has been administered disparately").[13]

The issue of pretext also arose in Woody v. City of West Miami, 477 F. Supp. 1073, 1080, 22 EPD ¶ 30,605 (S.D. Fla. 1979). In Woody, the court held that the city's policy of hiring retired 20-year service veterans as police officers, which was not based on a veterans' preference statute, was not justified by business necessity and was a pretext for sex discrimination against the female plaintiff since (1) the policy was not uniformly applied, (2) the policy was not necessary to the safe and efficient operation of the police department, (3) the policy was quickly discarded when the lawsuit was filed, and (4) the city hired its first policewoman, a nonveteran, immediately after the suit was filed.[14]

Charge Processing

In accordance with the foregoing discussion, a charge raising the issue of veterans' preference should be investigated and resolved in the following manner:

1) Where the veterans' preference is granted under the authority of a federal, state, territorial, or local law, the preference comes within the exception provided in Section 712 and is not subject to challenge under Title VII. A no cause LOD should be issued after:

a) obtaining a copy of the relevant statute and verifying that the preference extended by the employer is authorized by the statute, and

b) determining that the preference is accorded in a nondiscriminatory manner (i.e., without regard to an individual's protected class status).

Note: if the investigation reveals that the preference was not authorized by law or that it was applied in a discriminatory manner, see instructions below at Nos. 2 and 3, respectively.

2) Where the preference is voluntary (i.e., not authorized by law), it is subject to adverse impact analysis under Title VII. As discussed above, it is the Commission's position based on national statistics that veterans' preferences have an adverse impact on women. *See supra* notes 4, 8 and 9 and accompanying text. Where the employer fails to successfully rebut the Commission's presumption of adverse impact, a cause LOD should be issued unless the employer satisfies its burden of showing business justification. *See supra* note 10 and accompanying text on business justification under Wards Cove.

3) Even where the preference is authorized by law and, thus, otherwise within the scope of Section 712, it is still violative of Title VII if the investigation discloses that the preference is a pretext for discrimination. A cause LOD should be issued where the evidence reveals disparate treatment in the extension or application of the preference.

Questions concerning the application of this policy statement to the facts of a particular charge should be directed to the Regional Attorney for the Commission office in which the charge was filed.

___8/10/90_____ Approved: _____/s/_____
Date Evan J. Kemp, Jr.
Chairman

Footnotes

[1] For a discussion of veterans' preference under the Age Discrimination in Employment Act of 1967, as amended (ADEA), and the Equal Pay Act of 1963 (EPA), see *infra* note 14.

[2] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 261 & nn.6-7, 19 EPD ¶ 9240 (1979). Although the forms vary, veterans' preferences generally fall into one of four categories: (1) preference in appointment, (2) preference in promotion, (3) preference in retention, and (4) additional substantive and procedural protections in disciplinary or removal actions not accorded to nonveterans. B. Schlei and P. Grossman, Employment Discrimination Law, 434 & nn.295-99 (2d ed. 1983).

[3] Feeney, 442 U.S. at 265 & n.12. *See also* Bannerman v. Department of Youth Authority, 436 F. Supp. 1273, 1280, 16 EPD ¶ 8145 (N.D. Cal. 1977), *aff'd per curiam*, 615 F.2d 847, 22 EPD ¶ 30,772 (9th Cir. 1980).

[4] Recent statistics show that, of a total veteran population of 27,227,000, there are 26,019,000 (95.6%) male veterans and 1,208,000 (4.4%) female veterans. Office of Information Management and Statistics, Department of Veterans Affairs, Veteran Population (semi-annual report, 3/31/89).

[5] *See* Feeney, 442 U.S. at 269-70; Krenzer v. Ford, 429 F. Supp. 499, 502, 14 EPD ¶ 7514 (D.D.C. 1977); Anthony v. Commonwealth of Massachusetts, 415 F. Supp. 485, 489-90, 12 EPD ¶ 10,991 (D. Mass. 1976). For an historical overview of limitations placed on women seeking entry into the U.S. armed services, see Feeney, 442 U.S. 269 n.21, and Anthony, 415 F. Supp. at 489-90. *See also* Commission Decision No. 77-40, CCH EEOC Decisions (1983) ¶ 6591.

[6] In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), the Supreme Court upheld a Massachusetts statute that granted an absolute, lifetime hiring preference to veterans against attack under the Equal Protection Clause of the Fourteenth Amendment. In a two-step analysis, the court concluded that the statutory classification was gender-neutral and that, notwithstanding its adverse impact upon the employment opportunities of women, it was not enacted with discriminatory intent. *Id.* at 274-80. The Court noted that the Massachusetts statute was not challenged under Title VII, presumably because of the provision in Section 712 of the Act. *Id.* at 256 n.2.

[7] The Commission notes that the court in Skillern analyzed the discrimination alleged by the plaintiff, a male who suffered from dyslexia, under the disparate treatment rather than the adverse impact theory. The Commission further notes, however, that, although the plaintiff's Title VII basis was not disclosed by the decision, his sex would clearly not give rise to an adverse impact claim under Title VII since veterans' preferences disproportionately favor males. Finally, although the Commission is unaware of any evidence that a veterans' preference would result in discriminatory impact on persons protected by the Rehabilitation Act, the Commission takes no position on whether Title VII's veterans' preference provision extends to the Rehabilitation Act, as held by the Seventh Circuit.

[8] *See supra* note 4.

[9] *Cf.* EEOC Compl. Man., Vol. II, Section 604, Theories of Discrimination, Appendix B (Conviction Records - Statistics).

[10] Although the court cases and Commission decisions discussed in this section were decided prior to the Supreme Court's recent decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), and in reliance upon the earlier decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), it is the Commission's position that, for purposes of these veterans' preference cases, the business justification standard set forth in Wards Cove is not dissimilar to that in Griggs and would not alter the outcome of these cases.

[11] *But cf.* EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 39 EPD ¶ 35,853 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302, 45 EPD ¶ 37,681 (7th Cir. 1988). In performing its multiple regression analyses to disprove alleged sex discrimination against women with regard to compensation, Sears' model included, *inter alia*, veteran status. Finding that the inclusion of a veteran status variable was justified, the court stated:

> Although there are many conflicting opinions of the value of military service in civilian employment, at least in some cases, military service is related to higher starting salaries, and can be related to higher job performance. If nothing else, the variable measures a type of pre-Sears experience which, like any pre-Sears experience, can affect checklist starting salary.

628 F. Supp. at 1349.

[12] *Cf.* Krenzer v. Ford, 429 F. Supp. 499, 503 (D.D.C. 1977) (relying on Griggs, court noted that employer's burden of showing that "veterans only" policy was job-related was a particularly heavy burden where the requirement, if not met, was an absolute bar to employment).

[13] *See also* Skillern v. Bolger, 725 F.2d 1121, 1123 (7th Cir.), *cert. denied*, 469 U.S. 835 (1984) (plaintiff did not present one shred of evidence that the real reason he was not hired grew out of his handicap and not his failure to have served in the armed forces).

[14] Although this policy guidance addresses the issue of veterans' preferences solely in a Title VII context, the Commission notes that a related issue may arise under the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.* (1982), where a veterans' preference is challenged as discriminating against persons in the protected age group. Even though the ADEA, unlike Title VII, contains no veterans' preference provision, an employer might assert in defense to such a claim that veteran status is a "reasonable factor other than age" under Section 4(f) (1) of the ADEA. *See, e.g.*, Marshall v. Goodyear Tire & Rubber Co., 19 EPD ¶ 8973 at 6050 (W.D. Tenn. 1979) (employer failed to establish reasonable factor other than age defense in state employment office's referral preference for Vietnam veterans where, inter alia, Vietnam veterans over age 40 were rejected); Hodgson v. Approved Personnel Service, Inc., 529 F.2d 760, 767-68 n.14, 10 EPD ¶ 10,472 (4th Cir. 1975) (no ADEA violation in employment agency's help-wanted ads addressed to returning veterans where ads time-related to end of Vietnam war and not all returning veterans were young). The Commission further notes that a similar issue may be presented under the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (1) (1982). While the EPA, like the ADEA, is silent on the issue of veterans' preferences, veteran status may also be claimed to constitute a "factor other than sex" for purposes of justifying a pay differential between male and female employees. *See, e.g.*, Fallon v. State of Illinois, 882 F.2d 1206, 1211-12, 51 EPD ¶ 39,255 (7th Cir. 1989) (where state statute required that Veterans Service Officers (VSOs), but not Veterans Service Officer Associates (VSOAs), be wartime veterans, state employer's defense that difference in pay between VSOs (all male) and VSOAs (all female) was based on VSOs' veteran status was improperly rejected by district court as matter of law; reversing and remanding, appellate court noted the relation between veteran status and job at issue in that case and stated: "If applied in good faith and in nondiscriminatory manner, we believe that wartime veteran status can be a legitimate factor other than sex"). Because veteran status is so closely connected to sex, however, it is the Commission's position that, if such status bears no relationship to the requirements of the job or to the individual's performance of the job, the employer will probably not be able to sustain the defense. *Cf.* Commission's EPA Interpretations, 29 C.F.R. § 1620.21 (1989) ("head of household" status). Generally, to qualify as a valid factor other than sex, veteran status should be job-related and applied nondiscriminatorily. *See* EEOC Compl. Man. § 708, EPA Defenses (particularly §§ 708.5 and 708.6).