

OFFICE OF MANAGEMENT AND BUDGET

***Legislative Reference Division
Labor-Welfare-Personnel Branch***

Telecopier Transmittal SheetFROM: Melinda HaskinsPHONE: 395- 3923DATE: 9/1/99TIME: 11:50 a.m.Pages sent (including transmittal sheet): 2**COMMENTS:**

State Department's comments on revised EDAPA
draft bill.

TO: Nicole Rabner
Eddie Carria
Peter Rundle
Ellen Vargas

PLEASE CALL THE PERSON(S) NAMED ABOVE FOR IMMEDIATE PICK-UP.

Subject:**un/discrimination against parents MDR TOS***Revised EDAPA**Draft Bill*

Our comments remain essentially the same as before. 1) As lawyers entrusted w/defending the Dept in EEO actions, we believe no case has been made for extending the discrimination laws to parents. 2) It is unfair to limit the bill to only persons who have children. As we commented before, the bill should be extended to non-parents. For example: why should it be lawful for me to impose more onerous burdens on non-parents because they have the ability to work late or work rigid hours, thereby denying them an employment opportunity.

.....
Edward W. Correia
.....

08/04/99 11:32:48 AM
.....

Record Type: Record

To: Melinda D. Haskins/OMB/EOP@EOP

cc: See the distribution list at the bottom of this message

Subject: Re: EEOC's Reaction to DOL Edits to EDAPA Draft Bill 

I'm sorry but I can't be on the 3:00 call. As for the EEOC reaction to the DOL edits, I don't think the definition of parent is quite right. First, doesn't the first clause include a parent of a child under 18 and the second clause does as well? Second, the "reasonably anticipated in the near future" is quite broad. However, maybe it's OK to start out with that. If we do that, then there is no need to include (6), which sweeps in such cases as protracted child custody fights.

So I suggest using this definition: "Parent" means a person who has parental responsibilities with regard to a child under the age of 18 or with regard to a person over the age of 18 who is incapable of self-care because of a physical or mental disability, including: [then use the current text except drop (6)]

Message Copied To: _____

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adrien.silas@usdoj.gov @ inet
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Other comments?

From: Melinda D. Haskins on 08/04/99 01:29:46 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: FW: DOL's Informal Edits on the EEOC Draft Bill - "Ending Discrimination Against Parents Act" -Repl

FYI.

----- Forwarded by Melinda D. Haskins/OMB/EOP on 08/04/99 01:28 PM -----



"Silas, Adrien" <Adrien.Silas@usdoj.gov>

08/04/99 12:31:34 PM

Record Type: Record

To: Melinda D. Haskins/OMB/EOP

cc:

Subject: FW: DOL's Informal Edits on the EEOC Draft Bill - "Ending Discrimination Against Parents Act" -Repl

The attached came from our Civil Division folks and have been shared with our Civil Rights folks. I thought that you should have them as well.

-----Original Message-----

From: Marleigh Dover

Sent: Monday, August 02, 1999 9:50 AM

To: Silas, Adrien

Subject: FW: DOL's Informal Edits on the EEOC Draft Bill - "Ending Discrimination Against Parents Act" -Repl

DOL's line edits solve the problem I had with the prohibition against discrimination based on "parental status" having the unintended effect of not permitting benefits to parents. ✓

Civil continues to believe that the remedy for discrimination against parents should be the same as under Title VII, the ADA, and the Rehabilitation Act-- compensatory damages should be capped as under 42 U.S.C. 1981a(b)(3) and compensatory damages should not be available in mixed motive cases as under 42 U.S.C. 2000e-5(g)(2)(B)(ii).

*damages
compensatory
dam cap*

The Federal government is going to be the largest defendant (by far) under this proposed bill. Suits cannot be brought against the Federal government under 42 U.S.C. 1981. Thus, in all race cases against the Federal government, compensatory damages are capped at \$300,000. It would be anomalous in the extreme to permit unlimited compensatory damages for discrimination against parents but to cap compensatory

damages for discrimination based on race, sex, religion, color, national origin, and disability. Similarly, there is no reason to permit compensatory damages in mixed motive cases (where the employee would have been denied the employment benefit for legitimate reasons in addition to the illegitimate one) where the discrimination is based on being a parent but not when the discrimination is on the basis of race, sex, religion, color, national origin, or disability.



Message Sent To:

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From: Melinda D. Haskins on 08/02/99 10:17:47 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Janet R. Forsgren/OMB/EOP@EOP

Subject: FW: Parental Status Bill -- Belated DOJ - Civil Division Comments

Please review and comment on the DOJ - Civil Division comments on the parental non-discrimination draft bill that are attached below. (Many issues we have already discussed.)

----- Forwarded by Melinda D. Haskins/OMB/EOP on 08/02/99 10:18 AM -----



Silas Adrien <Adrien.Silas@usdoj.gov>

07/30/99 05:20:24 PM

Record Type: Record

To: Melinda D. Haskins/OMB/EOP

cc:

Subject: FW: Parental Status Bill

Here are comments on the proposal from our Civil Division.

-----Original Message-----

From: Marleigh Dover

Sent: Thursday, July 29, 1999 6:02 PM

To: Silas Adrien; Werner Ursula; Norris Branwen;

/DDV=crt04.po(hnorton)/DDT=wpm/O=CIV/P=GOV+DOJ/A=TELEMAIL/C=US/

Subject: Parental Status Bill

I learned today from the Dept. of the Navy that the EEOC has proposed a parental status bill. I checked with OLA and was told that they inadvertently neglected to circulate the bill to Civil. I have taken a quick look at it and on preliminary review have several concerns. (I have also sent it over to the Fed. Programs Branch for their input.)

1) There is no cap on compensatory and punitive damages. Damages are capped under Title VII and the Rehabilitation Act. I can't see why discrimination based on parental status should be treated more favorably than discrimination based on race, disability, etc. Although {1981 does not contain a cap, the federal government cannot be sued under {1981. Thus, in suits against the fed. government, there would be unlimited damages for discrimination based on parental status but not based on race.

2) Title VII does not permit compensatory damages in mixed motive

cases. Again, why with respect to parental status?

3) The definition of discrimination suggests that you cannot treat individuals more favorably because they are parents. This would undermine many benefits that are now provided. My impression is that such was not the intent.

4) The retaliation provision is a bit vague. Is it the intent of the bill to allow "individuals" who are not employees to sue if they have supported an employee and were harassed as a result? Under Title VII, you have to be an employee (or former employee) to sue even if you were supporting somebody else in their eeo activities.

5) Section 7(b) on quotas--I thought no action could be taken based on parental status. How then could you have a quota based on parental status?

6) What administrative process/exhaustion is going to apply?

Message Sent To:

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* numerical
evidence

ENDING DISCRIMINATION AGAINST PARENTS ACT OF 1999

FACT SHEET

The President today transmitted to the Congress the "Ending Discrimination Against Parents Act of 1999." This legislative proposal would ban discrimination against private and public employees on the basis of their status as parents.

The Need for this Legislation

Federal law protects working parents from employment discrimination in a number of important areas. Under Title VII of the Civil Rights Act of 1964, for example, employees are protected from discrimination on the bases of race, sex, national origin, and religion. The Pregnancy Discrimination Act of 1978 further prohibits discrimination against workers on the basis of pregnancy.

Despite these critical protections, there is no existing federal law that protects workers from employment discrimination that is based on their status as parents. Such protection is well warranted, however. Where an employer, an employment agency, or a labor organization acts on the basis of unsubstantiated assumptions that parents – or those who have caretaking responsibilities for others who are physically or mentally incapable of taking care of themselves – are unwilling or unable to make a commitment to their jobs, it injures not only the individuals concerned, but the economy as a whole.

For the individual who is subject to such discrimination, the consequences can be harsh and immediate. Discrimination on the basis of parental status is unfair. Such discrimination deprives the targeted individual of employment opportunities and can rob that person of the ~~fundamental~~ ^{ability to} ~~right to control~~ ^{influence} the progress of his or her career. Such discrimination can also depress the income received by the millions of families who rely on the wages of working parents to make ends meet. It can thus ~~destabilize and~~ limit opportunities for American families.

The economy is similarly disadvantaged by discrimination based on parental status. Such discrimination prevents the optimum utilization of available labor resources and constitutes an unfair method of competition in commerce. Because such discrimination is spread and perpetuated through commerce, moreover, it is a problem that is national in scope.

Ending Discrimination Against Parents Act of 1999

Acting to respond to this problem, President Clinton announced legislation prohibiting employment discrimination against workers because they are parents. The legislation applies to private and public sector employers, as well as employment agencies and labor organizations. The legislation protects individuals who are biological, adoptive, foster, or stepparents of -- as well as those who are actively seeking custody or adoption of and those who stand in loco parentis to -- individuals who are under the age of 18 or who are 18 or over but incapable of self-care because of a mental or physical disability. The legislation bars discrimination on the

basis of parental status in all aspects of employment, including recruitment, referral, hiring, promotions, discharge, training, and other terms and conditions of employment. While this legislation would not prohibit employers from making hiring and promotion decisions on the basis of job performance, it would ensure that workers are not discriminated against simply because they are parents.

The legislation will offer a remedy where, for example, an employer takes a parent off the "fast track" due to unsubstantiated concerns that parents cannot meet the requirements of demanding jobs. Similarly, it will bar employers from preferring applicants without children over equally or better qualified working parents or from refusing to hire single parents. [The legislation will also require that parents be able to use paid leave for child care purposes to the same extent that other employees are able to use it for other personal reasons.]

The scope of the problem has been recognized in the states, eight of which (Alaska, Kentucky, Michigan, Nebraska, New Hampshire, New Jersey, Pennsylvania, and South Dakota), plus the District of Columbia prohibit or authorize prohibition of discrimination based on familial status. The federal government should do no less.

DOL comments 7/29/99

re: parents

A BILL

To prohibit employment discrimination on the basis of parental status, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE. -- This Act may be cited as the “Ending Discrimination Against Parents Act of 1999.”

SECTION 2. FINDINGS.

- (a) XX percent of American workers are parents of children under the age of 18;
- (b) Federal law protects working parents from employment discrimination in a number of important areas. For instance, Title VII of the Civil Rights Act of 1964 prohibits discrimination against workers on the basis of sex; the Americans with Disabilities Act of 1990 prohibits discrimination against workers on the basis of disability; and the Pregnancy Discrimination Act of 1978 prohibits discrimination against workers on the basis of pregnancy. Also, the Family and Medical Leave Act of 1993 provides covered workers job protection when they take time off for certain family responsibilities. Nothing in this law is intended to affect the interpretation or application of these laws.
- (c) However, no existing federal statute protects workers from employment discrimination on the basis of their status as parents.
- (d) Such discrimination against parents occurs where, for example, employers refuse to hire or promote both men and women who are parents based on unwarranted stereotypes or overbroad assumptions about their level of commitment to the work force.
- (e) Such discrimination has occurred in the workplace and has been largely unremedied.
- (f) Such discrimination occurs in both the private and the governmental sectors.
- (g) The existence of such discrimination –

- (1) depresses the income earned by families who rely on the wages of working parents to make ends meet;
 - (2) prevents the optimum utilization of available labor resources;
 - (3) has been spread and perpetuated, through commerce and the channels and instrumentalities of commerce, among the workers of several States;
 - (4) burdens commerce and the free flow of goods in commerce;
 - (5) constitutes an unfair method of competition in commerce;
 - (6) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and
 - (7) interferes with the orderly and fair marketing of goods in commerce.
- (h) Elimination of such discrimination would have positive effects, including –
- (1) providing a solution to problems in the economy created by unfair discrimination on the basis of parental status;
 - (2) promoting stable families by enabling working parents to work free from discrimination on the basis of parental status; and
 - (3) remedying the effects of past discrimination on the basis of parental status.

SECTION 3. PURPOSES

The purposes of this Act are –

- (a) to prohibit employers, employment agencies, and labor organizations from discriminating against persons who have parental responsibilities because of the assumption that they cannot satisfy the requirements of a particular position; and
- (b) to provide meaningful and effective remedies for employment discrimination on the basis of parental responsibilities.

SECTION 4. DEFINITIONS

In this Act:

- (a) “Commission” means the Equal Employment Opportunity Commission.

(b) “Complaining Party” means the Commission, the Attorney General, or any other person who may bring an action or proceeding under this Act.

(c) “Covered Entity” means an employer, employment agency, labor organization, and joint labor-management committee.

(d) “Demonstrates” means meets the burdens of production and persuasion.

(e) “Employee” or “Individual” means:

(1) an individual to whom section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) applies;

(2) an individual to whom section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) an individual to whom section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) a covered employee as defined in section 101(3) of the Congressional Accountability Act of 1995 (2 U.S.C. 1301(3)); and

(5) a covered employee as defined in section 411(c)(1) of title 3, United States Code.

The terms “employee” and “individual” include applicants for employment and former employees.

(f) “Employer” means:

(1) a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has fifteen or more employees (as defined in section 701(f) of such Act (42 U.S.C. 2000e(f)) for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person;

(2) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) an employing office, as defined in section 101(9) of the Congressional Accountability Act of 1995 (2 U.S.C. 1301(9)); and

(5) an employing office as defined in section 411(c)(2) of title 3, United States Code.

The term “employer” does not include a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, United States Code.

(g) “Employment Agency” has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(h) “Incapable of Self-Care” means that the individual requires active assistance or supervision to provide daily self-care in three or more of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, and similar activities.

(i) “Labor Organization” has the meaning given the term in sections 701(d) and (e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d), (e)).

(j) “Office of Compliance” has the meaning given the term in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.).

(k) ~~“Parental Status”~~ “Parent” means ~~having the status of~~ a person who has, or who is reasonably anticipated to have in the near future, parental responsibilities, with regard to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability or who has, or who is reasonably anticipated to have in the near future, the status with regard to such an individual, of:

- (1) a biological parent;
- (2) an adoptive parent;
- (3) a foster parent;
- (4) a stepparent;
- (5) a custodian of a legal ward;

(6) a person who is actively seeking legal custody or adoption; or

(7) an individual standing in loco parentis.

(~~kl~~) “Parental Status” means status of a “Parent.”

(~~lm~~) “Person” has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

(~~mn~~) “Physical or mental disability” means a physical or mental impairment that substantially limits one or more of the major life activities of the individual.

(~~no~~) “State” has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

SECTION 5. DISCRIMINATION PROHIBITED.

(a) **Employer Practices.** -- 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 regard to the compensation, terms, conditions, or privileges of employment of the individual, because ~~of such individual’s parental status~~ such individual is a parent; or

(2) to limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the status of the individual as an employee, because ~~of such individual’s parental status~~ individual is a parent.

(b) **Employment Agency Practices.** -- It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because ~~of the parental status of the individual~~ such individual is a parent or to classify or refer for employment any individual on the basis of the parental status of the individual.

(c) **Labor Organization Practices.** -- It shall be an unlawful employment practice for a labor organization –

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because such individual ~~because of the parental status of the individual~~ is a parent;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect the status of the individual as an employee, because ~~of such individual's parental status~~ individual is a parent; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Act.

(d) Training Programs. -- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because ~~of the parental status of the individual~~ such individual is a parent in admission to, or employment in, any program established to provide apprenticeship or other training.

SECTION 6. RETALIATION AND COERCION PROHIBITED.

(a) Retaliation. -- A covered entity shall not discriminate against an individual because the individual has opposed any act or practice prohibited by this Act or because the individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) Interference, Coercion, or Intimidation. -- A covered entity shall not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of the individual's having exercised or enjoyed, or on account of the individual's having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

SECTION 7. OTHER PROHIBITIONS.

(a) **Collection of Statistics.** -- Notwithstanding any other provision of this Act, the Commission shall not collect statistics on parental status from covered entities, or compel the collection of such statistics by covered entities, outside the context of investigation or litigation of a claim of discrimination under this Act.

(b) **Quotas.** -- A covered entity shall not adopt or implement a quota with respect to parental status.

SECTION 8. MIXED MOTIVE DISCRIMINATION. -- An unlawful employment practice is established under this Act when the complaining party demonstrates that parental status, or retaliation, coercion, intimidation, threats, or interference with an individual as described in section 6 of this Act, was a motivating factor for any employment practice, even though other factors also motivated the practice.

SECTION 9. DISPARATE IMPACT. -- Notwithstanding any other provision of this Act, the fact that an employment practice has a disparate impact, as the term “disparate impact” is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of parental status shall not establish a violation of this Act.

SECTION 10. DEFENSES WHERE ACTIONS TAKEN IN A FOREIGN COUNTRY

(a) It shall not be unlawful under this Act for a covered entity to take any action otherwise prohibited under this Act with respect to an employee in a workplace in a foreign country if compliance with this Act would cause such entity to violate the law of the foreign country in which such workplace is located.

(b) If a covered entity controls a corporation whose place of incorporation is a foreign country, any practice prohibited by this Act engaged in by such corporation shall be presumed to be engaged in by such covered entity.

(1) This Act shall not apply with respect to the foreign operations of a corporation that is a foreign person not controlled by an American covered entity.

(2) For purposes of this subsection, the determination of whether a covered entity controls a corporation shall be based on the factors set forth in section 702(c)(3) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(c)(3)).

(c) This Act shall not apply to an employer with respect to the employment of aliens outside any State.

SECTION 11. ENFORCEMENT AND REMEDIES

(a) Incorporation of Powers, Remedies, and Procedures in Other Civil Rights

Statutes. -- With respect to the administration and enforcement of this Act in the case of a claim alleged by an individual for a violation of this Act, the following statutory provisions are hereby incorporated, and shall, along with the provisions in subsection (b), establish the powers, remedies, procedures, and jurisdiction that this Act provides to the Equal Employment Opportunity Commission, to the Attorney General, to the Librarian of Congress, to the Office of Compliance and its Board of Directors, to the Merit Systems Protection Board, to the President, to courts of the United States, and/or to any other person alleging a violation of any provision of this Act --

(1) for individuals who are covered under title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.), sections 705, 706, 707, 709, 710, 711, and 717 **[how delete affirmative employment provisions?]** of that Act (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9, 2000e-10, and 2000e-16), and sections 7701, 7702, and 7703 of title 5, United States Code, as applicable;

(2) for individuals who are covered under section 302(a) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)), sections 302(b)(1) and 304(b) - (e) of that Act (2 U.S.C. 1202(b)(1), 1220(b)-(e));

(3) for individuals who are covered under section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), sections 201(b)(1), 225, and 401-416 of that Act (2 U.S.C. 1311(b)(1), 1361, 1401-1416); and

(4) for individuals who are covered under section 411(c)(1) of title 3, United States Code, sections 411(b)(1), 435, and 451-456 of that title.

(b) Additional Remedies. --

(1) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a), and except as provided in subsection (b)(2) and in section 12, any covered entity that violates this Act shall be liable for such compensatory or punitive damages as may be appropriate.

(2) Notwithstanding subsection (b)(1),

(i) a State may be liable for compensatory damages only in an action brought by the Attorney General in a court of the United States; and

(ii) a State shall not be liable for punitive damages.

(3) Any sums recovered by the Attorney General pursuant to this subsection (b) or recovered by the Attorney General in a civil action brought pursuant to the provisions incorporated by subsection (a), shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the individual affected. Any such sums not paid to an individual because of inability to do so within a period of three years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(4) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a) or subsection (b)(2) above,

(i) an individual may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official for a violation of this Act; and

(ii) the Attorney General may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official or State for a violation of this Act.

SECTION 12. FEDERAL IMMUNITY. – Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for a violation to the same extent as the remedies are available against a private entity, except that punitive damages are not available.

SECTION 13. POSTING NOTICES. – A covered entity shall post notices for individuals to whom this Act applies, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

SECTION 14. REGULATIONS.

(a) **In General.** Except as provided in subsections (b), (c), and (d) below, the Commission shall have authority to issue regulations to carry out this Act.

(b) **Librarian of Congress.** The Librarian of Congress shall have authority to issue regulations to carry out this Act with respect to employees of the Library of Congress.

(c) **Board.** The Board referred to in section 11(a)(3) of this Act shall have authority to issue regulations to carry out this Act, in accordance with sections 303 and 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1383, 1384), with respect to covered employees as defined in section 101(3) of such Act (2 U.S.C. 1301(3)).

(d) **President.** The President shall have authority to issue regulations to carry out this Act with respect to covered employees as defined in section 411(c)(1) of title 3, United States Code.

SECTION 15. RELATIONSHIP TO OTHER LAWS. – This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or any law of a State or political subdivision of a State.

SECTION 16. SEVERABILITY. – If any provision of this Act, or the application of such provision to any person or circumstances, is held to be invalid, the remainder of this Act and the application of such provision to other persons and circumstances, shall not be affected.

SECTION 17. APPROPRIATIONS. -- There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

SECTION 18. EFFECTIVE DATE. – This Act shall take effect 60 days after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.

55 L 

OFFICE OF MANAGEMENT AND BUDGET

Legislative Reference Division
Labor-Welfare-Personnel Branch

Telecopier Transmittal Sheet



URGENT

FROM: M. Haskins

PHONE: 395- 3923

DATE: 8/2/99

TIME: 12:30 P.M.

Pages sent (including transmittal sheet): 13

COMMENTS:

~~DOE~~ **EEOC** comments on DOL comments
on "parental responsibility".

TO: Nicole Rabner
Eddie Correia

DOL - Herman Natcho
OMB - L. Matlack, D. Park, L. Fairhall,
D. LaPlaca, S. Can, J. Thompson

PL A CALL THE PERSON(S) NAMED ABOVE FOR IMMEDIATE PICK-UP.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

August 2, 1999

MEMORANDUM

TO: Melinda Huskins
Legislative Reference Division
OMB

FROM: William J. White, Jr. *William J. White, Jr.*
Acting Director of Communications and Legislative Affairs

SUBJECT: Ending Discrimination Against Parents Act

EEOC has reviewed the language proposed by the Department of Labor for inclusion in the above-named Act and we think it is a helpful addition to the bill. We have the following concerns about the language:

- The term "parental responsibilities" is currently undefined. A better approach than introducing a new term might be to rely simply on the "in loco parentis" language.
- Those who are "reasonably anticipated to have, in the near future," the status of biological parents include pregnant women. This raises the concern that this bill may overlap with -- and potentially undercut -- Title VII's ban on discrimination based on pregnancy. While, for example, Title VII would permit a charging party to claim that a practice had created a disparate impact based on pregnancy, this bill would disallow such a claim on the basis of parental status. It is unclear, therefore, whether Title VII protections would be undermined. ✓

It is unclear, moreover, whether the bill needs to protect those who are anticipated to have parental responsibilities in the near future. The bill will cover those who stand in loco parentis to a child; that coverage will address concerns about protection of persons who are caring for a child but have not yet finalized adoption or custody arrangements. As a result, I would recommend deleting any language that addresses prospective parental status.]

- The language "discrimination against parents," as integrated by the Department of Labor at various points in the draft, is a useful means to convey that only parents -- and not non-parents -- are protected by this bill. Based on these modifications, I do not believe that the bill needs to define or use the term "parental status" in any clause.

Based on the foregoing, We have redrafted the definition of "parent," and have modified sections of the bill to delete all references to "parental status." We have attached a redlined copy of the bill to identify the places in which changes have been made.

A BILL

To prohibit employment discrimination on the basis of parental status, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE. -- This Act may be cited as the "Ending Discrimination Against Parents Act of 1999."

SECTION 2. FINDINGS.

- (a) XX percent of American workers are parents of children under the age of 18;
- (b) Federal law protects working parents from employment discrimination in a number of important areas. For instance, Title VII of the Civil Rights Act of 1964 prohibits discrimination against workers on the basis of sex; the Americans with Disabilities Act of 1990 prohibits discrimination against workers on the basis of disability; and the Pregnancy Discrimination Act of 1978 prohibits discrimination against workers on the basis of pregnancy. Also, the Family and Medical Leave Act of 1993 provides covered workers job protection when they take time off for certain family responsibilities. Nothing in this law is intended to affect the interpretation or application of these laws.
- (c) However, no existing federal statute protects workers from employment discrimination on the basis of their status as parents.
- (d) Such discrimination against parents occurs where, for example, employers refuse to hire or promote both men and women who are parents based on unwarranted stereotypes or overbroad assumptions about their level of commitment to the work force.
- (e) Such discrimination has occurred in the workplace and has been largely unremedied.
- (f) Such discrimination occurs in both the private and the governmental sectors
- (g) The existence of such discrimination -

- (1) depresses the income earned by families who rely on the wages of working parents to make ends meet;
- (2) prevents the optimum utilization of available labor resources;
- (3) has been spread and perpetuated, through commerce and the channels and instrumentalities of commerce, among the workers of several States;
- (4) burdens commerce and the free flow of goods in commerce;
- (5) constitutes an unfair method of competition in commerce;
- (6) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and
- (7) interferes with the orderly and fair marketing of goods in commerce.
- (h) Elimination of such discrimination would have positive effects, including -
- (1) providing a solution to problems in the economy created by unfair discrimination on the basis of ~~parental status against parents~~;
- (2) promoting stable families by enabling working parents to work free from discrimination on the basis of ~~parental status against parents~~; and
- (3) remedying the effects of past discrimination on the basis of ~~parental status against parents~~.

SECTION 3. PURPOSES

The purposes of this Act are -

- (a) to prohibit employers, employment agencies, and labor organizations from discriminating against persons ~~who have parental responsibilities~~ parents because of the assumption that they cannot satisfy the requirements of a particular position; and
- (b) to provide meaningful and effective remedies for employment discrimination on the basis of ~~parental responsibilities against parents~~.

SECTION 4. DEFINITIONS

In this Act:

- (a) "Commission" means the Equal Employment Opportunity Commission.
- (b) "Complaining Party" means the Commission, the Attorney General, or any other

person who may bring an action or proceeding under this Act.

(c) "Covered Entity" means an employer, employment agency, labor organization, and joint labor-management committee.

(d) "Demonstrator" means meets the burdens of production and persuasion.

(e) "Employee" or "Individual" means:

(1) an individual to whom section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) applies;

(2) an individual to whom section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) an individual to whom section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) a covered employee as defined in section 101(3) of the Congressional Accountability Act of 1995 (2 U.S.C. 1301(3)); and

(5) a covered employee as defined in section 411(c)(1) of title 3, United States Code.

The terms "employee" and "individual" include applicants for employment and former employees.

(f) "Employer" means:

(1) a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has fifteen or more employees (as defined in section 701(f) of such Act (42 U.S.C. 2000e(f)) for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person;

(2) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) an employing office, as defined in section 101(9) of the Congressional Accountability Act of 1995 (2 U.S.C. 1301(9)); and

(5) an employing office as defined in section 411(c)(2) of title 3, United States

Code.

The term "employer" does not include a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, United States Code.

(g) "Employment Agency" has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(h) "Incapable of Self-Care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, and similar activities.

(i) "Labor Organization" has the meaning given the term in sections 701(d) and (e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d), (e)).

(j) "Office of Compliance" has the meaning given the term in the Congressional Accountability Act of 1995 (7 U.S.C. 1301 et seq.).

(k) "Parent" means a person who ~~has, or who is reasonably anticipated to have in the near future, parental responsibilities, with regard to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability or who has, or who is reasonably anticipated to have in the near future, the status with regard to such an individual, of:~~

~~(1)~~

(1) has the status of--

- (i) a biological parent;
- (2ii) an adoptive parent;
- (3iii) a foster parent;
- (4iv) a stepparent; or
- (5v) a custodian of a legal ward; or

(6) ~~a person who is actively seeking legal custody or adoption, or~~

~~(7) an individual (2) is a person standing in loco parentis;~~

finalizing (over)

(f) "Parental Status" means status of a "Parent to such an individual."

(m) "Person" has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000c(a)).

(nn) "Physical or Mental Disability" means a physical or mental impairment that substantially limits one or more of the major life activities of the individual.

(oo) "State" has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000c(i)).

SECTION 5. DISCRIMINATION PROHIBITED.

(a) **Employer Practices.** -- 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 regard to the compensation, terms, conditions, or privileges of employment of the individual, because such individual is a parent; or

(2) to limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the status of the individual as an employee, because such individual is a parent.

(b) **Employment Agency Practices.** -- It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because such individual is a parent or to classify or refer for employment any individual ~~on the basis of the parental status of the~~ because such individual is a parent.

(c) **Labor Organization Practices.** -- It shall be an unlawful employment practice for a labor organization --

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because such individual is a parent;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect the status of the individual as an employee, because such individual is a parent; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Act.

(d) **Training Programs.** -- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because such individual is a parent in admission to, or employment in, any program established to provide apprenticeship or other training.

SECTION 6. RETALIATION AND COERCION PROHIBITED.

(a) **Retaliation.** -- A covered entity shall not discriminate against an individual because the individual has opposed any act or practice prohibited by this Act or because the individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) **Interference, Coercion, or Intimidation.** -- A covered entity shall not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of the individual's having exercised or enjoyed, or on account of the individual's having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

SECTION 7. OTHER PROHIBITIONS.

(a) **Collection of Statistics.** -- Notwithstanding any other provision of this Act, the Commission shall not collect statistics on ~~parental status~~ from covered entities on their ~~employment of parents~~, or compel the collection of such statistics by covered entities, ~~outside the context of investigation or litigation unless such statistics are to be used in investigation, litigation, or resolution of a claim of discrimination under this Act.~~

(b) **Quotas.** -- A covered entity shall not adopt or implement a quota with respect to ~~parental status~~ its employment of parents.

SECTION 8. MIXED MOTIVE DISCRIMINATION. -- An unlawful employment practice

is established under this Act when the complaining party demonstrates that ~~parental status~~ an individual's status as a parent, or retaliation, coercion, intimidation, threats, or interference with an individual as described in section 6 of this Act, was a motivating factor for any employment practice, even though other factors also motivated the practice.

SECTION 9. DISPARATE IMPACT. Notwithstanding any other provision of this Act, the fact that an employment practice has a disparate impact on parents, as the term "disparate impact" is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000c-2(k)), ~~on the basis of parental status~~ shall not establish a violation of this Act.

SECTION 10. DEFENSES WHERE ACTIONS TAKEN IN A FOREIGN COUNTRY

(a) It shall not be unlawful under this Act for a covered entity to take any action otherwise prohibited under this Act with respect to an employee in a workplace in a foreign country if compliance with this Act would cause such entity to violate the law of the foreign country in which such workplace is located.

(b) If a covered entity controls a corporation whose place of incorporation is a foreign country, any practice prohibited by this Act engaged in by such corporation shall be presumed to be engaged in by such covered entity.

(1) This Act shall not apply with respect to the foreign operations of a corporation that is a foreign person not controlled by an American covered entity.

(2) For purposes of this subsection, the determination of whether a covered entity controls a corporation shall be based on the factors set forth in section 702(c)(3) of the Civil Rights Act of 1964 (42 U.S.C. 2000c-1(c)(3)).

(c) This Act shall not apply to an employer covered entity with respect to the employment of aliens outside any State.

SECTION 11. ENFORCEMENT AND REMEDIES

(a) **Incorporation of Powers, Remedies, and Procedures in Other Civil Rights Statutes.** -- With respect to the administration and enforcement of this Act in the case of a claim alleged by an individual for a violation of this Act, the following statutory provisions are hereby

incorporated, and shall, along with the provisions in subsection (b), establish the powers, remedies, procedures, and jurisdiction that this Act provides to the Equal Employment Opportunity Commission, to the Attorney General, to the Librarian of Congress, to the Office of Compliance and its Board of Directors, to the Merit Systems Protection Board, to the President, to courts of the United States, and/or to any other person alleging a violation of any provision of this Act —

(1) for individuals who are covered under title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.), sections 705, 706, 707, 709, 710, 711, and 717 ~~how delete affirmative employment provisions?~~ of that Act (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9, 2000e-10, and 2000e-16), and sections 7701, 7702, and 7703 of title 5, United States Code, as applicable;

(2) for individuals who are covered under section 302(a) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)), sections 302(b)(1) and 304(b) - (c) of that Act (2 U.S.C. 1202(b)(1), 1220(b)-(c));

(3) for individuals who are covered under section 101(3) of the Congressional Accountability Act of 1995 (2 U.S.C. 1301(3)), sections 201(b)(1), 225, and 401-416 of that Act (2 U.S.C. 1311(b)(1), 1361, 1401-1416); and

(4) for individuals who are covered under section 411(c)(1) of title 3, United States Code, sections 411(b)(1), 435, and 451-456 of that title.

(b) Additional Remedies. —

(1) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a), and except as provided in subsection (b)(2) and in section 12, any covered entity that violates this Act shall be liable for such compensatory or punitive damages as may be appropriate.

(2) Notwithstanding subsection (b)(1),

(i) a State may be liable for compensatory damages only in an action brought by the Attorney General in a court of the United States; and

(ii) a State shall not be liable for punitive damages.

(3) Any sums recovered by the Attorney General pursuant to this subsection (b) or recovered by the Attorney General in a civil action brought pursuant to the provisions

incorporated by subsection (a), shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the individual affected. Any such sums not paid to an individual because of inability to do so within a period of three years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(4) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a) or included in subsection (b)(2) above,

- (i) an individual may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official for a violation of this Act; and
- (ii) the Attorney General may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official or State for a violation of this Act.

SECTION 12. FEDERAL IMMUNITY. - Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for a violation to the same extent as the remedies are available against a private entity, except that punitive damages are not available.

SECTION 13. POSTING NOTICES. - A covered entity shall post notices for individuals to whom this Act applies, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

SECTION 14. REGULATIONS.

(a) **In General.** Except as provided in subsections (b), (c), and (d) below, the Commission shall have authority to issue regulations to carry out this Act.

(b) **Librarian of Congress.** The Librarian of Congress shall have authority to issue regulations to carry out this Act with respect to employees of the Library of Congress.

(c) **Board.** The Board referred to in section 11(a)(3) of this Act ~~the Office of Compliance~~

shall have authority to issue regulations to carry out this Act, in accordance with sections 303 and 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1383, 1384), with respect to covered employees as defined in section 101(3) of such Act (2 U.S.C. 1301(3)).

(d) **President.** The President shall have authority to issue regulations to carry out this Act with respect to covered employees as defined in section 411(c)(1) of title 3, United States Code.

SECTION 15. RELATIONSHIP TO OTHER LAWS. – This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or any law of a State or political subdivision of a State.

SECTION 16. SEVERABILITY. – If any provision of this Act, or the application of such provision to any person or circumstances, is held to be invalid, the remainder of this Act and the application of such provision to other persons and circumstances, shall not be affected.

SECTION 17. APPROPRIATIONS. – There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

SECTION 18. EFFECTIVE DATE. – This Act shall take effect 60 days after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.

OFFICE OF MANAGEMENT AND BUDGET

*Legislative Reference Division
Labor-Welfare-Personnel Branch*

Telecopier Transmittal Sheet



URGENT

FROM: M. Haskins

PHONE: 395-3923

DATE: 7/29/99

TIME: 8 AM

Pages sent (including transmittal sheet): 8

COMMENTS:

DOJ/OLC "unofficial" comments on EDAPA
draft bill.

TO: Nicole Rabner

cc: Jocelyn Samuels

PLEASE CALL THE PERSON(S) NAMED ABOVE FOR IMMEDIATE PICK-UP.



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

July 28, 1999

**MEMORANDUM FOR EDDIE CORREIA
SPECIAL COUNSEL TO THE PRESIDENT FOR CIVIL RIGHTS**

From: William Michael Treanor *WMT*
Deputy Assistant Attorney General

Re: July 20, 1999 Draft of the "Ending Discrimination Against Parents Act of 1999"

This memorandum sets forth certain comments and suggestions of the Office of Legal Counsel with respect to a July 20, 1999 draft of a possible Administration bill entitled the "Ending Discrimination Against Parents Act of 1999" ("EDAPA"). As we have discussed with you and with the Office of Management and Budget, our initial review of the draft EDAPA revealed two possible constitutional concerns - relating to state sovereign immunity and a religious exemption - and a number of statutory ambiguities and questions. We have been asked to draft some informal suggestions to ameliorate the possible constitutional concerns and to eliminate other ambiguities or concerns. In this memorandum, we offer such informal suggestions, but in view of the constraints of time, our legal analysis necessarily is tentative.

I. The State Sovereign Immunity Question.

Section 12(a) of the draft bill would purport to abrogate State sovereign immunity "under the 11th Amendment to the Constitution" for claims brought in federal court for violations of the EDAPA. Under recent Supreme Court doctrine, however, Congress may not, under its Article I powers (including its Commerce Clause authority), abrogate State sovereign immunity - including, but not limited to, immunity expressly conferred by, or implicitly presumed in, the Eleventh Amendment - for suits brought by individuals against a State. See, e.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Alden v. Maine, ___ U.S. ___, No. 98-436, slip op. (June 23, 1999); Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank, ___ U.S. ___, No. 98-531, slip op. (June 23, 1999); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board, ___ U.S. ___, No. 98-149, slip op. (June 23, 1999).

Of course, there are several significant limitations to this sovereign immunity doctrine.

First, Congress may abrogate such immunity when acting pursuant to its power under section 5 of the Fourteenth Amendment to "enforce" the substantive provisions of that Amendment. Seminole Tribe, 517 U.S. at 59; Alden, slip op. at 47; Florida Prepaid, slip op. at 8; College Savings, slip op. at 2. Second, sovereign immunity does not restrict the United States from bringing a suit in federal court against a State for damages, including a suit brought by the United States "on behalf of the employees" injured by a State violation of the statute. Alden, slip op. at 46-47, 51; see also United States v. Texas, 143 U.S. 621, 644-45 (1892); Seminole Tribe, 517 U.S. at 71 n.14. Third, aggrieved individuals can bring suits in federal court for declaratory or injunctive relief against state officers. See, e.g., Alden, slip op. at 48; Ex parte Young, 209 U.S. 123 (1908).¹

It is apparent from the text of the draft EDAPA that the abrogation of sovereign immunity is to be premised upon Congress's section 5 authority. It may be that Congress could develop a factual predicate of unconstitutional state discrimination against parents that would be sufficient to justify the use of section 5 to impose upon the States the substantive restrictions contained in the draft EDAPA (or some other variation of parental rights legislation). However, such a factual predicate is not apparent from the text of the draft legislation, and, in any event, attempting to abrogate State sovereign immunity pursuant to Congress's section 5 authority would at the very least involve significant litigation risks. The chances that the courts would sustain the abrogation would depend, in large part, on the type of constitutional scrutiny that would be applied under the Fourteenth Amendment to cases of state employment discrimination on the basis of parental status, a question that the existing case law does not resolve.

Accordingly, in the absence of an additional factual record, and in order to avoid substantial litigation risks, we recommend that the draft EDAPA not attempt to abrogate State sovereign immunity. Instead, as we have discussed previously, we believe that the legislation should clearly provide (i) that the Attorney General can sue a State for damages, on behalf of an aggrieved state employee; and (ii) that aggrieved employees may sue state officials for declaratory and injunctive relief. 

It is possible that the draft EDAPA already achieves these objectives, by virtue of section 11(b)(1)'s incorporation of (unspecified) "procedures and remedies applicable" under Title VII. But that question is difficult to resolve because it is unclear precisely which "procedures and remedies" of Title VII are intended to be incorporated, and how those incorporated Title VII provisions are to be construed in conjunction with the other "enforcement" provisions in section 11 of the draft EDAPA. We consulted with the Civil Rights Division about this question. That Division informed us that section 11 of the draft

¹ In addition, the principle of sovereign immunity does not bar suit by individuals against a municipal corporation or other governmental entity that is not an arm of the State. Alden, slip op. at 47. Such suits are authorized under the provisions of Title VII that the draft EDAPA would incorporate.

EDAPA is intended to incorporate solely sections 706, 707, 709, 710, 711, and 717 of Title VII, 42 U.S.C. §§ 2000e-5, 2000e-6, 2000e-8, 2000e-9, 2000e-10, and 2000e-16. With that understanding, we have worked with the Civil Rights Division to redraft sections 11 and 12 of the EDAPA, appended at the end of this memorandum.

As redrafted, subsections 11(b)(2) through (4) would make clear that the Attorney General's authority to seek injunctive relief and money damages against defendants generally extends to actions against States and State officials. Subsection 11(b)(2) would make clear that a State can be liable for compensatory damages, but not punitive damages, in a suit brought by the Attorney General on behalf of aggrieved employees. Subsection 11(b)(3) would expressly provide for a "pass-through" mechanism under which damages recovered by the Attorney General pursuant to such a suit would be paid directly to the affected employees. This provision is generally modeled on the powers of the Secretary of Labor to enforce the Family and Medical Leave Act, 29 U.S.C. § 2617(b). Subsection 11(b)(4) would permit the Attorney General to sue a State official or the State itself for declaratory and injunctive relief under this Act. This subsection also makes clear that individuals may sue State officials for declaratory and injunctive relief.

II. The Religious Organization Exemption.

Section 10(a) would provide that "[i]t shall not be a violation of this Act for a religious organization to fail or refuse to hire or to discharge an individual because the parental status of the individual violates the sincerely held beliefs of that religious organization." As drafted, this religious exemption might raise constitutional questions (at least in some cases), because it is a "principle at the heart of the Establishment Clause" that the government "should not prefer . . . religion to irreligion." Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 703 (1994); see also Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (noting that "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause"). As a general rule the government may not exempt religious adherents from obligations by which nonadherents must abide; instead, exemptions from otherwise generally applicable prohibitions must be drawn on a religion-neutral basis in order to pass muster under the Establishment Clause. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Kiryas Joel, 512 U.S. at 703-05.

Section 10(a)'s preference for religious organizations over other employers therefore would violate the Establishment Clause unless it could be defended as a permissible accommodation of religious exercise. A statutory exception exclusively for religion may be a permissible accommodation where, *inter alia*, the exception has the purpose and effect of "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions," Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335, 339 (1987), or of otherwise removing "a significant state-imposed deterrent to the free exercise of religion." Texas Monthly, 489 U.S. at 15 (plurality opinion); see also Kiryas Joel, 512 U.S. at 70:

(noting that "the Constitution allows the State to accommodate religious needs by all relieving special burdens" on religious belief and practice) (emphasis added). Proposed section 10(a), however, would appear to provide an exemption to a religious organization, not only where adherence to the EDAPA would significantly interfere with the ability of the organization to define and carry out its religious mission, but also, where the employee herself in some sense "violates" the organization's "beliefs" (presumably, for example, where her parental status "violates" certain religious tenets).

The provision could readily be amended, however, to be tailored to situations where the EDAPA would impose a significant burden on the organization's exercise of religion. For example:

(a) Religious Organizations. -- It shall not be a violation of this Act for a religious organization to fail or refuse to hire, or to discharge, an individual, if the organization's employment or continued employment of such individual would violate the religious tenets, or the sincere religious beliefs, of the religious organization, or would otherwise significantly interfere with the ability of the organization to define and carry out its religious mission.

III. Miscellaneous Suggestions.

We would also offer the following suggestions, most of which are unrelated to any constitutional problems:

1. In section 2(d), you might wish to modify either or both of the words "stereotypes" and "assumptions" with adjectives such as "unjustified," "inaccurate," "irrational," "overbroad," "invidious," etc.
2. Because the bill will no longer attempt to abrogate State sovereign immunity on the basis of Congress's section 5 authority, sections 2(g)(8), 2(h)(4) and 3(c) should be removed.
3. In section 5(a)(1), last line, a comma should be added after "of the individual," in order to conform the prohibition to that found in Title VII and in order to ensure that the "because of" clause applies to each of the "employment practices" (e.g., fail to hire, discharge, etc.) described in the subsection.
4. In section 7(b), the phrase "on the basis of" should be replaced with "with respect to," so as to eliminate the suggestion that the quota prohibition is dependent upon the employer's intent.
5. In section 9, we strongly recommend adding the phrase "Notwithstanding any other

provision of this Act," at the very beginning of the sentence, and replacing the word "does" in the last line with the word "shall." Without such changes, section 5 could be read to suggest that section 5 itself (and in particular sections 5(a)(2) and 5(c)(2)) would not establish a disparate impact prohibition, and, further, that provision is in other statutes (e.g., Title VII, the ADEA) that are similar or identical to section 5 of the EDAPA also do not establish disparate impact prohibitions.

6. We recommend replacing the severability sentence in section 16 with the more comprehensive severability provision that already is applicable to Title VII (§ 42 U.S.C. § 1981 note), to wit:

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

PROPOSED REVISION TO SECTIONS 11 AND 12

SECTION 11. ENFORCEMENT AND REMEDIES

(a) Incorporation of Powers, Remedies and Procedures in Other Civil Rights Statutes. --

With respect to the administration and enforcement of this Act, the following statutory provisions are hereby incorporated, and shall, along with the provisions in subsection (b), establish the powers, remedies, procedures and jurisdiction that this title provides to the Equal Employment Opportunity Commission, to the Attorney General, to the Librarian of Congress, to the Board of Directors of the Office of Compliance, to the Merit Systems Protection Board, to the President, to courts of the United States, and to any person alleging a violation of any provision of this Act --

(1) for individuals who are covered under title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.), sections 705, 706, 707, 709, 710, 711, and 717 of that Act (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9, 2000e-10, and 2000e-6);

(2) for individuals who are covered under section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)), sections 302(b) and 304(b) of that Act (2 U.S.C. 1202(b), 1220(b));

(3) for individuals who are covered under section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), sections 201, 225, and 401-416 of that Act (2 U.S.C. 1311(b)(1), 1361, 1401-1416);

(4) for individuals who are covered under section 401(a)(2) of title 3, United States Code, sections 411(b)(1), 435, and 451-456 of that title.

(b) Additional Remedies. --

(1) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a), and except as provided in subsection (b)(2) and in section 12, any covered entity that violates this Act shall be liable for such compensatory or punitive damages as may be appropriate in any action brought in a court of the United States by an individual, by the Commission, or by the Attorney General.

(2) Notwithstanding subsection (1),

(A) a State may be liable for compensatory damages only in an action

brought by the Attorney General in a court of the United States; and

(B) a State shall not be liable for punitive damages.

(3) Any sums recovered by the Attorney General pursuant to this subsection (b), or recovered by the Attorney General in a civil action brought pursuant to the provisions incorporated by subsection (a), shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the individual affected. Any such sums not paid to an individual because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(4) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a) above,

- (i) an individual may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official for a violation of this Act;
- (ii) the Attorney General may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official or a State for a violation of this Act.

SECTION 12. FEDERAL IMMUNITY

Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for a violation to the same extent as the remedies available against a private entity, except that punitive damages are not available.



U.S. Department of Justice

Office of Legal Counsel



Washington, D.C. 20530

July 28, 1999

**MEMORANDUM FOR EDDIE CORREIA
SPECIAL COUNSEL TO THE PRESIDENT FOR CIVIL RIGHTS**

From: William Michael Treanor 
Deputy Assistant Attorney General

Re: July 20, 1999 Draft of the "Ending Discrimination Against Parents Act of 1999"

This memorandum sets forth certain comments and suggestions of the Office of Legal Counsel with respect to a July 20, 1999 draft of a possible Administration bill entitled the "Ending Discrimination Against Parents Act of 1999" ("EDAPA"). As we have discussed with you and with the Office of Management and Budget, our initial review of the draft EDAPA revealed two possible constitutional concerns - relating to state sovereign immunity and a religious exemption - and a number of statutory ambiguities and questions. We have been asked to draft some informal suggestions to ameliorate the possible constitutional concerns and to eliminate other ambiguities or concerns. In this memorandum, we offer such informal suggestions, but in view of the constraints of time, our legal analysis necessarily is tentative.

I. The State Sovereign Immunity Question.

Section 12(a) of the draft bill would purport to abrogate State sovereign immunity "under the 11th Amendment to the Constitution" for claims brought in federal court for violations of the EDAPA. Under recent Supreme Court doctrine, however, Congress may not, under its Article I powers (including its Commerce Clause authority), abrogate State sovereign immunity - including, but not limited to, immunity expressly conferred by, or implicitly presumed in, the Eleventh Amendment - for suits brought by individuals against a State. See, e.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Alden v. Maine, ___ U.S. ___, No. 98-436, slip op. (June 23, 1999); Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank, ___ U.S. ___, No. 98-531, slip op. (June 23, 1999); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board, ___ U.S. ___, No. 98-149, slip op. (June 23, 1999).

Of course, there are several significant limitations to this sovereign immunity doctrine.

(6)

First, Congress may abrogate such immunity when acting pursuant to its power under section 5 of the Fourteenth Amendment to "enforce" the substantive provisions of that Amendment. Seminole Tribe, 517 U.S. at 59; Alden, slip op. at 47; Florida Prepaid, slip op. at 8; College Savings, slip op. at 2. Second, sovereign immunity does not restrict the United States from bringing a suit in federal court against a State for damages, including a suit brought by the United States "on behalf of the employees" injured by a State violation of the statute. Alden, slip op. at 46-47, 51; see also United States v. Texas, 143 U.S. 621, 644-45 (1892); Seminole Tribe, 517 U.S. at 71 n.14. Third, aggrieved individuals can bring suits in federal court for declaratory or injunctive relief against state officers. See, e.g., Alden, slip op. at 48; Ex parte Young, 209 U.S. 123 (1908).¹

It is apparent from the text of the draft EDAPA that the abrogation of sovereign immunity is to be premised upon Congress's section 5 authority. It may be that Congress could develop a factual predicate of unconstitutional state discrimination against parents that would be sufficient to justify the use of section 5 to impose upon the States the substantive restrictions contained in the draft EDAPA (or some other variation of parental rights legislation). However, such a factual predicate is not apparent from the text of the draft legislation, and, in any event, attempting to abrogate State sovereign immunity pursuant to Congress's section 5 authority would at the very least involve significant litigation risks. The chances that the courts would sustain the abrogation would depend, in large part, on the type of constitutional scrutiny that would be applied under the Fourteenth Amendment to cases of state employment discrimination on the basis of parental status, a question that the existing case law does not resolve.

Accordingly, in the absence of an additional factual record, and in order to avoid substantial litigation risks, we recommend that the draft EDAPA not attempt to abrogate State sovereign immunity. Instead, as we have discussed previously, we believe that the legislation should clearly provide (i) that the Attorney General can sue a State for damages, on behalf of an aggrieved state employee; and (ii) that aggrieved employees may sue state officials for declaratory and injunctive relief.

It is possible that the draft EDAPA already achieves these objectives, by virtue of section 11(b)(1)'s incorporation of (unspecified) "procedures and remedies applicable" under Title VII. But that question is difficult to resolve because it is unclear precisely which "procedures and remedies" of Title VII are intended to be incorporated, and how those incorporated Title VII provisions are to be construed in conjunction with the other "enforcement" provisions in section 11 of the draft EDAPA. We consulted with the Civil Rights Division about this question. That Division informed us that section 11 of the draft

¹ In addition, the principle of sovereign immunity does not bar suit by individuals against a municipal corporation or other governmental entity that is not an arm of the State. Alden, slip op. at 47. Such suits are authorized under the provisions of Title VII that the draft EDAPA would incorporate.

EDAPA is intended to incorporate solely sections 706, 707, 709, 710, 711, and 717 of Title VII, 42 U.S.C. §§ 2000e-5, 2000e-6, 2000e-8, 2000e-9, 2000e-10, and 2000e-16. With that understanding, we have worked with the Civil Rights Division to redraft sections 11 and 12 of the EDAPA, appended at the end of this memorandum.

As redrafted, subsections 11(b)(2) through (4) would make clear that the Attorney General's authority to seek injunctive relief and money damages against defendants generally extends to actions against States and State officials. Subsection 11(b)(2) would make clear that a State can be liable for compensatory damages, but not punitive damages, in a suit brought by the Attorney General on behalf of aggrieved employees. Subsection 11(b)(3) would expressly provide for a "pass-through" mechanism under which damages recovered by the Attorney General pursuant to such a suit would be paid directly to the affected employees. This provision is generally modeled on the powers of the Secretary of Labor to enforce the Family and Medical Leave Act, 29 U.S.C. § 2617(b). Subsection 11(b)(4) would permit the Attorney General to sue a State official or the State itself for declaratory and injunctive relief under this Act. This subsection also makes clear that individuals may sue State officials for declaratory and injunctive relief.

II. The Religious Organization Exemption.

Section 10(a) would provide that "[i]t shall not be a violation of this Act for a religious organization to fail or refuse to hire or to discharge an individual because the parental status of the individual violates the sincerely held beliefs of that religious organization." As drafted, this religious exemption might raise constitutional questions (at least in some cases), because it is a "principle at the heart of the Establishment Clause" that the government "should not prefer . . . religion to irreligion." Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 703 (1994); see also Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (noting that "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause"). As a general rule the government may not exempt religious adherents from obligations by which nonadherents must abide; instead, exemptions from otherwise generally applicable prohibitions must be drawn on a religion-neutral basis in order to pass muster under the Establishment Clause. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Kiryas Joel, 512 U.S. at 703-05.

Section 10(a)'s preference for religious organizations over other employers there fore would violate the Establishment Clause unless it could be defended as a permissible accommodation of religious exercise. A statutory exception exclusively for religion may be a permissible accommodation where, *inter alia*, the exception has the purpose and effect of "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions," Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335, 339 (1987), or of otherwise removing "a significant state-imposed deterrent to the free exercise of religion." Texas Monthly, 489 U.S. at 15 (plurality opinion); see also Kiryas Joel, 512 U.S. at 70:

(D)

(noting that "the Constitution allows the State to accommodate religious needs by alleviating special burdens" on religious belief and practice) (emphasis added). Proposed section 10(a), however, would appear to provide an exemption to a religious organization, not only where adherence to the EDAPA would significantly interfere with the ability of the organization to define and carry out its religious mission, but also, where the employee herself in some sense "violates" the organization's "beliefs" (presumably, for example, where her parental status "violates" certain religious tenets).

The provision could readily be amended, however, to be tailored to situations where the EDAPA would impose a significant burden on the organization's exercise of religion. For example:

(a) Religious Organizations. -- It shall not be a violation of this Act for a religious organization to fail or refuse to hire, or to discharge, an individual, if the organization's employment or continued employment of such individual would violate the religious tenets, or the sincere religious beliefs, of the religious organization, or would otherwise significantly interfere with the ability of the organization to define and carry out its religious mission.

III. Miscellaneous Suggestions.

We would also offer the following suggestions, most of which are unrelated to any constitutional problems:

1. In section 2(d), you might wish to modify either or both of the words "stereotypes" and "assumptions" with adjectives such as "unjustified," "inaccurate," "irrational," "overbroad," "invidious," etc.
2. Because the bill will no longer attempt to abrogate State sovereign immunity on the basis of Congress's section 5 authority, sections 2(g)(8), 2(h)(4) and 3(c) should be removed.
3. In section 5(a)(1), last line, a comma should be added after "of the individual," in order to conform the prohibition to that found in Title VII and in order to ensure that the "because of" clause applies to each of the "employment practices" (e.g., fail to hire, discharge, etc.) described in the subsection.
4. In section 7(b), the phrase "on the basis of" should be replaced with "with respect to," so as to eliminate the suggestion that the quota prohibition is dependent upon the employer's intent.
5. In section 9, we strongly recommend adding the phrase "Notwithstanding any other

(E)

provision of this Act," at the very beginning of the sentence, and replacing the word "does" in the last line with the word "shall." Without such changes, section 1 could be read to suggest that section 5 itself (and in particular sections 5(a)(2) and 5(c)(2)) would not establish a disparate impact prohibition, and, further, that provision is in other statutes (e.g., Title VII, the ADEA) that are similar or identical to section 5 of the EDAPA also do not establish disparate impact prohibitions.

6. We recommend replacing the severability sentence in section 16 with the more comprehensive severability provision that already is applicable to Title VII (§ 242 U.S.C. § 1981 note), to wit:

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

(F)

PROPOSED REVISION TO SECTIONS 11 AND 12

SECTION 11. ENFORCEMENT AND REMEDIES

(a) Incorporation of Powers, Remedies and Procedures in Other Civil Rights Statutes. --

With respect to the administration and enforcement of this Act, the following statutory provisions are hereby incorporated, and shall, along with the provisions in subsection (b), establish the powers, remedies, procedures and jurisdiction that this title provides to the Equal Employment Opportunity Commission, to the Attorney General, to the Librarian of Congress, to the Board of Directors of the Office of Compliance, to the Merit Systems Protection Board, to the President, to courts of the United States, and to any person alleging a violation of any provision of this Act --

(1) for individuals who are covered under title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.), sections 705, 706, 707, 709, 710, 711, and 717 of that Act (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9, 2000e-10, and 2000e-6);

(2) for individuals who are covered under section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)), sections 302(b) and 304(b) of that Act (2 U.S.C. 1202(b), 1220(b));

(3) for individuals who are covered under section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), sections 201, 225, and 401-416 of that Act (2 U.S.C. 1311(b)(1), 1361, 1401-1416);

(4) for individuals who are covered under section 401(a)(2) of title 3, United States Code, sections 411(b)(1), 435, and 451-456 of that title.

(b) Additional Remedies. --

(1) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a), and except as provided in subsection (b)(2) and in section 12, any covered entity that violates this Act shall be liable for such compensatory or punitive damages as may be appropriate in any action brought in a court of the United States by an individual, by the Commission, or by the Attorney General.

(2) Notwithstanding subsection (c)(1),

(A) a State may be liable for compensatory damages only in an action

(6)

brought by the Attorney General in a court of the United States; and

(B) a State shall not be liable for punitive damages.

(3) Any sums recovered by the Attorney General pursuant to this subsection (b), or recovered by the Attorney General in a civil action brought pursuant to the provisions incorporated by subsection (a), shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the individual affected. Any such sums not paid to an individual because of inability to do so within a period of 3 years shall be deposited into the treasury of the United States as miscellaneous receipts.

(4) Notwithstanding any express or implied limitation on the remedies incorporated by reference in subsection (a) above,

- (i) an individual may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official for a violation of this Act;
- (ii) the Attorney General may bring an action in a district court of the United States for declaratory or injunctive relief against any appropriate State official or a State for a violation of this Act.

SECTION 12. FEDERAL IMMUNITY

Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for a violation to the same extent as the remedies available against a private entity, except that punitive damages are not available.

①
DRAFT

Office of Personnel Management
Office of Congressional Relations
Legislative Analysis Staff

Fax: (202) 606-2526

Office: (202) 606-1424

TELECOPIER TRANSMITTAL SHEET

FROM: Gay Gardner

TO: Melinda Haskins

Receiving Telecopier Number: 395-6148

Pages sent (including transmittal sheet): 1

RE: Draft Bill on Ending Discrimination Against Parents Act of 1999

More information about the need for this legislation might be helpful. For instance, section 2 ["Findings"] includes several sweeping conclusions about the nature of discrimination due to parental status but presents no data such as numbers of legal claims that were brought but rejected by the courts, numbers of claims rejected by EEOC, etc. Moreover, section 2(c) states that "no existing federal statute protects workers from employment discrimination on the basis of their status as parents." We assume what is meant here is that discrimination based on parental status is not explicitly covered under Title VII. Discrimination based on non-merit factors such as parental status would be a prohibited personnel practice under the civil service laws.

The definition of individuals having "parental status" in section 4(j) includes an individual who is "actively seeking legal custody or adoption." This appears to create a very broad coverage unless the EEOC intends to regulate the meaning of "actively seeking."

We also would simply note that the law provides for compensatory damages from Federal agencies (punitive damages being excluded) based on a finding of discrimination, but there does not appear to be any monetary cap on the compensatory damages as there would be under the Civil Rights Act.

Exop/OMB Staff Comments:

(2)

MSPB has come to you with a few technical issues on bundling of issues, and how they would be handled respectively by EEOC and MSPB on appeal. We concur that this needs to get sorted out.

We also had some serious concern ~~with~~ with just what the burden of proof would entail, and what kinds of defenses would be available to employers. Discrimination on the basis of parental status seems to be a pretty tricky thing to pin down in some circumstances -- I contrast three cases. **Case one**, prospective employer says "you are a parent, and won't be here when I need you to put in the hours, so I won't hire you." That may be pretty straightforward. But what about **case 2**, where the employer says to the employee, "I could not promote you, because you have not put in the kind of time that your colleague who was promoted did." The underlying cause was that the employee who was not promoted left at 5 on the dot to pick up the kids from daycare, or go to the ball game, or . . . But he was not taking any unexcused leave, performing all of his assigned duties in an exemplary fashion, and only taking earned leave or working a full workweek, but not an 80 hour work week. Or **case 3**, where an employee is taking a lot of unanticipated leave to deal with a sick child and is clearly falling behind in his work, and he is denied a promotion, or fired for nonperformance. Are these discrimination issues? Are there no remedies already available under the Family and Medical Leave Act? Or are these simply performance management issues, that should be in the control of a manager?

I think that the materials really need to lay out exactly what kinds of circumstances they are trying to prohibit, and what circumstances would be permissible.

I also wonder about the cut off of application to employers with 15 or more employees -- employers with less than 15 are currently not covered by the Family and Medical Leave Act, either. While I can understand the economic reasons for excluding them from the requirements of that Act, I don't see why they should be allowed to discriminate against parents as a matter of law, if we all do agree that that is a bad thing. (Do we allow small employers to discriminate on the basis of race, sex, or age? This is not a rhetorical question -- I didn't check.)

One more substantive question -- the fact sheet refers to a provision in the bill that would allow parents to use paid leave for child care purposes to the same extent that other employees could use it for other personal reasons, but we could not find this provision in the version of the draft bill that we were reviewing. (We may have missed it.)

What is that "such sums" appropriation supposed to be funding?

1) The disparate impact section indicates that disparate impact is not a violation of the Act. Are there similar provisions in Title VII and other non-discrimination statutes? I know that the courts have long held that disparate treatment and disparate impact discrimination are both actionable claims in typical race discrimination claims. Thus, I am not sure why this provision is in here.

2) What is the rationale behind limiting the Commission from collecting statistics on parental status?

Do we have any quantitative evidence that such discrimination is occurring or is a problem? If so, it might be added to the findings section of the bill.

EXOP/OMB staff:

(3)

In The fact sheet, we need to define what discrimination against parents is.

Examples of this problem should be moved to the front of the document.

In The draft bill, are we giving non-parents (i.e., a single person) a reason to sue on the grounds of non-discrimination?

MSPB (Merit Systems Protection Board)

Will MSPB and EEOC both have jurisdiction in cases of discharge that are appealable? What is the referral procedure?

LABOR

July 22, 1999

**DOL's Comments to OMB Regarding EEOC Draft Bill - "Ending
Discrimination Against Parents Act of 1999"**

The Department of Labor (DOL) fully supports the intent of this draft bill. However, DOL is concerned that the language of the draft bill could have the unintended consequences of prohibiting existing employer practices that accommodate the needs of working parents, with the result of eroding important benefits for children.

Section 5(a)(1) of the draft bill would make it an unlawful employment practice for an employer to "... discriminate against any individual with regard to compensation, terms, conditions, or privileges of employment of the individual because of such individual's parental status." Section 5(a)(2) of the draft bill would prohibit, among other things, the classifying of employees in a way that would adversely affect individuals because of their parental status. Section 4(j) of the draft bill defines "parental status" to mean, essentially, having a parental relationship to a child. It is not clear whether this language would allow individuals who are not parents to claim that they are adversely affected on account of their "parental status" within the scope of this bill.

The draft bill does not define "compensation or privileges of employment," and it is not clear whether employee benefits such as pensions, health insurance or life insurance would be encompassed by these terms. Assuming that such benefits would be covered by the draft bill, DOL notes that some current employer practices in providing benefits to workers have the effect of benefitting workers who are parents. For example, some group health plans (like the Federal program) charge a certain premium amount for "family" coverage. This premium is typically the same for employees who have only a spouse or for employees who have many children. The value of such coverage is greater for employees with children. Similar issues may arise under other traditional benefit plans such as pension plans or life insurance plans which provide for survivor benefits.

For these reasons, DOL would like to work with EEOC to draft language clarifying the intent of the legislation, i.e., only those with parental status would be able to claim the protections of the act. In the absence of such clarification, the draft bill could provide a basis for a claim of "reverse discrimination," by workers without children who claim that they are not receiving the value of benefits that are provided only to parents (such as an on-site day-care center). Clarifying language could make clear that discrimination is prohibited against individuals "who are parents" on account of their parental status, or otherwise preserve "bona fide pension and welfare benefit plan arrangements."

State Department

MEMORANDUM

TO: OMB - Melinda D. Haskins

FROM: *State Department*RE: Draft Bill "Ending Discrimination Against Parents
Act of 1999"

We have several comments on this proposed bill.

First, we suggest that the bill include language contained in Section 702(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-1(a)), which specifically excludes coverage of aliens employed outside the United States. Employment of aliens outside the United States by federal agencies is excluded by reference to Section 717(a) of the Title VII. However, we note that there is no parallel exclusion for the employment of aliens outside the United States by private employers. This would bring parity for private employers between Title VII and the proposed legislation.

Second, we suggest that, in the interests of fairness, you consider broadening the definition of "parental status" to include individuals who are childless. Our experience, and the professional literature reflects, that childless people have suffered discrimination on that account. For example, women managers who deferred their careers to raise a family have been known to discriminate against career women who chose to remain childless. Equity counsels that childless persons be protected from discrimination by parents who might otherwise wish to favor other parents in employment decisions.

Third, we suggest that the legislation eliminate the possibility that it might insulate from employer discipline or other employment decisions parents who are delinquent with their child support payments. Such delinquency certainly is a legitimate suitability factor.

Finally, questions have been raised about the effect of this bill on dwindling agency EEO resources given that discrimination against parents has not proved to be a problem, at least here at the Department of State. Moreover, we question the need for this legislation as opposed to legislation prohibiting discrimination on other bases such as marital status or any other

State Department

non-merit factor. In our view, the majority of "parental status" cases (e.g., women being placed in a slower advancement track) are already covered by the sex discrimination prohibition in Title VII of the Civil Rights Act.



Mark Holmstrup <Mark.Holmstrup@ost.dot.gov>
07/22/99 09:55:41 AM

Record Type: Record

To: Melinda D. Haskins/OMB/EOP

cc: Comments on MDH93: Ending Discrimination Against Parents

Melinda-

In Section 7, the bill would prohibit collection of statistics. We believe that the EEOC and other appropriate agencies should be permitted to collect statistics if such statistics are necessary to investigate and make findings on specific complaints.

Thanks,
Mark Holmstrup
366-9296

----- Forwarded with Changes -----
From: Marc Brenman at OSTCENTRAL
Date: 7/21/99 12:18PM
To: Mark Holmstrup at OSTCOUNSEL
Subject: CQI: M-073: Ending Discrimination Against Parents

(8)

LRM ID: MD1193

SUBJECT: Draft Bill on Ending Discrimination Against Parents Act of 1999

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concurring comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the _____ toll-free line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melinda D. Haskins Phone: 395-3923 Fax: 395-6144
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: 7/21/99 (Date)
Jack Kristy (Name)
ED (Agency)
401-8313 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

☐ Concur
☒ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet

ED has no objection. However, we wonder whether by extending protection to persons "standing in loco parentis" the class of persons protected hasn't been made subjective.

LRM ID: MDH93 SUBJECT: Draft Bill on Ending Discrimination Against
Parents Act of 1999

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no
comment), we prefer that you respond by e-mail or by faxing us this
response sheet. If the response is short and you prefer to call, please
call the branch-wide line shown below (NOT the analyst's line) to leave a
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(1) calling the analyst/attorney's direct line (you will be connected
to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melinda D. Haskins Phone: 395-3923 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: 7/22/99 (Date)

William J. White, Jr. (Name)

EEOC (Agency)

663-4901 (Telephone)

The following is the response of our agency to your request for views on
the above-captioned subject:

☐ Concur

☐ No Objection

☐ No Comment

☒ See proposed edits on pages 3, 4, 5, 6, 7, 8, 9

☐ Other: _____

☒ FAX RETURN of 7 pages, attached to this response sheet

E20C (10)

U.S.C. 2000e-16(a)) applies;

(3) ~~a Presidential appointee or State employee~~ ^{an individual} to whom section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) a covered employee as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301); or

(5) a covered employee as defined in section ~~401(a)(2)~~ ^{411(c)(1)} of title 3, United States Code.

The term "employee" includes applicants for employment and former employees.

(f) "Employer" means:

(1) a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has fifteen or more employees (as defined in section 701(f) of such Act (42 U.S.C. 2000e(f)) for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person;

(2) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301); or

(5) an employing office as defined in section ~~401(a)(4)~~ ^{411(c)(2)} of title 3, United States Code.

The term "employer" does not include a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, United States Code.

(g) "Employment Agency" has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(h) "Incapable of Self-Care" has the meaning given the term in regulations implementing section 101(12)(B) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611(12)(B)).

(i) "Labor Organization" has the meaning given the term in sections 701(d) and (e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d), (e)).

(j) "Parental Status" means having the status, with regard to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, of:

- (1) a biological parent;
- (2) an adoptive parent;
- (3) a foster parent;

EEC (11)

- (4) a stepparent;
- (5) a custodian of a legal ward;
- (6) a person who is actively seeking legal custody or adoption; or
- (7) an individual standing in loco parentis.

(k) "Person" has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

(l) "Religious Organization" means:

- (1) a religious corporation, association, or society; or
- (2) a school, college, university, or other educational institution or institution of learning, if -

(i) the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or

(ii) the curriculum of the school, college, university, or other educational institution is directed toward the propagation of a particular religion.
Not institution of learning

(m) "State" has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

SECTION 5. DISCRIMINATION PROHIBITED.

(a) **Employer Practices.** -- 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 regard to the compensation, terms, conditions, or privileges of employment of the individual because of such individual's parental status; or

(2) to limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the status of the individual as an employee, because of such individual's parental status.

(b) **Employment Agency Practices.** -- It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of the parental status of the individual or to classify or refer for employment any individual on the basis of the parental status of the individual.

(c) **Labor Organization Practices.** -- It shall be an unlawful employment practice for a labor organization -

(1) to exclude or expel from its membership, or otherwise to discriminate against,

EEOC
12

any individual because of the parental status of the individual;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect the status of the individual as an employee or as an applicant for employment, because of such individual's parental status; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Act.

(d) **Training Programs.** -- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of the parental status of the individual in admission to, or employment in, any program established to provide apprenticeship or other training.

SECTION 6. RETALIATION AND COERCION PROHIBITED.

(a) **Retaliation.** -- A covered entity shall not discriminate against an individual because the individual has opposed any act or practice prohibited by this Act or because the individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) **Interference, Coercion, or Intimidation.** -- A covered entity shall not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of the individual's having exercised or enjoyed, or on account of the individual's having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

SECTION 7. OTHER PROHIBITIONS.

(a) **Collection of Statistics.** -- The Commission shall not collect statistics on parental status from covered entities, or compel the collection of such statistics by covered entities.

(b) **Quotas.** -- A covered entity shall not adopt or implement a quota on the basis of parental status.

SECTION 8. MIXED MOTIVE DISCRIMINATION. -- An unlawful employment practice is established under this Act when the complaining party demonstrates that parental status, or retaliation, coercion, intimidation, threats, or interference with an individual as described in section 7 of this Act, was a motivating factor for any employment practice, even though other

EEOC (13)

factors also motivated the practice.

SECTION 9. DISPARATE IMPACT. -- The fact that an employment practice has a disparate impact, as the term "disparate impact" is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of parental status does not establish a violation of this Act.

SECTION 10. DEFENSES

(a) **Religious Organizations.** -- It shall not be a violation of this Act for a religious organization to fail or refuse to hire or to discharge an individual because the parental status of the individual violates the sincerely held religious beliefs of that religious organization.

(b) **Actions in a Foreign Country.**

(1) It shall not be unlawful under this Act for a covered entity to take any action otherwise prohibited under this Act with respect to an employee in a workplace in a foreign country if compliance with this Act would cause such entity to violate the law of the foreign country in which such workplace is located.

(2) (i) If a covered entity controls a corporation whose place of incorporation is a foreign country, any practice prohibited by this Act engaged in by such corporation shall be presumed to be engaged in by such covered entity.

(ii) This Act shall not apply with respect to the foreign operations of a corporation that is a foreign person not controlled by an American covered entity.

(iii) For purposes of this subsection, the determination of whether a covered entity controls a corporation shall be based on the factors set forth in section 702(c)(3) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(c)(3)).

SECTION 11. ENFORCEMENT

(a) **Enforcement Powers.** -- With respect to the administration and enforcement of this Act in the case of a claim alleged by an individual for a violation of this Act --

(1) the Commission shall have the same powers as the Commission has to administer and enforce

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(ii) ~~sections 303 and~~ 304 of the Government Employee Rights Act of 1991 (2 U.S.C. ~~1219 and~~ 1220);

in the case of a claim alleged by the individual for a violation of such title or of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1)), respectively;

(2) the Librarian of Congress shall have the same powers as the Librarian of

EEOC
(14)

Congress has to administer and enforce title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by the individual for a violation of such title:

(3) the ~~Board~~ ^{Office and the Board} (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) shall have the same powers as the ~~Board~~ ^{Office and the Board} has to administer and enforce ^{thely} the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by the individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1));

(4) the Attorney General shall have the same powers as the Attorney General has to administer and enforce

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(ii) ~~sections 303 and 304~~ of the Government Employee Rights Act of 1991 (2 U.S.C. ~~1219 and 1220~~);

in the case of a claim alleged by the individual for a violation of such title or of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1)), respectively;

(5) the President, the Commission, and the Merit Systems Protection Board shall have the same powers as the President, the Commission, and that Board, respectively, have under ~~section 454 of title 5, United States Code~~ ^{sections 452, 453, and 454} in the case of a claim alleged by the individual for a violation of section 411(a)(1) of such title;

(6) a court of the United States shall have the same jurisdiction and powers as the court has to enforce -

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by the individual for a violation of such title;

(ii) ~~sections 303 and 304~~ of the Government Employee Rights Act of 1991 (2 U.S.C. ~~1219 and 1220~~) in the case of a claim alleged by the individual for a violation of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1));

(iii) the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by the individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and

(iv) section 451 of title 3, United States Code, in the case of a claim alleged by the individual for a violation of section 411(a)(1) of such title.

(b) **Procedures and Remedies.** - The procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are -

(1) for individuals who are covered under title VII of the Civil Rights Act of 1964

EEOC-
(15)

(42 U.S.C. 2000e et seq.), the procedures and remedies applicable under such title for a violation of such title;

(2) for individuals who are covered under section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)), the procedures and remedies applicable for a violation of such section;

(3) for individuals who are covered employees under section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), the procedures and remedies applicable for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and

(4) for individuals who are covered employees under section ~~411(a)(1)~~ ^{411(c)(1)} of title 3, United States Code, the procedures and remedies applicable for a violation of section 411(a)(1) of title 3, United States Code.

(c) **Additional Remedies.** - Notwithstanding any limitation on the remedies specified in subsection (b), and in addition to the remedies specified in subsection (b), any covered entity that violates this Act shall be liable for such compensatory or punitive damages as may be appropriate, except that neither a State nor the United States shall be liable for punitive damages.

(d) **Other Applicable Provisions.** - With respect to a claim alleged by a covered employee (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) for a violation of this Act, title IV of the Congressional Accountability Act of 1995 (2 U.S.C. 1401 et seq.) shall apply in the same manner as such title applies with respect to a claim alleged by such a covered employee for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

SECTION 12. STATE AND FEDERAL IMMUNITY

(a) **State Immunity.** - A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal court of competent jurisdiction for a violation of this Act.

(b) **Remedies Against the United States and the States.** - Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States or a State for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for a violation to the same extent as the remedies are available against a private entity, except that punitive damages are not available.

SECTION 13. POSTING NOTICES. - A covered entity shall post notices for individuals to whom the provisions specified in section 11(b) of this Act apply, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

EEEC
16

SECTION 14. REGULATIONS.

(a) **In General.** Except as provided in subsections (b), (c), and (d) below, the Commission shall have authority to issue regulations to carry out this Act.

(b) **Librarian of Congress.** The Librarian of Congress shall have authority to issue regulations to carry out this Act with respect to employees of the Library of Congress.

(c) **Board.** The Board referred to in section 11(a)(3) of this Act shall have authority to issue regulations to carry out this Act, in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384), with respect to covered employees as defined in section 101 of such Act (2 U.S.C. 1301).

(d) **President.** The President shall have authority to issue regulations to carry out this Act with respect to covered employees as defined in section ~~1051(a)~~ of title 3, United States Code.
411(c)(1)

SECTION 15. RELATIONSHIP TO OTHER LAWS. - This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or any law of a State or political subdivision of a State.

SECTION 16. SEVERABILITY. Should any provision of this Act be found to be invalid by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

SECTION 17. APPROPRIATIONS. -- There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

SECTION 18. EFFECTIVE DATE. - This Act shall take effect 60 days after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.

OFFICE OF MANAGEMENT AND BUDGET
Legislative Reference Division
Labor-Welfare-Personnel Branch

Telecopier Transmittal Sheet

SPECIAL



FROM: M. Haskin

PHONE: 395- 3923

DATE: 7/22/99

TIME: 12:30 p.m.

Pages sent (including transmittal sheet): _____

COMMENTS:

Comments we've received to date
on EDAPA doc + bill. DOJ,
HHS, +

TO:

Nicole Fabian

Defense have
yet to comment.

HM

PLEASE CALL THE PERSON(S) NAMED ABOVE FOR IMMEDIATE PICK-UP.

→ Mess

Office of Personnel Management
Office of Congressional Relations
Legislative Analysis Staff

Fax: (202) 606-2526

Office: (202) 606-1424

TELECOPIER TRANSMITTAL SHEET

FROM: Gay Gardner

TO: Melinda Haskins

Receiving Telecopier Number: 395-6148

Pages sent (including transmittal sheet): 1

RE: Draft Bill on Ending Discrimination Against Parents Act of 1999

More information about the need for this legislation might be helpful. For instance, section 2 ["Findings"] includes several sweeping conclusions about the nature of discrimination due to parental status but presents no data such as numbers of legal claims that were brought but rejected by the courts, numbers of claims rejected by EEOC, etc. Moreover, section 2(c) states that "no existing federal statute protects workers from employment discrimination on the basis of their status as parents." We assume what is meant here is that discrimination based on parental status is not explicitly covered under Title VII. Discrimination based on non-merit factors such as parental status would be a prohibited personnel practice under the civil service laws.

Don't have info

Doesn't make draft legal null

The definition of individuals having "parental status" in section 4(j) includes an individual who is "actively seeking legal custody or adoption." This appears to create a very broad coverage unless the EEOC intends to regulate the meaning of "actively seeking."

do we want to include?

We also would simply note that the law provides for compensatory damages from Federal agencies (punitive damages being excluded) based on a finding of discrimination, but there does not appear to be any monetary cap on the compensatory damages as there would be under the Civil Rights Act.

Cap on damages?

Why start there?

or any other PDA; not just Tit VII

Lisa B. Fairhall

07/22/99 11:08:08 AM

Record Type: Record

To: Melinda D. Haskins/OMB/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: parental discrimination bill

True
I understand that MSPB has come to you with a few technical issues on bundling of issues, and how they would be handled respectively by EEOC and MSPB on appeal. We concur that this needs to get sorted out.

We also had some serious concern in the branch with just what the burden of proof would entail, and what kinds of defenses would be available to employers. Discrimination on the basis of parental status seems to be a pretty tricky thing to pin down in some circumstances — I contrast three cases. **Case one**, prospective employer says "you are a parent, and won't be here when I need you to put in the hours, so I won't hire you." That may be pretty straightforward. But what about **case 2**, where the employer says to the employee, "I could not promote you, because you have not put in the kind of time that your colleague who was promoted did." The underlying cause was that the employee who was not promoted left at 5 on the dot to pick up the kids from daycare, or go to the ball game, or . . . But he was not taking any unexcused leave, performing all of his assigned duties in an exemplary fashion, and only taking earned leave or working a full workweek, but not an 80 hour work week. Or **case 3**, where an employee is taking a lot of unanticipated leave to deal with a sick child and is clearly falling behind in his work, and he is denied a promotion, or fired for nonperformance. Are these discrimination issues? Are there no remedies already available under the Family and Medical Leave Act? Or are these simply performance management issues, that should be in the control of a manager?

*only cases
still
at job
performance*

*FMLA
not
EOPPA*

I think that the materials really need to lay out exactly what kinds of circumstances they are trying to prohibit, and what circumstances would be permissible.

*add to
transmittal -
says in
fact sheet*

I also wonder about the cut off of application to employers with 15 or more employees -- employers with less than 15 are currently not covered by the Family and Medical Leave Act, either. While I can understand the economic reasons for excluding them from the requirements of that Act, I don't see why they should be allowed to discriminate against parents as a matter of law, if we all do agree that that is a bad thing. (Do we allow small employers to discriminate on the basis of race, sex, or age? This is not a rhetorical question -- I didn't check.)

*OK
enough
threshold*

One more substantive question -- the fact sheet refers to a provision in the bill that would allow parents to use paid leave for child care purposes to the same extent that other employees could use it for other personal reasons, but we could not find this provision in the version of the draft bill that we were reviewing. (We may have missed it.)

OK

And just what is that "such sums" appropriation supposed to be funding?

OK

This is the big stuff. Is this bill really going to go?

Message Copied To:



Nacho Herman <nacho-herman@dol.gov>
07/22/99 09:49:09 AM

Record Type: Record

To: Melinda D. Haskins/OMB/EOP
cc: Lesser William <lesser-william@dol.gov>, Thomas Rosalind <thomas-rosalind@dol.gov>, Lindrew
Gerald-PWBA <lindrewg@pwba.dol.gov>, Hoopes Terry-PWBA <hoopest@pwba.dol.gov>
Subject: DOL's Comments to OMB Regarding EEOC Draft Bill - Ending Discrimination Against Parents Act
of 1999

<<PARENT.WPD>>
<WP Attachment Enclosed>

Here are our comments in a WordPerfect 6.1 document.

If you have any question, I can be reached at 219-8065, ext. 128

 - PARENT.WPD

July 22, 1999

**DOL's Comments to OMB Regarding EEOC Draft Bill - "Ending
Discrimination Against Parents Act of 1999"**

The Department of Labor (DOL) fully supports the intent of this draft bill. However, DOL is concerned that the language of the draft bill could have the unintended consequences of prohibiting existing employer practices that accommodate the needs of working parents, with the result of eroding important benefits for children.

Section 5(a)(1) of the draft bill would make it an unlawful employment practice for an employer to "... discriminate against any individual with regard to compensation, terms, conditions, or privileges of employment of the individual because of such individual's parental status." Section 5(a)(2) of the draft bill would prohibit, among other things, the classifying of employees in a way that would adversely affect individuals because of their parental status. Section 4(j) of the draft bill defines "parental status" to mean, essentially, having a parental relationship to a child. It is not clear whether this language would allow individuals who are not parents to claim that they are adversely affected on account of their "parental status" within the scope of this bill.

Not
intent -
only protect
parents

The draft bill does not define "compensation or privileges of employment," and it is not clear whether employee benefits such as pensions, health insurance or life insurance would be encompassed by these terms. Assuming that such benefits would be covered by the draft bill, DOL notes that some current employer practices in providing benefits to workers have the effect of benefitting workers who are parents. For example, some group health plans (like the Federal program) charge a certain premium amount for "family" coverage. This premium is typically the same for employees who have only a spouse or for employees who have many children. The value of such coverage is greater for employees with children. Similar issues may arise under other traditional benefit plans such as pension plans or life insurance plans which provide for survivor benefits.

For these reasons, DOL would like to work with EEOC to draft language clarifying the intent of the legislation, i.e., only those with parental status would be able to claim the protections of the act. In the absence of such clarification, the draft bill could provide a basis for a claim of "reverse discrimination," by workers without children who claim that they are not receiving the value of benefits that are provided only to parents (such as an on-site day-care center). Clarifying language could make clear that discrimination is prohibited against individuals "who are parents" on account of their parental status, or otherwise preserve "bona fide pension and welfare benefit plan arrangements."

✓ YES



Mark Holmstrup <Mark.Holmstrup@ost.dot.gov>
07/22/99 09:55:41 AM

Record Type: Record

To: Melinda D. Haskins/OMB/EOP

cc:

Subject: Comments on MDH93: Ending Discrimination Against Parents

Melinda-

In Section 7, the bill would prohibit collection of statistics. We believe that the EEOC and other appropriate agencies should be permitted to collect statistics if such statistics are necessary to investigate and make findings on specific complaints.

Thanks,
Mark Holmstrup
366-9296

*I think just
not require
collection*

----- Forwarded with Changes -----
From: Marc Brenman at OSTCENTRAL
Date: 7/21/99 12:18PM
To: Mark Holmstrup at OSTCOUNSEL
Subject: CQI: M-073: Ending Discrimination Against Parents

LRM ID: MDH93

SUBJECT: Draft Bill on Ending Discrimination Against Parents Act of 1999

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melinda D. Haskins Phone: 395-3923 Fax: 395-8148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: 7/22/99 (Date)
Vaneesa Harrison (Name)
State (Agency)
(47-446) (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

☐ Concur

☐ No Objection

☐ No Comment

☐ See proposed edits on pages _____

☐ Other: _____

☒ FAX RETURN of 2 pages, attached to this response sheet

State

MEMORANDUM

TO: OMB - Melinda D. Haskins

RE: Draft Bill "Ending Discrimination Against Parents
Act of 1989"

We have several comments on this proposed bill.

First, we suggest that the bill include language contained in Section 702(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-1(a)), which specifically excludes coverage of aliens employed outside the United States. Employment of aliens outside the United States by federal agencies is excluded by reference to Section 717(a) of the Title VII. However, we note that there is no parallel exclusion for the employment of aliens outside the United States by private employers. This would bring parity for private employers between Title VII and the proposed legislation.

fine

Second, we suggest that, in the interests of fairness, you consider broadening the definition of "parental status" to include individuals who are childless. Our experience, and the professional literature reflects, that childless people have suffered discrimination on that account. For example, women managers who deferred their careers to raise a family have been known to discriminate against career women who chose to remain childless. Equity counsels that childless persons be protected from discrimination by parents who might otherwise wish to favor other parents in employment decisions.

NO

?

Third, we suggest that the legislation eliminate the possibility that it might insulate from employer discipline or other employment decisions parents who are delinquent with their child support payments. Such delinquency certainly is a legitimate suitability factor.

?

how

Finally, questions have been raised about the effect of this bill on dwindling agency EEO resources given that discrimination against parents has not proved to be a problem, at least here at the Department of State. Moreover, we question the need for this legislation as opposed to legislation prohibiting discrimination on other bases such as marital status or any other

non-merit factor. In our view, the majority of "parental status" cases (e.g., women being placed in a slower advancement track) are already covered by the sex discrimination prohibition in Title VII of the Civil Rights Act.

LRM ID: MD1193

SUBJECT: Draft Bill on Ending Discrimination Against Parents Act of 1999

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concursive comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melinda D. Haskins Phone: 395-3923 Fax: 395-6144
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: 7/21/99 (Date)
Jack Kristy (Name)
ED (Agency)
401-8313 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

☐ Concur
☒ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet

ED has no objection. However, we wonder whether by extending protection to persons "standing in loco parentis" the class of persons protected hasn't been made subjective.

LRM ID: MDH93 SUBJECT: Draft Bill on Ending Discrimination Against
Parents Act of 1999

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no
comment), we prefer that you respond by e-mail or by faxing us this
response sheet. If the response is short and you prefer to call, please
call the branch-wide line shown below (NOT the analyst's line) to leave a
message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected
to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melinda D. Haskins Phone: 395-3923 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: 7/22/99 (Date)
William J. White, Jr. (Name)
EEOC (Agency)
663-4901 (Telephone)

The following is the response of our agency to your request for views on
the above-captioned subject:

☐ Concur

☐ No Objection

☐ No Comment

☒ See proposed edits on pages 3, 4, 5, 6, 7, 8, 9

☐ Other: _____

☒ FAX RETURN of 7 pages, attached to this response sheet

U.S.C. 2000e-16(a)) applies;

(3) a ~~Presidential appointee or State employee~~ ^{an individual} to whom section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) a covered employee as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301); or

(5) a covered employee as defined in section ~~411(a)(2)~~ ^{411(c)(1)} of title 3, United States Code.

The term "employee" includes applicants for employment and former employees.

(f) "Employer" means:

(1) a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has fifteen or more employees (as defined in section 701(f) of such Act (42 U.S.C. 2000e(f)) for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person;

(2) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301); or

(5) an employing office as defined in section ~~411(a)(2)~~ ^{411(c)(2)} of title 3, United States Code.

The term "employer" does not include a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, United States Code.

(g) "Employment Agency" has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(h) "Incapable of Self-Care" has the meaning given the term in regulations implementing section 101(12)(B) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611(12)(B)).

(i) "Labor Organization" has the meaning given the term in sections 701(d) and (e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d), (e)).

(j) "Parental Status" means having the status, with regard to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, of:

- (1) a biological parent;
- (2) an adoptive parent;
- (3) a foster parent;

- (4) a stepparent;
- (5) a custodian of a legal ward;
- (6) a person who is actively seeking legal custody or adoption; or
- (7) an individual standing in loco parentis.

(k) "Person" has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

(l) "Religious Organization" means:

- (1) a religious corporation, association, or society; or
- (2) a school, college, university, or other educational institution or institution of learning, if -

(i) the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or

(ii) the curriculum of the school, college, university, or other educational institution is directed toward the propagation of a particular religion. Not institution of learning

(m) "State" has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

SECTION 5. DISCRIMINATION PROHIBITED.

(a) **Employer Practices.** -- 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 regard to the compensation, terms, conditions, or privileges of employment of the individual because of such individual's parental status; or

(2) to limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the status of the individual as an employee, because of such individual's parental status.

(b) **Employment Agency Practices.** -- It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of the parental status of the individual or to classify or refer for employment any individual on the basis of the parental status of the individual.

(c) **Labor Organization Practices.** -- It shall be an unlawful employment practice for a labor organization -

(1) to exclude or expel from its membership, or otherwise to discriminate against,

any individual because of the parental status of the individual;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect the status of the individual as an employee or as an applicant for employment, because of such individual's parental status; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Act.

(d) **Training Programs.** -- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of the parental status of the individual in admission to, or employment in, any program established to provide apprenticeship or other training.

SECTION 6. RETALIATION AND COERCION PROHIBITED.

(a) **Retaliation.** -- A covered entity shall not discriminate against an individual because the individual has opposed any act or practice prohibited by this Act or because the individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) **Interference, Coercion, or Intimidation.** -- A covered entity shall not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of the individual's having exercised or enjoyed, or on account of the individual's having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

SECTION 7. OTHER PROHIBITIONS.

(a) **Collection of Statistics.** -- The Commission shall not collect statistics on parental status from covered entities, or compel the collection of such statistics by covered entities.

(b) **Quotas.** -- A covered entity shall not adopt or implement a quota on the basis of parental status.

SECTION 8. MIXED MOTIVE DISCRIMINATION. -- An unlawful employment practice is established under this Act when the complaining party demonstrates that parental status, or retaliation, coercion, intimidation, threats, or interference with an individual as described in section 7 of this Act, was a motivating factor for any employment practice, even though other

factors also motivated the practice.

SECTION 9. DISPARATE IMPACT. -- The fact that an employment practice has a disparate impact, as the term "disparate impact" is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of parental status does not establish a violation of this Act.

SECTION 10. DEFENSES

(a) **Religious Organizations.** -- It shall not be a violation of this Act for a religious organization to fail or refuse to hire or to discharge an individual because the parental status of the individual violates the sincerely held religious beliefs of that religious organization.

(b) **Actions in a Foreign Country.**

(1) It shall not be unlawful under this Act for a covered entity to take any action otherwise prohibited under this Act with respect to an employee in a workplace in a foreign country if compliance with this Act would cause such entity to violate the law of the foreign country in which such workplace is located.

(2) (i) If a covered entity controls a corporation whose place of incorporation is a foreign country, any practice prohibited by this Act engaged in by such corporation shall be presumed to be engaged in by such covered entity.

(ii) This Act shall not apply with respect to the foreign operations of a corporation that is a foreign person not controlled by an American covered entity.

(iii) For purposes of this subsection, the determination of whether a covered entity controls a corporation shall be based on the factors set forth in section 702(e)(3) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(e)(3)).

SECTION 11. ENFORCEMENT

(a) **Enforcement Powers.** -- With respect to the administration and enforcement of this Act in the case of a claim alleged by an individual for a violation of this Act --

(1) the Commission shall have the same powers as the Commission has to administer and enforce

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(ii) ~~sections 303 and~~ 304 of the Government Employee Rights Act of 1991 (2 U.S.C. ~~1219 and~~ 1220);

in the case of a claim alleged by the individual for a violation of such title or of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1)), respectively;

(2) the Librarian of Congress shall have the same powers as the Librarian of

Congress has to administer and enforce title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by the individual for a violation of such title;

(3) the ~~Board~~ ^{Office and the Board} (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) shall have the same powers as the ~~Board~~ ^{Office and the Board} has to administer and enforce the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by the individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1));

(4) the Attorney General shall have the same powers as the Attorney General has to administer and enforce

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(ii) ~~sections 303 and~~ 304 of the Government Employee Rights Act of 1991 (2 U.S.C. ~~1219 and~~ 1220);

in the case of a claim alleged by the individual for a violation of such title or of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1)), respectively;

(5) the President, the Commission, and the Merit Systems Protection Board shall have the same powers as the President, the Commission, and that Board, respectively, have under ~~sections 432, 452, and~~ section 454 of title 3, United States Code, in the case of a claim alleged by the individual for a violation of section 411(a)(1) of such title;

(6) a court of the United States shall have the same jurisdiction and powers as the court has to enforce -

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by the individual for a violation of such title;

(ii) ~~sections 303 and~~ 304 of the Government Employee Rights Act of 1991 (2 U.S.C. ~~1219 and~~ 1220) in the case of a claim alleged by the individual for a violation of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1));

(iii) the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by the individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and

(iv) section 451 of title 3, United States Code, in the case of a claim alleged by the individual for a violation of section 411(a)(1) of such title.

(b) **Procedures and Remedies.** - The procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are -

(1) for individuals who are covered under title VII of the Civil Rights Act of 1964

(42 U.S.C. 2000e et seq.), the procedures and remedies applicable under such title for a violation of such title;

(2) for individuals who are covered under section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)), the procedures and remedies applicable for a violation of such section;

(3) for individuals who are covered employees under section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), the procedures and remedies applicable for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and

(4) for individuals who are covered employees under section ~~411(a)(1)~~ ^{411(c)(1)} of title 3, United States Code, the procedures and remedies applicable for a violation of section 411(a)(1) of title 3, United States Code.

(c) **Additional Remedies.** - Notwithstanding any limitation on the remedies specified in subsection (b), and in addition to the remedies specified in subsection (b), any covered entity that violates this Act shall be liable for such compensatory or punitive damages as may be appropriate, except that neither a State nor the United States shall be liable for punitive damages.

(d) **Other Applicable Provisions.** - With respect to a claim alleged by a covered employee (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) for a violation of this Act, title IV of the Congressional Accountability Act of 1995 (2 U.S.C. 1401 et seq.) shall apply in the same manner as such title applies with respect to a claim alleged by such a covered employee for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

SECTION 12. STATE AND FEDERAL IMMUNITY

(a) **State Immunity.** - A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal court of competent jurisdiction for a violation of this Act.

(b) **Remedies Against the United States and the States.** - Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States or a State for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for a violation to the same extent as the remedies are available against a private entity, except that punitive damages are not available.

SECTION 13. POSTING NOTICES. - A covered entity shall post notices for individuals to whom the provisions specified in section 11(b) of this Act apply, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

SECTION 14. REGULATIONS.

(a) **In General.** Except as provided in subsections (b), (c), and (d) below, the Commission shall have authority to issue regulations to carry out this Act.

(b) **Librarian of Congress.** The Librarian of Congress shall have authority to issue regulations to carry out this Act with respect to employees of the Library of Congress.

(c) **Board.** The Board referred to in section 11(a)(3) of this Act shall have authority to issue regulations to carry out this Act, in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384), with respect to covered employees as defined in section 101 of such Act (2 U.S.C. 1301).

(d) **President.** The President shall have authority to issue regulations to carry out this Act with respect to covered employees as defined in section ~~AD 411~~ of title 3, United States Code.

AD 411 (c)(1)

SECTION 15. RELATIONSHIP TO OTHER LAWS. - This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or any law of a State or political subdivision of a State.

SECTION 16. SEVERABILITY. Should any provision of this Act be found to be invalid by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

SECTION 17. APPROPRIATIONS. -- There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

SECTION 18. EFFECTIVE DATE. - This Act shall take effect 60 days after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.

► Daniel I. Werfel
07/22/99 09:36:06 AM
.....

Record Type: Record

To: Melinda D. Haskins/OMB/EOP@EOP
cc: Daniel J. Chenok/OMB/EOP@EOP
Subject: Re: URGENT -- Draft Bill on Ending Discrimination Against Parents Act of 1999 -- Comments Due 10 A.M.
Thursday (7/22) 

Thanks for sending. I have two questions. (At this point these are just general questions, and by asking them I don't mean to imply that we have specific concerns with these sections.)

1) The disparate impact section indicates that disparate impact is not a violation of the Act. Are there similar provisions in Title VII and other non-discrimination statutes? I know that the courts have long held that disparate treatment and disparate impact discrimination are both actionable claims in typical race discrimination claims. Thus, I am not sure why this provision is in here. *ENDA*

2) What is the rationale behind limiting the Commission from collecting statistics on parental status?

*Just
not
beg.*



Richard B. Bavier

07/20/99 02:53:38 PM

Record Type: Record

To: Melinda D. Haskins/OMB/EOP@EOP

cc: Susanne D. Lind/OMB/EOP@EOP

Subject: Re: URGENT -- Draft Bill on Ending Discrimination Against Parents Act of 1999 -- Comments Due 10 A.M.
Thursday (7/22)

Do we have any quantitative evidence that such discrimination is occurring or is a problem? If so, it might be added to the findings section of the bill.

No.

A BILL

To prohibit employment discrimination on the basis of parental status, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE. -- This Act may be cited as the “Ending Discrimination Against Parents Act of 1999.”

SECTION 2. FINDINGS.

(a) XX percent of American workers are parents of children under 18;

(b) Federal law protects working parents from employment discrimination in a number of important areas. For instance, Title VII of the Civil Rights Act of 1964 prohibits discrimination against workers on the basis of sex; the Americans with Disabilities Act of 1990 prohibits discrimination against workers on the basis of disability; and the Pregnancy Discrimination Act of 1978 prohibits discrimination against workers on the basis of pregnancy. *caretaking resp for children - 70 subject* [Also, the Family and Medical Leave Act of 1993 provides covered workers job protection when they take time off for certain family responsibilities. *6* Nothing in this law is intended to affect the interpretation or application of these laws.

(c) However, no existing federal statute protects workers from employment discrimination on the basis of their status as parents.

(d) Such discrimination against parents occurs where, for example, employers refuse to hire or promote both men and women who are parents based on stereotypes and assumptions about their level of commitment to the work force.

(e) Such discrimination has occurred in the workplace and has been largely unremedied.

(f) Such discrimination occurs in both the private and the governmental sectors.

(g) The existence of such discrimination –

(1) depresses the wages and employment opportunities of working families that rely on the wages of working parents to make ends meet;

(2) prevents the optimum utilization of available labor resources;

(3) has been spread and perpetuated, through commerce and the channels and instrumentalities of commerce, among the workers of several States;

(4) burdens commerce and the free flow of goods in commerce;

(5) constitutes an unfair method of competition in commerce;

(6) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;

(7) interferes with the orderly and fair marketing of goods in commerce; and

(8) in many instances, may deprive workers of equal protection of the laws in violation of the 5th and 14th amendments to the United States Constitution.

(h) Elimination of such discrimination would have positive effects, including –

(1) providing a solution to problems in the economy created by unfair discrimination on the basis of parental status;

(2) promoting stable families by enabling working parents to work free from discrimination on the basis of parental status;

(3) remedying the effects of past discrimination on the basis of parental status;

(4) ensuring equal protection pursuant to Congress' power to enforce the 5th and 14th amendments to the United States Constitution.

SECTION 3. PURPOSES

The purposes of this Act are –

(a) to provide a comprehensive Federal prohibition of employment discrimination on the basis of parental status;

(b) to provide meaningful and effective remedies for employment discrimination on the basis of parental status; and

(c) to invoke congressional powers, including the powers to enforce the 14th amendment to the United States Constitution and to regulate interstate commerce, in order to prohibit discrimination on the basis of parental status.

SECTION 4. DEFINITIONS

In this Act:

(a) “Commission” means the Equal Employment Opportunity Commission.

(b) “Complaining Party” means the Commission, the Attorney General, or any other person who may bring an action or proceeding under this Act.

(c) “Covered Entity” means an employer, employment agency, labor organization, and joint labor-management committee.

(d) “Demonstrates” means meets the burdens of production and persuasion.

(e) “Employee” means:

(1) an individual to whom section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) applies;

(2) an individual to whom section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) a Presidential appointee or State employee to whom section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) a covered employee as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301); or

(5) a covered employee as defined in section 401(a)(2) of title 3, United States Code.

The term “employee” includes applicants for employment and former employees.

(f) “Employer” means:

(1) a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has fifteen or more employees (as defined in section 701(f) of such Act (42 U.S.C. 2000e(f)) for each working day in each of

for
all
claims

twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person;

(2) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies;

(3) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) applies;

(4) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301); or

(5) an employing office as defined in section 401(a)(4) of title 3, United States Code.

The term “employer” does not include a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, United States Code.

(g) “Employment Agency” has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(h) “Incapable of Self-Care” has the meaning given the term in regulations implementing section 101(12)(B) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611(12)(B)).

put in reg.

(i) “Labor Organization” has the meaning given the term in sections 701(d) and (e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d), (e)).

(j) “Parental Status” means having the status, with regard to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, of:

(1) a biological parent;

(2) an adoptive parent;

(3) a foster parent;

(4) a stepparent;

(5) a custodian of a legal ward;

(6) a person who is actively seeking legal custody or adoption; or

(7) an individual standing in loco parentis.

7.

(k) "Person" has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

(l) "Religious Organization" means:

(1) a religious corporation, association, or society; or
(2) a school, college, university, or other educational institution or institution of learning, if –

(i) the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or

(ii) the curriculum of the school, college, university, or other educational institution is directed toward the propagation of a particular religion.

(m) "State" has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

SECTION 5. DISCRIMINATION PROHIBITED.

(a) **Employer Practices.** -- 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 regard to the compensation, terms, conditions, or privileges of employment of the individual because of such individual's parental status; or

(2) to limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the status of the individual as an employee, because of such individual's parental status.

(b) **Employment Agency Practices.** -- It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate

against, any individual because of the parental status of the individual or to classify or refer for employment any individual on the basis of the parental status of the individual.

(c) Labor Organization Practices. -- It shall be an unlawful employment practice for a labor organization –

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of the parental status of the individual;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect the status of the individual as an employee or as an applicant for employment, because of such individual's parental status; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this Act.

(d) Training Programs. -- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of the parental status of the individual in admission to, or employment in, any program established to provide apprenticeship or other training.

SECTION 6. RETALIATION AND COERCION PROHIBITED.

(a) Retaliation. -- A covered entity shall not discriminate against an individual because the individual has opposed any act or practice prohibited by this Act or because the individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) Interference, Coercion, or Intimidation. – A covered entity shall not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of the individual's having exercised or enjoyed, or on account of the individual's having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

SECTION 7. OTHER PROHIBITIONS.

(a) **Collection of Statistics.** -- The Commission shall not collect statistics on parental status from covered entities, or compel the collection of such statistics by covered entities.

(b) **Quotas.** -- A covered entity shall not adopt or implement a quota on the basis of parental status.

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invest.

SECTION 8. MIXED MOTIVE DISCRIMINATION. -- An unlawful employment practice is established under this Act when the complaining party demonstrates that parental status, or retaliation, coercion, intimidation, threats, or interference with an individual as described in section 5 of this Act, was a motivating factor for any employment practice, even though other factors also motivated the practice.

SECTION 9. DISPARATE IMPACT. -- The fact that an employment practice has a disparate impact, as the term “disparate impact” is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of parental status does not establish a violation of this Act.

SECTION 10. DEFENSES

(a) **Religious Organizations.** -- It shall not be a violation of this Act for a religious organization to fail or refuse to hire or to discharge an individual because the parental status of the individual violates the sincerely held religious beliefs of that religious organization.

(b) **Actions in a Foreign Country.**

(1) It shall not be unlawful under this Act for a covered entity to take any action otherwise prohibited under this Act with respect to an employee in a workplace in a foreign country if compliance with this Act would cause such entity to violate the law of the foreign country in which such workplace is located.

(2) (i) If a covered entity controls a corporation whose place of incorporation is a foreign country, any practice prohibited by this Act engaged in by such corporation shall be presumed to be engaged in by such covered entity.

(ii) This Act shall not apply with respect to the foreign operations of a corporation that is a foreign person not controlled by an American covered entity.

(iii) For purposes of this subsection, the determination of whether a covered entity controls a corporation shall be based on the factors set forth in section 702(c)(3) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(c)(3)).

SECTION 11. ENFORCEMENT

(a) **Enforcement Powers.** -- With respect to the administration and enforcement of this Act in the case of a claim alleged by an individual for a violation of this Act --

(1) the Commission shall have the same powers as the Commission has to administer and enforce

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(ii) sections 303 and 304 of the Government Employee Rights Act of 1991 (2 U.S.C. 1219 and 1220);

in the case of a claim alleged by the individual for a violation of such title or of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1)), respectively;

(2) the Librarian of Congress shall have the same powers as the Librarian of Congress has to administer and enforce title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by the individual for a violation of such title;

(3) the Board (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) shall have the same powers as the Board has to administer and enforce the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by the individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1));

(4) the Attorney General shall have the same powers as the Attorney General has to administer and enforce

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(ii) sections 303 and 304 of the Government Employee Rights Act of 1991 (2 U.S.C. 1219 and 1220);

in the case of a claim alleged by the individual for a violation of such title or of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1)), respectively;

(5) the President, the Commission, and the Merit Systems Protection Board shall have the same powers as the President, the Commission, and that Board, respectively, have under section 454 of title 3, United States Code, in the case of a claim alleged by the individual for a violation of section 411(a)(1) of such title;

(6) a court of the United States shall have the same jurisdiction and powers as the court has to enforce –

(i) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by the individual for a violation of such title;

(ii) sections 303 and 304 of the Government Employee Rights Act of 1991 (2 U.S.C. 1219 and 1220) in the case of a claim alleged by the individual for a violation of section 302(a)(1) of such Act (2 U.S.C. 1202(a)(1));

(iii) the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by the individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and

(iv) section 451 of title 3, United States Code, in the case of a claim alleged by the individual for a violation of section 411(a)(1) of such title.

(b) **Procedures and Remedies.** – The procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are –

(1) for individuals who are covered under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the procedures and remedies applicable under such title for a violation of such title;

(2) for individuals who are covered under section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)), the procedures and remedies applicable for a violation of such section;

(3) for individuals who are covered employees under section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301), the procedures and remedies applicable for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and

(4) for individuals who are covered employees under section 401(a)(2) of title 3, United States Code, the procedures and remedies applicable for a violation of section 411(a)(1) of title 3, United States Code.

(c) **Additional Remedies.** – Notwithstanding any limitation on the remedies specified in subsection (b), and in addition to the remedies specified in subsection (b), any covered entity that violates this Act shall be liable for such compensatory or punitive damages as may be appropriate, except that neither a State nor the United States shall be liable for punitive damages.

(d) **Other Applicable Provisions.** – With respect to a claim alleged by a covered employee (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) for a violation of this Act, title IV of the Congressional Accountability Act of 1995 (2 U.S.C. 1401 et seq.) shall apply in the same manner as such title applies with respect to a claim alleged by such a covered employee for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

SECTION 12. STATE AND FEDERAL IMMUNITY

(a) **State Immunity.** – A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal court of competent jurisdiction for a violation of this Act.

(b) **Remedies Against the United States and the States.** – Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States or a

State for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for a violation to the same extent as the remedies are available against a private entity, except that punitive damages are not available.

SECTION 13. POSTING NOTICES. – A covered entity shall post notices for individuals to whom the provisions specified in section 11(b) of this Act apply, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

SECTION 14. REGULATIONS.

(a) **In General.** Except as provided in subsections (b), (c), and (d) below, the Commission shall have authority to issue regulations to carry out this Act.

(b) **Librarian of Congress.** The Librarian of Congress shall have authority to issue regulations to carry out this Act with respect to employees of the Library of Congress.

(c) **Board.** The Board referred to in section 11(a)(3) of this Act shall have authority to issue regulations to carry out this Act, in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384), with respect to covered employees as defined in section 101 of such Act (2 U.S.C. 1301).

(d) **President.** The President shall have authority to issue regulations to carry out this Act with respect to covered employees as defined in section 401(a)(2) of title 3, United States Code.

SECTION 15. RELATIONSHIP TO OTHER LAWS. – This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or any law of a State or political subdivision of a State.

SECTION 16. SEVERABILITY. – Should any provision of this Act be found to be invalid by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

SECTION 17. APPROPRIATIONS. -- There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

SECTION 18. EFFECTIVE DATE. – This Act shall take effect 60 days after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.