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The affirmative action mandate of Executive Order 11,246, as amended,[1] together with the enforcement of Title VII of the Civil Rights Act of 1964[2] and the Equal Pay Act of 1963[3] have resulted in a substantial alteration of the employment practices among the nation's employers. The abolition of overt discrimination on the basis of race, color, religion, sex, and national origin is nearing reality. The current thrust of the federal government's effort to end employment discrimination has turned to more subtle forms of discrimination which, although often lacking a discriminatory purpose or intent, nevertheless have the effect of perpetuating the results of past discriminatory practices. Pursuant to the affirmative action mandate, the federal equal employment opportunity agencies have, through a mutual effort, hammered out negotiated settlements and judicial decisions that have put an end to many such discriminatory employment practices. However, in the process of enforcing nondiscriminatory hiring and treatment of employees, many legal problems have arisen regarding the traditional law of labor relations and the collective bargaining process.

This article explores the development, theory, and design of the government's Contract Compliance Program[4] and the other statutory means of pursuing equal employment opportunity. Part I is a brief explanation of the Contract Compliance Program under Executive Order 11,246. Part II presents a discussion of the legal underpinnings of the affirmative action concept. Part III deals with the decision *In the Matter of Bethlehem Steel Corporation,*[5] a landmark

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1. 3 C.F.R. 173-81 (1973).
2. 42 U.S.C. §§ 2000 *et seq.* (1970).
3. 29 U.S.C. § 206 (1970).
4. *See* notes 8-16 *infra* and accompanying text.
5. 1 CCH EMPL. PRAC. GUIDE ¶ 5128 (OFCC Docket No. 102-68, Jan. 15,1973).

administrative hearing under procedures established by the Office of Federal Contract Compliance, and the American Telephone & Telegraph Company Memorandum of Agreement and Consent Decree,[6] which has been described as "the largest and most impressive civil rights settlement in the history of the nation."[7] Part IV attempts to discuss some recent decisions in labor relations that have been profoundly affected by the *Bethlehem* and *AT&T* cases. Finally, this article concludes that the affirmative action concept has the full support of the federal government and that, despite the many legal issues which have arisen and which will develop in the future, the commitment to equal employment opportunity will be actively pursued while still maintaining a sensitivity to the valid interests of the parties to collective-bargaining agreements.

I. EXECUTIVE ORDER 11,246

The goal of Executive Order 11,246 is the attainment of equal opportunity in the employment practices of employers who are parties to contracts with the federal government.[8] The Executive Order provides that those entering into contracts with the federal government or performing work on federally-assisted construction contracts[9] agree by contract stipulation that they will not discriminate against an employee or applicant for employment with respect to such factors as race, color, religion, sex, or national origin.[10] The Order requires that as a condition of doing business with the government, contractors, subcontractors, and those performing work on federally-assisted construction contracts will take "affirmative action"[11] to insure that applicants are employed and that employees are treated without regard to race, color, religion, sex, or national

6. The provisions of the Consent Decree are reported at 1 CCH EMPL. PRAC. GUIDE ¶ 1860 at 1533-3 to 1533-14 (1973).

7. Quoting the Introduction to the opinion in EEOC v. American Tel. & Tel. Co., Civil No. 73-149 (E.D. Pa. Oct. 5, 1973).

8. Executive Order 11,246 has been held to have the force and effect of a statute enacted by the Congress. *See* Farkas v. Texas Instr. Inc., 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964).

9. 41 C.F.R. § 60-1.3(k) (1973) defines federally-assisted construction contracts as: "any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaking pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work."

10. Exec. Order No. 11,246, 3 C.F.R. 174 (1973).

11. *Id.*

origin. As a result, the affirmative action concept requires that employers seeking to do business with the federal government must do more than merely refrain from discriminatory practices and policies. They must take positive, result-oriented steps toward the elimination of employment barriers to minorities and women.[12]

The Executive Order places the responsibility for administration of its provisions upon the Secretary of Labor and, with the exception of his responsibility for issuing rules and regulations of general application,[13] allows the Secretary to delegate his functions and duties to others. The day-to-day administration of the Executive Order program is handled through the Department of Labor's Office of Federal Contract Compliance (OFCC).[14] The Office has assigned compliance responsibility for specific industries to fifteen compliance agencies, each agency having compliance responsibility for those industries with which it is most familiar.[15] In the construction industry, the compliance agency for each project is the contracting agency, except for projects in Alaska, where the Interior Department has overall compliance responsibility. The compliance agencies in each area conduct investigations, compliance reviews, and conciliation efforts, hold hearings, and impose sanctions under the ongoing guidance and supervision of the OFCC.

Remedies and relief available for noncompliance with the requirements of the Executive Order and its implementing procedures and regulations include suspension, cancellation, and termination of contracts, as well as debarment of contractors from receiving any additional federal contracts, subcontracts, or federally-assisted construction contracts.[16] In addition, the Secretary of Labor may recommend to the Equal Employment Opportunity Commission (EEOC) and the Attorney General that legal proceedings under Title VII of the Civil Rights Act of 1964 be instituted against the parties. The OFCC and its compliance agencies may also negotiate settlement agreements with noncomplying contractors under which

12. *See* Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970); Contractors Ass'n of E. Pa. v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Trustees of Tufts College v. Volpe Constr. Co., 3 F.E.P. Cases 34 (Sup. Jud. Ct. Mass. 1970); Weiner v. Cuyahoga Community College Dist., 15 Ohio Misc. 289, 238 N.E.2d 839 (Ohio C.P.), *aff'd*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1968), *cert. denied*, 396 U.S. 1004 (1969).

13. Exec. Order. No. 11,246, 3 C.F.R. 174 (1973).

14. Secretary of Labor Order No. 26-65, 31 Fed. Reg. 6921 (1966).

15. *See* Order No. 1, John L. Wilks, Director, Office of Federal Contract Compliance, Consolidation and Reassignment of Compliance Agency Responsibility (Oct. 24, 1969).

16. Exec. Order No. 11,246, 3 C.F.R. 177-78 (1973).

the latter agree to remedy existing deficiencies, including the modification of seniority systems, increased minority and female participation at various job levels, and back pay provisions to remedy past discrimination.

Thus, the Contract Compliance Program uses the government's procurement process to require equal employment opportunity by federal contractors and subcontractors and federally-assisted construction contractors and subcontractors. The thrust of the Program is to increase the utilization of minorities and women throughout the employer's work force pursuant to nondiscrimination and affirmative action objectives.

II. Legal Basis for Affirmative Action and the Contract Compliance Program

The Department of Labor's position on equal employment opportunity emphasizes the legitimate concern of the government to ensure that the manpower needs of the nation are met. It is a privilege, rather than a right, to conduct business with the government. It is entirely proper, and perhaps constitutionally required,[17] for the federal government to exact from persons who do business with it contract stipulations not to discriminate against employees and job applicants and to take affirmative action to insure that applicants are employed and that employees are treated during employment without regard to race, color, religion, sex, or national origin.

Although the Executive Order program has been in effect with various degrees of efficacy since 1941,[18] its potential was not realized until the late 1960's.[19] It was in the latter part of the last decade that the federal government determined to give definition to the vague affirmative action mandate. Because of its visibility, the obvious disparity in job opportunities, and the unique aspect of a somewhat transient workforce, the construction industry was viewed as a target.

A number of approaches were tried by the government. The St. Louis Plan, issued by the Department of Labor in 1966, required

17. *See* NAACP v. Brennan, 5 F.E.P. Cases 1239 (D.D.C. 1973); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); Todd v. Joint Apprenticeship Comm., 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Weiner v. Cuyahoga Community College Dist., 15 Ohio Misc. 289, 238 N.E.2d 839 (Ohio C.P.), *aff'd*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1968), *cert. denied*, 396 U.S. 1004 (1969); *cf.* Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).

18. *See* Exec. Order No. 8,802, 3 C.F.R. 957 (Comp. 1938-1943).

19. *See generally* Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U.L. Rev. 225 (1971).

federal agencies to conduct pre-award employment opportunity compliance reviews with the contractor with a minimum of guidance or prescribed standards. This was followed by the San Francisco Bay Area Plan, which detailed pre-award procedures for agencies to follow, but embodied no standards by which agencies could qualify employers. The Cleveland Plan of 1967 soon followed and introduced the use of so-called manning tables.[20] The Plan required post-award negotiations with successful bidders over minority employment.[21] The original Philadelphia Plan[22] followed the Cleveland Plan and incorporated many of its features, including the post-award negotiation of minority employment figures. The Comptroller General of the United States attacked the Philadelphia Plan, however, as violative of procurement law considerations because it lacked specificity by leaving the determinations of minority manpower utilization open for post-award negotiations.[23] As a result of this opinion, the revised Philadelphia Plan of 1969 was issued.

The revised Plan was carefully drafted to satisfy the Comptroller General's objections to its predecessor. No post-award negotiations were authorized. Instead, numerical ranges for minority manpower utilization were set up by the government prior to the invitation for bids. In formulating the ranges, the government examined and evaluated such factors as the current extent of minority participation in the trades, the availability of minorities for placement, the extent of available training and the need for training, and the impact of the Plan on the existing labor force. Currently, the ranges are included with all bid invitations for projects covered by the Plan, and it is within these ranges that a participating bidder selects his goal. This allows the government to measure his efforts in taking affirmative action during performance under the awarded contract. If the goal is met, he is presumed to be in compliance; if the goal is not reached, the contractor is given the opportunity to demonstrate that he made a good faith effort to reach the goal.

The Comptroller General charged that the revised Philadelphia

20. A manning table is a specific proposal in wbich the contractor details the total number of employees he will use in each trade and how many of that number will constitute his "goal" of minority employment. The manning table concept provided a simple standard by which progress toward equal employment could be measured easily.

21. The validity of the procedure was upheld in Weiner v. Cuyahoga Community College Dist., 15 Ohio Misc. 289, 238 N.E.2d 839 (Ohio C.P.), *aff'd*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1968), *cert. denied*, 396 U.S. 1004 (1969).

22. The original plan was known as the Philadelphia Pre-Award Plan and was put into effect on November 30, 1967.

23. 48 COMP. GEN. 326 (1968).

Plan's special treatment of minorities violated the Civil Rights Act of 1964, although he admitted that his prior objections regarding procurement law considerations had been met.[24] The Attorney General, however, in response to the Department of Labor's request for informal advice, rendered an opinion supporting the legality of the Plan.[25] The Senate Subcommittee on Separation of Powers subsequently held hearings on the Plan, alleging that it represented a violation of the separation of powers mandate of the Constitution. In December, 1969 the Senate attached a rider attacking the Philadelphia Plan to a supplemental appropriation bill. The rider, designed to allow the Comptroller General to veto the Plan, failed in a late evening, pre-Christmas vote.

After the effort to kill the revised Philadelphia Plan via administrative and legislative processes had failed, the Plan was challenged in the courts. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,*[26] a federal district court and the Third Circuit Court of Appeals both determined that the Plan was consistent with the Constitution and the laws of the United States. In that case, the plaintiff Association contended that the Plan constituted illegal and unconstitutional executive action because it was drawn without authorization from Congress. More specifically, the plaintiffs alleged that the record keeping and hiring practices required by the Plan violated Pennsylvania law[27] without the benefit of statutory or constitutional authority for the executive action. They contended that without such statutory or constitutional authority, no substantive federal requirements could be imposed upon a contract between the Commonwealth of Pennsylvania and its contractors. The Court of Appeals replied that the Plan was but a refined approach to the affirmative action requirements of the Executive Order program beginning in 1941,[28] and:

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24. OP. COMP. GEN. No. B-163026, 115 CONG. REC. 17,201-04 (daily ed. Dec. 18, 1969) (Letter to Secretary of Labor, George P. Shultz, Aug. 5, 1969).

25. 42 OP. ATT'Y GEN. 37 (1969).

26. 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

27. 442 F.2d at 166. The court noted that "[t]he Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq.* (Supp. 1970), specifically prohibits an employer from keeping any record of or using any form of application with respect to the race, color, religion, ancestry, sex, or national origin of an applicant for employment. 43 P.S. § 955(b)(1). The Act also prohibits the use of a quota system for employment based on the same criteria. 43 P.S. § 955(b)(3). The record-keeping prohibition may be of limited force due to certain requirements of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-8(c). Moreover, we do not know how the Pennsylvania courts or the Pennsylvania Human Relations Commission would react to a scheme of 'benign' quota hiring." *Id.* at n.14.

28. 442 F.2d at 170.

> [w]hile the orders do not contain any specific statutory reference other than the appropriations statute, 31 U.S.C. § 690, they would seem to be authorized by the broad grant of procurement authority with respect to Titles 40 and 41.[29]

The court concluded that Congress had granted sufficient procurement authority to the executive branch to enable it to carry out the Plan.

The plaintiffs further contended that the Plan was inconsistent with several sections of Title VII of the Civil Rights Act of 1964.[30] After holding that the restrictive language contained in sections 703(j)[31] and 703(h)[32] of the Act are limitations only upon Title VII, not upon any other remedies, state or federal, the appellate court turned to plaintiffs' contention that the Plan, by imposing remedial quotas, required them to violate the basic prohibitions of Section 703(a), which states:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire . . . any individual . . . because of such individual's race . . . or
> (2) to . . . classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race . . . .[33]

The court stated that while the Plan does require a certain color consciousness, it does not thereby require or authorize discrimination against white craftsmen in the affected trades. In an order dated September 23, 1969,[34] the Department of Labor made findings that contractors could commit themselves to specific employment goals without adversely affecting the existing labor force. Therefore, minority persons could be recruited without eliminating job opportunities for white craftsmen. Thus, the court held that the revised Philadelphia Plan does not violate the Civil Rights Act of 1964.

The court also noted that the Plan does not violate section 8(f)

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29. *Id.*

30. Civil Rights Act of 1964, § 701, 42 U.S.C. §§ 2000e *et seq.* (1970).

31. *Id.* § 703(j), 42 U.S.C. § 2000e-2(j) (1970) provides: "Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed . . . in comparison with the total number of [sic] percentage of persons of such race . . . in the available work force in any community . . . or other area."

32. *Id.* § 703(h), 42 U.S.C. § 2000e-2(h) (1970) provides: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ."

33. *Id.* § 703(a), 42 U.S.C. § 2000e-2(a) (1970).

34. The revised Philadelphia Plan was implemented like a 2-staged rate making process. *See* BNA-FEP 401:251 (Order of June 27, 1969), and 401:255 (Order of Sept. 23, 1969).

of the National Labor Relations Act (NLRA),[35] which permits exclusive hiring hall arrangements in the construction industry. Paragraph 8(b) of a June 27, 1969 Department of Labor order[36] provides that:

> It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally-involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, . . . such contractors cannot be considered to be in compliance with [the] Executive Order . . . .

Plaintiffs contended that this language violates the NLRA by interfering with the exclusive hiring hall arrangements that the contractors have with unions pursuant to collective-bargaining agreements. The court found it legally irrelevant that the contractor might be compelled to look outside the union for employees, speculating that it is entirely likely that the economics of the market place will produce an accommodation between the contract provisions desired by the unions and those desired by the source of construction funds.[37] The decision indicates that contractors are faced with the choice of undertaking a commitment to affirmative action or losing opportunities to bid on federally assisted work. The court viewed the dilemma of the contractors as merely a contradiction between contractual undertakings, rather than a violation of the NLRA.[38]

Finally, the court held that the Plan's specified goals were not racial quotas being imposed upon individuals by the government. Instead, the court viewed the program as a valid executive action designed to remedy a perceived evil—that minority tradesmen have not been included in the available labor pool for construction projects in which the federal government has an interest. The conclusion was that such action was not prohibited by the fifth amendment.[39]

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35. 29 U.S.C. § 158(f) (1970).

36. BNA-FEP, 401:251 (Order of June 27, 1969).

37. 442 F.2d at 174.

38. So, too, the court dismissed the contention that the Plan could be attacked on the grounds that the plaintiffs were being forced to take action to remedy what is really union discrimination. *Id.* at 174.

39. *Id.* at 176-77.

The decision by the Third Circuit indicates that to the extent that the requirements of law change subsequent to the execution of a contract by the parties, the contract is nevertheless subject to the prevailing law. The court stated that present seniority and hiring hall practices, racially neutral on their face, may nevertheless be avoided if their effect is to perpetuate the effects of past discrimination, regardless of whether such past discrimination was intentionally caused. The implications of this aspect of the appellate decision on the government's ability to enforce the affirmative action requirements of Title VII and Executive Order 11,246 will be explored further in the discussion of the *Bethlehem* and *AT&T* cases.

The holding in *Contractors Association of Eastern Pennsylvania* provides legal support for the concept of goals and timetables in minority recruitment as a means of implementing the affirmative action mandate of Executive Order 11,246. Such measures were required by the regulations issued by the Office of Federal Contract Compliance[40] to facilitate prompt achievement of full and equal employment opportunity for minorities and women where they might prove useful in overcoming deficiencies in their employment. The court's ruling that the submission of minority utilization goals and timetables falls within the ambit of the affirmative action mandate of Executive Order 11,246 also holds that they do not constitute unlawful quotas.[41] The result is that the government's approach to the affirmative action mandate of the Executive Order became a solid foundation from which the government could seek to defeat discrimination in employment.

III. *Bethlehem* AND *AT&T* EXPLORED: THE CONCEPTS IN ACTION

Using the concept of minority employment goals and timeta-

40. 41 C.F.R. §§ 60-1 *et seq.* (1973).

41. The decision has broader implications beyond the construction industry, particularly since nonconstruction contractors are also required to submit goals and timetables which express the contractor's reasonable expectations as to his good faitb efforts to make his affirmative action program work. 41 C.F.R. § 60-2 (1973) details the procedures and guidelines to be used by *nonconstruction* contractors in developing written affirmative action programs. 41 C.F.R. § 60-2.10 states:

> An acceptable affirmative action program must . . . include goals and timetables to which the contractor's good faith efforts must be directed *to correct the deficiencies* and, thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist. (emphasis added).

Concerning the reasonableness of the goals, 41 C.F.R. § 60-2.12(e) states: "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."

bles, the Department of Labor is requesting prospective contractors to review their personnel policies, practices, and procedures to ensure that they are fair and valid, to take affirmative action to increase the relevant pool of available labor from which they recruit and promote, and to make good faith efforts to meet these goals and timetables. It would be inconsistent, however, to recognize the necessity of remedying the underutilization of minorities and women without meeting the concomitant need to remedy the effects of past discrimination. It is clear that affirmative action to remedy the current underutilization of minorities and women, without more, may not be an effective remedy for the victims of past discrimination.

The Secretary of Labor's decision *In re Bethlehem Steel Corp.*[42] and the Memorandum of Agreement and Consent Decree signed by the Department of Labor, the Equal Employment Opportunity Commission, and the Department of Justice with the American Telephone and Telegraph Company[43] are significant in the development of adequate relief for the victims of past patterns of discrimination. Both employers had a history of individual employee complaints; both AT&T and Bethlehem were found in violation of the Executive Order in compliance reviews; and neither had submitted, prior to the initiation of administrative procedures, effective corrective action plans to remedy the equal employment deficiencies at issue. The relief afforded in each case will deeply affect both employment programs at other companies and the collective-bargaining process generally.

A. The Bethlehem Case

The initial question in *Bethlehem* was whether the company, at its Sparrows Point, Maryland plant, had initially hired and assigned employees to particular jobs, units, and departments on a racial basis. A hearing panel and, subsequently, the Secretary concurred in the finding that blacks had been hired into all- or predominantly-black departments with less desirable and lower paying jobs than those given to white employees. The investigators then attempted to determine whether the effects of that discrimination had later been remedied by the company. The panel found, and the Secretary again affirmed, that the company had not taken suffi-

42. 1 CCH EMPL. PRAC. GUIDE ¶ 5128 (OFCC Docket No. 102-68, Jan. 15, 1973).

43. The American Telephone and Telegraph Company signed the Agreement on behalf of itself and its associated telephone companies.

cient affirmative steps to remedy the effects of its past discrimination in regard to those employees originally hired and placed into "black" jobs.

Bethlehem had opened up the formerly "white" lines of progression to black employees, offering them an opportunity to transfer whenever a vacancy occurred. The employee opting to transfer, however, would have to begin at the entry level position in the new unit, sacrificing the pay he formerly earned for the standard pay of the new job. Perhaps even more significantly, the transferring employee was forced to sacrifice his seniority in the old unit, regardless of how long he had been employed at Sparrows Point, and to begin accumulating seniority anew in the transfer unit. Thus the black employee, who had been denied an opportunity to work and compete for promotions in those units in the past, had the same status as a new employee beginning the same job on the same day.

A major problem for the Secretary was to prescribe a remedy for the discrimination suffered by both blacks who had already transferred and incurred such losses and those who had not transferred because of the hardships. Accordingly, the elements of relief ordered by the Secretary for the affected class—black employees hired and initially assigned to predominantly black departments on or before March 31, 1968—include:

1. The company will offer to each employee who has not transferred out of a predominantly black department the opportunity, in writing, to do so.

2. Employees requesting transfers into predominantly white departments with better advancement opportunities will compete for vacancies as they become available on the basis of total plant service.

3. When employees transferred in accordance with the Decree compete for promotions in their new unit, all employees in that unit must compete on the basis of total plant seniority. Plant seniority also controls in bumping less senior employees in case of layoff. This is necessary because the Sparrows Point plant operated on the standard system of basing promotions solely on unit and department seniority.

4. All employees who transfer under the Order will be paid "red-circled" wages until such time as their pay in the new job equals their wages in their former job. This means that they will be paid either at the rate nearest to their average earnings in their old departments or at the appropriate scale, including incentives, shift differential, and overtime, in the new job, whichever is higher.

5. No employee need be transferred if he does not have the basic skills to perform the requested job *and* could not be so equipped with minimal training. The Order also calls for the establishment of minimum periods of residency in certain jobs which, in a given progression line, would provide necessary training and experience for the next higher job.

6. Employees who have transferred previously at the sacrifice of pay and seniority are to be given the same red circle pay remedy and plant seniority privileges as those who elect to transfer under this decree.

The *Bethlehem* decision will have a major immediate effect on the seniority system at the Sparrows Point installation. Similar seniority modifications have been ordered by the courts for Bethlehem's Lackawanna, New York plant[44] and United States Steel's Fairfield, Alabama plant.[45] The Secretary's decision grants to the affected class members the seniority they would have had in the new jobs if the jobs had originally been available to them. The remedies devised under the Order, however, are utilized only when traditional practices would be discriminatory. For example, plant seniority comes into play only when a person in the affected class is competing for a job in a unit to which he has transferred. Traditional contract seniority will continue to be controlling when white employees compete with each other or with black employees who are not members of the affected class for promotions, layoff, and recall.

B. *The AT&T Case*

The *Bethlehem* case did not deal with issues concerning women, professionals, or managerial personnel, and it did not require back pay for those whose earnings over the years had been lessened by discrimination. These issues, however, were firmly addressed in the AT&T Memorandum of Agreement and Consent Decree involving remedial relief under Executive Order 11,246, Title VII of the Civil Rights Act of 1964, and the Equal Pay Act of 1963.[46] The settlement negotiated with AT&T covers all of its twenty-four operating companies and is unique in that it provides back pay for over 13,000 women and 2,000 minority men, establishes specific remedial steps for the upgrading of all qualified college-trained

44. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971), *modifying* 312 F. Supp. 977 (W.D.N.Y. 1970).

45. United States v. United States Steel Corp., 5 F.E.P. Cases 1253 (N.D. Ala. May 2, 1973).

46. 29 U.S.C. § 206(d) (1970).

women, and increases present salaries of persons whose earnings are less than they would have been but for prior discrimination in job placement. Moreover, since the settlement was incorporated into a federal consent decree, it has the force of law and remains enforceable by the courts.

The primary provisions of the Agreement are:

1. The Bell companies will develop goals for increasing the utilization of women and minorities in each job classification at all of the 700 establishments within the Bell system and will set specific hiring and promotion targets for those groups. These targets will be under constant review by the operating companies, AT&T headquarters, the Office of Federal Contract Compliance, and the Equal Employment Opportunity Commission.

2. The companies will establish goals for the employment of males in the previously all female job category of telephone operator.

3. The companies will take the necessary steps to assure that their transfer and promotion procedures are in compliance with the Equal Pay Act, the Civil Rights Act of 1964, and Executive Order 11,246. Back pay will be awarded to women who have been paid less than men for substantially equal work.

4. Women and minorities in nonmanagement, noncraft jobs will compete for entry-level craft jobs upon the attainment of basic qualifications and seniority. Competition for higher-paying craft jobs will also be facilitated.

5. The companies agree not to use the results of preemployment tests that have not been validated to the satisfaction of the government as a justification for failure to meet their employment goals, but reserve the right to use validated tests to help determine qualifications of prospective employees.

6. Employees who are promoted will be paid in their new positions on the basis of their total length of service with the companies, subject to some limitations due to lack of experience in more skilled occupations.

7. All female college graduates hired into management between July 2, 1965, the effective date of the Civil Rights Act of 1964, and December 31, 1971, will be assessed to determine their interest and potential for higher-level jobs. A special development program will prepare these women for promotions as they become available.

8. All employees will be encouraged to seek promotions and will be informed of the Agreement's provisions and of the vacancies and promotions under the Agreement which take place in their re-

spective establishments.

9. A number of pay adjustments will also be made by the companies involved. Chief among them are: first, approximately 3,000 women presently employed in craft jobs but earning less than their male counterparts will receive retroactive pay adjustments covering a period up to two years; second, women presently employed in craft jobs who are not yet at their maximum rate of pay will receive immediate wage increases to conform to the Agreement; third, wage rates for 500 switchroom helpers employed by Michigan Bell—mostly women—will be raised into line with what is paid for comparable work in other Bell companies and retroactive pay adjustments will be made for a period of up to two years; fourth, to provide restitution for possible delays in promotion, the companies have agreed to make lump sum payments ranging from $100 to $400 to at least 10,000 women and minorities promoted from noncraft jobs into craft jobs between June 30, 1971, and July 1, 1974, provided they remain in the new jobs a minimum of 6 months; and finally, women college graduates hired directly into management who qualify under the telephone companies' new assessment program will receive a $100 a month raise as soon as they qualify.

C. *Analysis of the Cases*

Bethlehem was the first decision under Executive Order 11,246 providing meaningful relief for an affected class of employees by establishing a plant-wide seniority system in partial substitution for a unit or departmental seniority system that had perpetuated prior discrimination. The Secretary recognized that full relief would require providing these individuals an opportunity to move into their rightful place—where they would have been but for the employer's initial discrimination in job assignment.[47] In the AT&T Memorandum of Agreement and Consent Decree, following on the heels of the *Bethlehem* decision, the government here too was able to grasp a new dimension of relief for women and minority workers and further expand it to include back pay. Moreover, the result suggests some new legal concepts being utilized in the process, particularly the concept of restitution for delay in promotion.[48]

A critical aspect of the relief obtained in the *Bethlehem* deci-

47. *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263-66 (1967).

48. *See* p. 96 *infra* for an explanation of the terms "would bave been" and "should bave been" used to describe tbe group of employees who suffered the effects of discriminatory personnel policies, practices, and procedures.

sion was the determination of the affected class. The concept of providing remedial relief for members of an "affected class" has been applied by the courts in numerous Title VII cases[49] and the Secretary relied upon this same approach to identify those minority group employees who were suffering the present effects of past discrimination at the company. The Office of Federal Contract Compliance proposed that all black employees be included in the affected class unless and until the company established a different class. The Secretary, reviewing the evidence, found this proposal to be inappropriate. Instead, he determined that the affected class should consist of those black employees working at Sparrows Point who were hired prior to the company's liberalized transfer policy instituted March 31, 1968,[50] and were initially assigned to all-black or predominantly-black departments. The Secretary noted that there was no evidence presented that supported a conclusion that the company's former overt discrimination had not been effectively eliminated or that employees hired since March 31, 1968, have not been accorded equal opportunity.

The AT&T negotiations, however, presented a more difficult problem in identifying the members of the affected class. The government contended that the primary affected class was women and minorities who in the past were unlawfully assigned to traditionally female or minority job classifications, in the operator and service categories. Other affected classes that the government included were: applicants rejected on the basis of unlawful criteria; incumbent employees whose transfer requests were rejected on the basis of unlawful criteria; and all females and minorities who had transferred to craft jobs and whose craft wages were not based solely on net-credited service. AT&T representatives refused to accept the term "affected class" as an accurate description of those employees whom the government regarded as entitled to relief and financial restitution. Rather, the company insisted on referring to these em-

49. *See, e.g.*, United States v. Chesapeake & O. Ry., 471 F.2d 582 (4th Cir.), *cert. denied*, 411 U.S. 939 (1973); United States v. St. Louis & S.F. Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4tb Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5tb Cir. 1969), *aff'g* 282 F. Supp. 39 (E.D. La. 1968), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

50. On March 14, 1968, the company and the union signed a Memorandum of Understanding which liberalized qualifications and length of service conditions to transfer into a different department. In addition, the company submitted to the OFCC an affirmative action program on March 25, 1968.

ployees in the less incriminating terms of the "would have beens" and the "should have beens"—those persons who, but for prior company personnel policies, practices, or procedures, would have been or should have been in other jobs. Regardless of the labels used, AT&T was correct in its argument that the government could not accurately identify those groups of employees who by virtue of past discrimination continued to suffer the present effects of that discrimination.

Faced with this dilemma, the government proceeded on the premise that although the identity of the affected class was not readily ascertainable, some percentage of these employees had been denied equality of opportunity for advancement to the higher paying craft jobs. Therefore, the government agencies negotiating with AT&T avoided the problem of defining precisely an affected class by utilizing the definition of the "would have beens" and the "should have beens" in the company's affirmative action program. The development of an affirmative action program requires

> an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.[51]

Pursuant to the kind of analysis called for in the regulations of the Office of Federal Contract Compliance,[52] the government determined that it was reasonable to expect that AT&T would have a rate of attrition and expansion of job opportunities sufficient to absorb the transfer of approximately 10,000 women and minorities from operator and clerical jobs into entry-level craft jobs over a two year time period on the basis of minimum qualifications and seniority. In order to encourage and facilitate the transfer of the "would have beens" and the "should have beens," a comparability study was conducted to determine the existing pay rates of these employees and what they would have been earning if they were employed in craft positions. The total dollar amount was then spread out over the projected 10,000 women and minority transferees from noncraft, nonmanagement jobs into craft jobs. The result was that those who transferred into craft jobs in the first six months after the Agreement would get a lump sum payment of $100, those who transfer in the second six months would get a lump sum payment of $200, in the third six months $300, and in the fourth six months $400.

51. 41 C.F.R. § 60-2.10 (1973).
52. *Id.* § 60-2.11.

Thus there was an incentive for the affected female and minority employees to transfer to the higher-paying craft jobs and a concomitant incentive for AT&T to transfer these employees since the speed of the transfers determined the cost incurred by the company. In addition to the incentive factor, the escalating payment formula contained in the Memorandum of Agreement involved some equitable considerations in that those employees who transferred later deserved a greater sum of money as compensation than those employees who suffered the effect of AT&T's discriminatory personnel policies and practices for a shorter time before being transferred to craft jobs.

Another notable aspect of the Memorandum of Agreement is the variety of legal theories that led to the resolution of a large equal pay problem. The vast majority of employees of AT&T worked in sex-segregated job classifications; taking all of the organization's operating companies together, males constituted 98.6 per cent of all AT&T craft workers on December 31, 1971, while 96.6 per cent of all office and clerical employees were women.[53] During the last few years before the Agreement, AT&T permitted a handful of women to transfer to craft jobs, which transfer entailed, as it did for men, a refiguring of the wage rate for the individual. There are a variety of ways in which the various Bell companies accomplish this, but all methods operate on the same principle, namely that the wage rate in the new job is at least partly determined by the wage rate of the old job, even though no particular prior experience is required for the new job. Since men have traditionally had the higher paying jobs, a man who transfers between craft jobs is paid more than an equally qualified woman who transfers into the same job.[54] Relief from the inequities of these discriminatory policies and practices could have been achieved either under Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, or Executive Order 11,246 depending upon the legal theory adopted by the party seeking relief.

53. *'A Unique Competence': A Study of Equal Employment Opportunity in the Bell System*, 118 CONG. REC. E1243 (daily ed. Feb. 17, 1972) [hereinafter cited as 1972 EEOC Study].

54. Using the not so typical hypothetical described in Appendices I and II, to show the magnitude of potential liability, assume a male frameman (craft job) and a female operator each with 72 months of service are simultaneously promoted to the craft job of station installer. The man will move from $152.50 per week to $156.50; the woman will go from $118 to $124 per week. After 18 months on the job the man would be earning $176, the woman, $139.50. If each then moves to the top craft job of PBX installer, the man will enter the job at $183, the woman at $142. Assuming they both stay in the PBX installer job, the woman will receive the top wage 4½ years after the man and will have lost $6,500 during the whole period.

Title VII and Executive Order 11,246 provide relief for an affected class that is suffering the present effects of past discrimination. AT&T had pursued a practice of discriminatory assignment of females and minorities to traditionally female or minority job classifications based solely on their sex or race. The company's failure to identify those employees who were discriminated against by this sytem of unlawful job assignment and to modify the promotional wage structure constituted discrimination on the basis of sex and race since the employees who had been assigned to the lowest paying jobs would continue to suffer wage discrimination upon transfer, thereby perpetuating the effects of past discrimination. The Supreme Court has ruled that Title VII prohibits not only overt discrimination, but also practices that are fair on their face but discriminatory in operation.[55] Thus, a promotional wage structure that on its face is nondiscriminatory, but nevertheless has a discriminatory impact, is unlawful. The same result can be reached under Executive Order 11,246.[56] Therefore, the presence of a sex-segregated work force and a promotional wage structure that perpetuates such discrimination is violative of both Title VII and the Executive Order.

On the other hand, viewing the AT&T case as an equal pay action, a somewhat different legal approach would be taken. The Equal Pay Act prohibits an employer from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . which requires equal skill, effort, and responsibility . . .,"[57] except where such payment is made pursuant to four excepted situations.[58] The promotional wage structure in its various forms throughout the Bell System resulted in women earning wages less than the rate at which male employees are compensated for substantially equal work. AT&T could not bring this unequal treatment within any of the exceptions contained in the Act. The promotional wage plan is not a seniority system, the first exception, since neither length of employment nor similar time-based indices are used to determine the new wage rate. The primary

55. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

56. *In re* Bethlehem Steel Corp., 1 CCH EMPL. PRAC. GUIDE ¶ 5128 (OFCC Docket No. 102-68, Jan. 15, 1973).

57. 29 U.S.C. § 206(d)(1) (1970).

58. *Id.* The 4 exceptions are: "(i) [A] seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."

determinant is simply the number of dollars paid in the preceding job. Merit, the second exception to the Act, plays no part in determining the amount of increase since all of the systems described above are applied without regard to individual characteristics. Quantity or quality of production, the third exception, comes into play only in the accumulation of credit towards a wage grade within a job classification and in the decision whether to promote an employee. It does not determine the wage to be paid at various job classifications.

Under the final catch-all exception to the Act, wage rates determined on a "factor other than sex," the only colorable claim available to AT&T was that prior craft experience is an asset when transferring to another craft job and that the wage differential between men and women employees is actually payment for this experience. The response to this argument was the company's own personnel position that each job in the Bell system is unique and requires special training. The Bell companies have few prerequisite jobs;[59] indeed, twelve operating companies of the Bell system publicly advertised that for *every craft job at every level,* employees are given extended classroom and on the job training.[60] An in-depth study of Michigan Bell's promotion practices, however, revealed no set lines of progression, indicating that no job requires any particular kind of previous experience.[61] This is also borne out by the "relevant labor pools" described in AT&T's affirmative action plan submitted to OFCC.[62] The relevant pool for the telephone craft-inside-skilled group, for example, includes all inside and outside semi-skilled craftworkers and skilled general service workers. The variety of jobs covered by these three categories is so broad as to preclude a conclusion that skills learned on these lower jobs are necessary to the proper performance of the higher.

Even if AT&T could have shown that some common elements run through all craft jobs and that these common elements must be acquired by employees before moving on to higher level craft jobs, this does not constitute a "factor other than sex" because the Bell System has prevented women employees from gaining these skills through a variety of discriminatory practices. As was alleged above, AT&T was violating Title VII and Executive Order 11,246, *inter alia,* by means of slanted recruiting, processing differently male and

59. 1972 EEOC Study *supra* note 53, at E1245.
60. *Id.*
61. *See generally* 1972 EEOC Study *supra* note 53.
62. AT&T Affirmative Action Plan, Addendum XI page 3.

female job applicants, maintaining sex-segregated job groupings, and restricting transfers. To recognize the lack of craft experience on the part of the women as a factor other than sex would be directly contrary to the policy stated by the Department of Labor that "the requirements for such an exception are not met unless the factor of sex provides *no* part of the basis for the wage differential."[63] It is therefore clear that the Equal Pay Act remains a viable vehicle for ensuring equal employment opportunity, complementing Title VII and Executive Order 11,246.

A specific example of the interaction of the Title VII-Executive Order and Equal Pay remedial theories was the government's approach in dealing with a specific problem at Michigan Bell. Michigan Bell had an overwhelming majority of women in the job classification of switchroom helper. At all other companies in the Bell System this position is a male craft job with the title of frameman and pays substantially more than the counterpart at Michigan Bell.[64] Section 6(d)(1) of the Equal Pay Act prohibits employers from discriminating "within any establishment"[65] between employees on the basis of sex by paying employees of one sex in such establishment at a rate less than he pays those of the other sex for equal work. This presented an interesting problem for the government: the Equal Pay Act limits comparison of jobs to those within a single establishment and could only be applied if Michigan Bell was considered a component of the single AT&T establishment and not a company operating separately from the rest of the Bell System. This question is a complex one involving detailed analyses of the operating practices of each of the Bell companies. Both the law of tariff regulation and antitrust would be relevant to such a determination. The government attempted to see whether Title VII and the Executive Order would provide a supportable legal theory to bring about a clearly equitable result. The difficulty with such an approach was that remedies for violation of Title VII and the Executive Order have generally pursued a theory of integrating individuals rather than elevating wages of the segregated job. Thus, the normal remedy would have been to order AT&T to take affirmative action to provide the switchroom helpers opportunity to transfer into craft jobs and out of the sex-segregated switchroom helpers classification. However, the remedy fashioned for these employees

63. 29 C.F.R. § 800.142 (1973).
64. 1972 EEOC Study *supra* note 53, at E1247.
65. 29 U.S.C. § 206(d)(1) (1970).

took a different course. Michigan Bell agreed to raise the wage rates of its switchroom helpers to a level comparable to the average rate earned by framemen throughout the Bell System, plus a back pay provision. What was accomplished was an equal pay remedy under a Title VII-Executive Order guise. This action opens the possibility of future challenges to wage structures that, while not violative of the Equal Pay Act because of jurisdictional limitations, may be the result of sexual preference.[66]

IV. Implications of *Bethlehem* and *AT&T* on the Collective Bargaining Process

It should be noted that the AT&T Memorandum of Agreement and Consent Decree stipulates that "[e]ach Bell company agrees that it will notify all appropriate collective bargaining representatives of the terms of [the] Agreement and of its willingness to negotiate in good faith concerning these terms."[67] Accordingly, AT&T's operating companies and their employees' collective bargaining representatives are not restricted from, and are even under a mandatory duty to, negotiate alternatives to the provisions of the Agreement—provided that such alternatives are in compliance with federal law. Remedies such as those fashioned in *Bethlehem* and *AT&T* underscore the government's commitment to meaningful enforcement of the affirmative action obligations of private contractors under Executive Order 11,246. However, these and similar cases under Title VII and the Executive Order raise many important questions concerning the impact of the federal government's involvement in enforcing equal employment opportunity law upon the collective-bargaining process.

The regulations issued pursuant to Executive Order 11,246 provide for formal sanction proceedings with participation by any labor organization that is a signatory to a collective bargaining agreement when the matter is based in whole or in part on matters covered by the bargaining agreement.[68] These provisions are designed to facilitate union participation in enforcement proceedings concerning the rights of their members. Clearly, unions have a right to be heard

66. *Cf.* Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972), where, under the Equal Pay Act, the court held that a company cannot engage in evasive tactics to avoid raising a wage rate which had its basis in sex discrimination. Therefore, the jurisdictional reach of the Equal Pay Act is unquestionably broad.

67. AT&T Memorandum of Agreement and Consent Decree, Part C, Section VII—Collective Bargaining Agreements, at 31.

68. *See* 41 C.F.R. § 60-1.26(b)(1) (1973) and 41 C.F.R. § 60-30.11(a)(1) (1973).

with regard to their legitimate interest in representing their members. In the *AT&T* case, the government and the company attempted to deal with this problem by setting up parameters within which AT&T and the unions representing its employees could negotiate effectively. Essentially, the Memorandum of Agreement and Consent Decree contains only a general framework of required relief. So, for example, while the Agreement calls for the partial replacement of department seniority with company seniority, it leaves the parties to bargain about the imposition of system-wide seniority provisions.[69] The government set for itself a general policy that it would not seek anything beyond that which it needed for compliance with the various statutes and the Executive Order, leaving to the company or to the unions with which it bargains anything that they could gain in collective bargaining.

The Communications Workers of America (CWA) filed a suit in the United States District Court for the Eastern District of Pennsylvania[70] seeking to intervene as of right in the AT&T Consent Decree pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.[71] The Communications Workers charged that it was not adequately included in the settlement, that its bargaining rights were violated, and that the Memorandum of Agreement discriminates against some employees, particularly white males, and would force the union to discriminate against them as well. The union petitioned the court to suspend its Consent Decree until the Communications Workers and the Bell System companies could reach agreement or until the court determined the issues. The union argued that since AT&T was alleged to have violated the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and Executive Order 11,246, these statutes conferred upon the CWA an *unconditional* right to intervene as a plaintiff under Rule 24(a)(1).

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69. System-wide seniority would be viewed as a major step forward to an industrial union like the Communication Workers; but would be vigorously opposed by a craft union like The International Brotherhood of Electrical Workers, which also bargains with the Bell System.

70. Daily Labor Report, No. 29, F-1 (Feb. 12, 1973).

71. FED. R. CIV. P. 24 provides in part:

(a) Intervention of Right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; (2) when the applicant claims an interest relating to the property or transaction which is the subject of tbe action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The district court issued an opinion which said, with some ambiguity, that the CWA can intervene to litigate the limited question of maternity leave only.[72] The court reviewed the several statutes which could have authorized the full intervention sought by the union, but determined that neither section 17 of the Fair Labor Standards Act[73] nor the regulations issued by the Office of Federal Contract Compliance pursuant to Executive Order 11,246[74] conferred an absolute right to intervene in this suit. Turning its attention to the Civil Rights Act of 1964, however, the court found that section 706(f)(1) does confer upon "person or persons aggrieved" the right to intervene where there exists a nexus between a charge filed by that person or persons with the EEOC and a suit subsequently filed in the district court by the EEOC.[75] The court found that the

72. EEOC v. American Tel. & Tel. Co., Civil No. 73-149 (E.D. Pa., Oct. 5, 1973).

73. 29 U.S.C. § 217 (1970).

74. 41 C.F.R. § 60-30.11(a)(1) (1973).

75. 42 U.S.C. § 2000e-5(f)(1) (Supp. 1972). If within 30 days after a charge is filed with the Commission or within 30 days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has heen unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political suhdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within 180 days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than 60 days pending the termination of state or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

CWA had taken no action before the EEOC touching on the issues in the AT&T Memorandum of Agreement and Consent Decree except for AT&T's maternity leave policy. Thus, the union's motion for intervention under section 706(f)(1) was granted as to maternity leave but dismissed as to all other issues.

The Communications Workers also asserted that Rule 24(a)(2) conferred a right of intervention upon parties whose ability to protect their interest was impeded and inadequately represented by the existing parties. The union relied upon *Trbovich v. United Mine Workers of America*,[76] in which a union member was allowed to intervene in a suit instituted by the Secretary pursuant to Title IV of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).[77] The Secretary's suit sought to set aside an election of union officials due to violations of the Act. The Supreme Court upheld the plaintiff's right to intervene despite the LMRDA's provision that a suit by the Secretary of Labor is the exclusive post-election remedy for challenging violations of Title IV. The Court relied upon the legislative history of the Act to conclude that the statute imposes a duty on the Secretary to serve two separate interests: the first is to protect the individual union members' rights against their union; the second is to protect the public interest in assuring free and democratic union elections. Therefore, the court held that the union member had a valid complaint about the Secretary's performance in protecting his interests and allowed intervention by the individual member, based upon Rule 24(a)(2).

Unlike *Trbovich*, however, there is no dual interest in the *AT&T* situation. Furthermore, the Memorandum of Agreement and Consent Decree provides numerous precautions so as not to prejudice the CWA's rights.[78] Thus, the plaintiff was not able to demon-

76. 404 U.S. 528 (1972).

77. 29 U.S.C. §§ 481 *et seq.* (1970).

78. AT&T Memorandum of Agreement and Consent Decree, Part C, section VII states:

> This Agreement shall not be interpreted as requiring or permitting the abandonment of any provision in any Bell Company's collective bargaining agreement(s) except as required to maintain compliance with Federal law, Executive Orders, and regulations promulgated pursuant thereto pertaining to discrimination in employment. The government asserts that all of the Bell Companies' obligations in this Agreement are required for compliance with Federal law; provided, however, that nothing in this Agreement is intended to restrict the right of the Bell Companies and the collective bargaining representatives of their employees to negotiate alternatives to the provisions of this Agreement which would also be in compliance with Federal law.
>
> To the extent that any Bell Company has in effect, in connection with the promotion and transfer of employees, a posting and bidding system, or other system, said system shall continue to be used. *Id.* at 30-36.

strate an impairment of its ability to protect its interest unless permitted to intervene in the litigation. As a result, the CWA was excluded as a plaintiff except for the limited participation granted pursuant to the Civil Rights Act of 1964. Even this limited intervention, however, if read broadly by the court to include matters not raised by the Agreement, could prove troublesome to the government's ability to enter into final and binding settlements with private parties.[79]

The possibility of any union intervention as party plaintiff in a case where the employer is a defendant also raises important questions about the employer's ability to counterclaim for contribution against the union with whom it has a collective-bargaining agreement. In *Gilbert v. General Electric Co.*,[80] General Electric filed a counterclaim against the International Union of Electrical, Radio and Machine Workers (I.U.E.) for contribution with respect to any liability that the company might incur for acts or omissions alleged in a complaint of sex discrimination filed by the plaintiffs.[81] General Electric urged that since the policies alleged to be discriminatory

79. In Williamson v. Bethlehem Steel Corp., 5 F.E.P. Cases 202 (W.D. N.Y.), *rev'd and remanded*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), 6 black employees of Bethlehem Steel's Lackawanna plant sought to enjoin the recall of laid off employees on an alleged racially discriminatory basis. The district court dismissed the motion, citing the fact that the relief sought was considered but not granted in an earlier case filed by the Attorney General in U.S. v. Bethlehem Steel Corp. (Lackawanna) 446 F.2d 652 (2d Cir. 1971). However, the Second Circuit reversed and remanded because the Attorney General did not expressly seek the same relief as the 6 individual plaintiffs were pursuing. Thus, the court held that for purposes of res judicata or collateral estoppel, the private citizen is not hound by the Attorney General's action if such person or persons were not parties to such action and do not have interests so as to be in privity with the Attorney General. Furthermore, inasmuch as the government did not seek the same relief sought by the individual plaintiffs, the earlier decision did not control the later suit. The court further stated:

> While the 1972 amendments [to Title VII of the Civil Rights Act of 1964] authorize the Equal Employment Opportunity Commission to bring a Title VII suit in the name of the Government, individuals party to Commission conciliation proceedings in the same action may intervene in such suits, and in those brought by the Attorney General, [citations omitted] and presumably individuals not party to Commission proceedings may institute a suit despite any legal action taken by the Commission or the Attorney General.

Read together, the *CWA* case and the *Williamson* case not only permit individuals party to EEOC conciliation proceedings to intervene in Title VII suits instituted by the government but also seem to permit individuals not party to such proceedings to institute a separate suit despite previous litigation by the government. The holdings in these cases might create a doubt in the minds of defendant employers as to whether entering into settlement agreements with federal agencies will insulate them from further judicial proceedings concerning the alleged discriminatory practices which are the gravamen of the settlement agreements.

80. 5 F.E.P. Cases 989 (E.D. Va. 1973).

81. *Id.* at 990 n.1. The named plaintiffs to this action included the International Union of Electrical, Radio and Machine Workers, AFL-CIO and Local 161 of that union.

were bargained for in a collective-bargaining agreement with the I.U.E., both the company and the union should share responsibility and contribute equally to the payment of any damages awarded by the court.

The court denied the union's motion to dismiss on the basis of *Blanton v. Southern Bell Telephone & Telegraph Co.*[82] and *Bowe v. Colgate-Palmolive Co.*[83] *Blanton* involved a complaint of sex discrimination by employees and the union against their employer. Southern Bell filed a counterclaim similar to General Electric's and, although the court expressed serious doubts whether Southern Bell could ultimately prove a right to contribution if found to be liable, it held that a counterclaim may be brought under theories of either tort or Title VII or both. *Blanton* relied upon the *Bowe* case, which tacitly held that a union freely a party to a negotiated contract with illegal provisions may potentially be held as a joint tortfeasor upon a counterclaim. However, *Bowe* indicated that the union may not be held liable if efforts were made by the union to alter the effects or stop the implementation of alleged discriminatory provisions after the law became clear. Accordingly, the issue stated by the court in *Gilbert* was whether the I.U.E. sought to gain relief for its members from alleged discriminatory clauses in the contract relating to pregnancy benefits after the issuance of an EEOC decision holding that disparate treatment of pregnancy-related disabilities constituted sex discrimination.[84] Pursuant to the principles of law articulated in *Blanton* and *Bowe*, the court denied the union's motion to dismiss the counterclaim and permitted General Electric to pursue its claim under a theory of tort liability.

Gilbert is important because it acknowledged the standard first mentioned in *Bowe* that unions and employers appear to have an affirmative obligation to resist the inclusion in future contracts of any provisions that are illegal at the time of the agreement and, further, to attempt to effect changes in the terms of an existing collective-bargaining agreement once it becomes apparent that the said terms violate the law. The case also raises the possible anomalous situation of an employer shifting its liability to a union whose funds consist, at least in part, of dues collected from the victims of the employer's discrimination. If General Electric successfully counterclaims against the I.U.E. for a right of contribution and the

82. 49 F.R.D. 162, 2 F.E.P. Cases 602 (N.D. Ga. 1970).

83. 272 F. Supp. 332, 1 F.E.P. Cases 201 (S.D. Ind. 1967), *modified on other grounds*, 416 F.2d 711, 2 F.E.P. Cases 121 (7th Cir. 1969).

84. EEOC Decision No. 71-1474, 3 F.E.P. Cases 588 (1971).

plaintiffs, female members of the union, prevail, the victims of the discriminatory practices may be contributing to their own relief. There is a serious question whether an injured party should be compelled to contribute to the payment of his own damages. Practically, will such a precedent discourage unions from pursuing the enforcement of the rights of its members? More specifically, will the rank and file membership of a union permit the dissipation of union funds for the benefit of a minority of its members when the union must ultimately contribute a portion of the damages awarded the individual plaintiffs?

Moreover, the holding in *Gilbert* raises many questions concerning the collective-bargaining relationship of employees and unions with regard to equal employment opportunity. Perhaps the issue can best be explored in two phases: first, the situation before the government becomes involved in charges of discriminatory employment practices; and second, after the government engages in the enforcement of rights of the employees who have been the victims of such practices.

Prior to the initiation of enforcement proceedings pursuant to the Civil Rights Act of 1964, Executive Order 11,246, and the Equal Pay Act, the relationship between employers and unions with regard to employment practices is within the exclusive domain of the National Labor Relations Act. The NLRA has been construed to impose upon an exclusive bargaining representative a duty of fair representation which is owed to all members of the bargaining unit.[85] Where a union breaches its duty of fair representation, a court may grant damages or injunctive relief and the National Labor Relations Board (NLRB) may revoke the union's certification or refuse to apply the contract bar rule under section 9(c)(3) of the NLRA.[86] If a breach of the duty of fair representation is held to be an unfair labor practice, under section 8 of the NLRA,[87] the Board also has authority to issue a cease and desist order.

The Supreme Court, however, has never resolved the question whether a breach of duty of fair representation is an unfair labor practice.[88] Not until *Miranda Fuel Co.*,[89] in 1962, did the Board hold

85. Syres v. Oil Workers, 350 U.S. 892 (1955); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (Railway Labor Act).

86. 29 U.S.C. § 159(c)(3) (1970) provides that: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

87. 29 U.S.C. § 158 (1970).

88. Although the Supreme Court has never ruled on the direct question of whether a breach of the duty of fair representation is an unfair labor practice, dictum in Vaca v. Sipes,

that breach of the duty of fair representation constituted an unfair labor practice, and the Second Circuit, splitting three ways, refused to enforce the Board's order. In 1964, a majority of the Board again held that breach of the union's duty of fair representation by racial discrimination was an unfair labor practice. In *Independent Metal Workers Union (Hughes Tool Co.)*,[90] the Board found that the failure of a local union of white members to process the grievance of a black employee was a *per se* violation of sections 8(b)(1), (2), and (3).[91] On the other side, *Packinghouse Workers v. National Labor Relations Board*,[92] held that employer discrimination based upon race is likewise an unfair labor practice. However, unlike union discrimination, which is a *per se* violation of the NLRA, employer discrimination violates section 8(a)(1)[93] only where "such discrimination is not merely unjustified, but interferes with or restrains discriminated employees from exercising their statutory right to act concertedly for their own aid or protection, as guaranteed by Section 7 of the Act."[94] The district court held that section 8(a)(1) is violated where an employer has a policy and practice of discrimination against its employees on account of their race and such discrimination inhibits said employees from asserting their rights, as guaranteed by the NLRA.

Therefore, employer discrimination on the basis of race, color, religion, sex, or national origin is not a *per se* violation of the National Labor Relations Act. *Packinghouse Workers* was followed in *Jubilee Manufacturing Co.*,[95] where the Board dismissed a charge of sex discrimination against the employer based upon disparate wage rates and increases in pay. The United Steel Workers of America charged that by paying women lower wages than men in the same job classification, the company was committing an unfair labor practice under sections 8(a)(1) and (3). The majority of the Board

386 U.S. 171 (1967), states that a state court has jurisdiction over suits involving, *inter alia*, an alleged breach of the duty of fair representation, conduct which is arguably an unfair labor practice. In deciding that § 301 of the Labor-Management Relations Act (Taft-Hartley Act) confers jurisdiction upon courts to enforce collective bargaining agreements even though it is necessary to prove an unfair labor practice by the union, the Court recognized, at least inferentially, that a breach of the duty of fair representation is an unfair labor practice.

89. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

90. 147 N.L.R.B. 1573 (1964) (3-2 decision).

91. 29 U.S.C. §§ 158(b)(1)-(3) (1970).

92. 169 N.L.R.B. 290 (1968), *aff'd and remanded for further proceedings*, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

93. 29 U.S.C. § 158(a)(1) (1970).

94. 416 F.2d at 1135.

95. 202 N.L.R.B. No. 2, 83 L.R.R.M. 1482 (Mar. 8, 1973).

ruled that invidious discrimination, standing alone, is not inherently destructive of workers' self-organizational rights under section 7 of the NLRA. Instead, "[t]here must be actual evidence, as opposed to speculation, of a nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the Act."[96]

While the holding in *Jubilee Manufacturing* is consistent with *Packinghouse Workers*, it should be noted that these cases create an interesting possibility. The issue in *Jubilee Manufacturing* was alleged sex discrimination, more particularly, a dual rate schedule for payments of compensation to men and women. This was also a major issue in *AT&T*. While proof of an employer's invidious discrimination alone will not sustain an unfair labor practice charge before the Board, it is clear that a federal equal employment agency could subsequently institute enforcement proceedings against an employer with a discriminatory rate schedule similar to Jubilee's as violative of the Civil Rights Act, Executive Order 11,246, and the Equal Pay Act.

There is a disparity of policies between the Board and the federal equal employment agencies that is difficult to resolve inasmuch as they apparently have concurrent jurisdiction in employment discrimination cases. The question whether the NLRB was deprived of jurisdiction in the area of racial discrimination by Title VII of the Civil Rights Act of 1964 was considered in *Packinghouse Workers*. In an extensive footnote,[97] the court not only noted that Title VII is silent concerning whether the Board is ousted from jurisdiction in these matters but also cited the legislative history of Title VII to demonstrate that the Board was not meant to be so affected. The court concluded that the Board has concurrent jurisdiction with the EEOC and, furthermore, that there is concurrent jurisdiction among federal equal employment agencies to remedy discrimination in employment in federal programs under Executive Order 11,246 and the Equal Pay Act. While the federal equal employment agencies and the Board share jurisdiction concurrently, the NLRB is motivated by a desire to protect the collective bargaining process as a means of eliminating industrial strife and the federal equal employment agencies are striving for the elimination of discriminatory employment patterns sometimes perpetuated and effectuated through collective bargaining agreements. A disparity of policies is inevitable.

96. *Id.* 83 L.R.R.M. at 1484.
97. 416 F.2d at 1133 n.11.

The National Labor Relations Act creates a duty to bargain over "wages, hours, and other terms and conditions of employment."[98] Refusal to bargain over these subjects is a refusal to bargain under the NLRA, *per se*, without regard to any issue of good faith.[99] However, where an employer refuses to bargain with a labor organization on the basis that the union practices racial discrimination, there is no duty to bargain. In *NLRB v. Mansion House Corp.*,[100] the Eighth Circuit, citing the fifth amendment, held that where a union is practicing racial discrimination and seeks to force the employer to bargain, the remedial machinery of the National Labor Relations Act cannot be invoked. The case represents an attempt to bridge the sometimes disparate action of federal agencies by limiting the overlapping jurisdiction. As noted above, however, these agencies should properly be expected to have different thrusts and purposes because the statutes creating them were designed to further differing interests that, although they may at times be in conflict, need not result in irreconcilable conflict. It may be that the noble intent of *Mansion House* will come to haunt the future development of both the labor-management relationship and equal employment opportunity.

The court's failure in *Mansion House* to provide guidelines by which the Board may deter an employer from improperly refusing to bargain with an authorized union on the pretext that the union is practicing racial discrimination raises serious questions. It leaves the door open for an employer to raise the issue of racial discrimination as a means of avoiding its duty to bargain when the union seeks to bargain about any subject, even those totally unrelated to the union's alleged discriminatory practices. In fact, in *Mansion House* the record demonstrated that during negotiation meetings the company did not mention discriminatory practices to the union as the reason for its refusal to bargain. The Board's refusal to compel a party to bargain on the grounds of discrimination may lead to future labor unrest and a heightening of racial tension.[101]

98. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1970).

99. NLRB v. Katz, 369 U.S. 736, 743 (1962).

100. 473 F.2d 471 (8th Cir. 1973).

101. The court of appeals in *Mansion House* cites a Columbia Law Review article to the contrary. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 607-08 (1962). This article theorizes that although there is nothing in the law to prevent a union from striking to force an employer to bargain with it, when given a choice between abandoning racist policies and risking their certification in recognition strikes, some unions will choose to cease discriminating. The article also suggests that a policy of racial discrimination is usually the choice of the local union rather than the international

The most serious problem with *Mansion House* may be the procedural difficulties that could arise out of it. Will the NLRB hold a hearing on the question of discrimination when it is raised as a defense to a refusal to bargain charge? What about employer discrimination, which can take very sophisticated forms, as we saw in *Bethlehem* and *AT&T*; will the Board attempt to deal with those issues if a union refuses to bargain on the grounds that to do so on a particular issue is to further employer discrimination? Will a Board determination on racial, ethnic, or sexual discrimination be reopened by the courts in dealing with Title VII or Executive Order 11,246 matters? Should a Board ruling of employer discrimination result in a determination that the employer is a non-responsible contractor for the purpose of federal procurement?[102] Must the Board respect the rulings of federal district courts on discrimination matters as well as a court of appeals? What about determinations of the EEOC or the Department of Labor? On the other side of the equation dealing with NLRB involvement in discrimination matters is the fact that the Board is *already* involved in these matters via the route of *Hughes Tool, Miranda, Packinghouse Workers*, and *Jubilee*. The Board already has before it the difficult problems of meshing its role with that of the equal employment agencies. The camel's nose is under the tent; the fifth amendment may require the camel to enter the tent and bed down.

The cases discussed above concerned matters arising prior to the involvement of the federal government in the employment practices of an employer or labor organization. Problems may also arise after the government becomes involved. *Savannah Printing Specialties & Paper Products, Local 604 v. Union Camp Corp.*,[103] grew out of a refusal of Union Camp Corporation to arbitrate a grievance filed by several members of the plaintiff union. The grievance concerned seniority and layoff procedures implemented by the company's affirmative action program established in compliance with standards set forth by the Department of Labor and approved by the Office of Federal Contract Compliance. The union contended that the collective-bargaining agreement requires arbitration of grievances involving seniority and layoff and relied upon the policy reflected

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and the withholding of support by the Board would seriously inhibit organizational efforts causing the internationals to exert greater pressure to pull stray locals into line. Thus, the article concludes the result might be new nondiscriminatory policies for labor organizations which formerly practiced racial discrimination rather than new labor unrest.

102. *See* 41 C.F.R. § 60-2 (1973).

103. 350 F. Supp. 632 (S.D. Ga. 1972).

in the NLRA and decisions emphasizing the proper role of the court when a party refuses to arbitrate.[104] The court held, however, that "[i]f arbitration can result in obstructing or thwarting the eradication of racial discrimination in employment, an employer is not forced to go through with it."[105] It further stated that the seniority provisions in question were entered into under the laws of the United States and pursuant to its public policy and cannot be diluted by private negotiations or arbitration. Even though the company's change in the seniority provisions of the collective bargaining agreement was unilateral, the court held that Union Camp properly refused to arbitrate the grievances. The decision indicates that an employer can unilaterally implement an affirmative action plan required by the government and thereafter need not submit issues concerning the required changes in the collective-bargaining agreement to arbitration. In addition, it is now settled law that management and labor cannot contract between themselves to avoid the obligations mandated by the Civil Rights Act of 1964 and Executive Order 11,246.[106] A union could react to this decision by striking against an employer who implements an affirmative action program approved by the government, but the employer may be able to enjoin such a strike since Title VII permits a court to enjoin unlawful employment practices.[107] The Act also exempts civil actions brought under Title VII from the anti-injunction proscription of the Norris-LaGuardia Act.[108] Thus, Title VII and, by analogy, Executive Order 11,246, may enable an employer to enjoin a work stoppage directed at opposing the implementation of an affirmative action plan.

V. CONCLUSION

The affirmative action mandate has been carried forward in various formats. The Contract Compliance Program was developed as a means of realizing equal opportunity in the employment practices of employers doing business with the federal government. The thrust of the Program is to increase the utilization of minorities and

104. In 1960 the Supreme Court decided a series of cases known as the *Steelworkers Trilogy* dealing with the enforcement of arbitration clauses. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

105. 350 F. Supp. at 636.

106. Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

107. 42 U.S.C. § 2000e-5(g) (1970), *as amended*, 42 U.S.C. § 2000e-5(g) (Supp. 1973).

108. 42 U.S.C. § 2000e-5(h) (1970).

women throughout the employer's work force. The Program requires that an employer seeking to do business with the federal government must take affirmative action toward the elimination of discriminatory employment practices through established federal contract procurement law.

The *Contractors Association of Eastern Pennsylvania* decision and other case law established the legality of the Contract Compliance Program under the broad procurement authority delegated to the executive branch of government. *Contractors Association of Eastern Pennsylvania* also provided legal support for the concept of goals and timetables for the recruitment of minority persons as a means of implementing the affirmative action mandate of Executive Order 11,246.

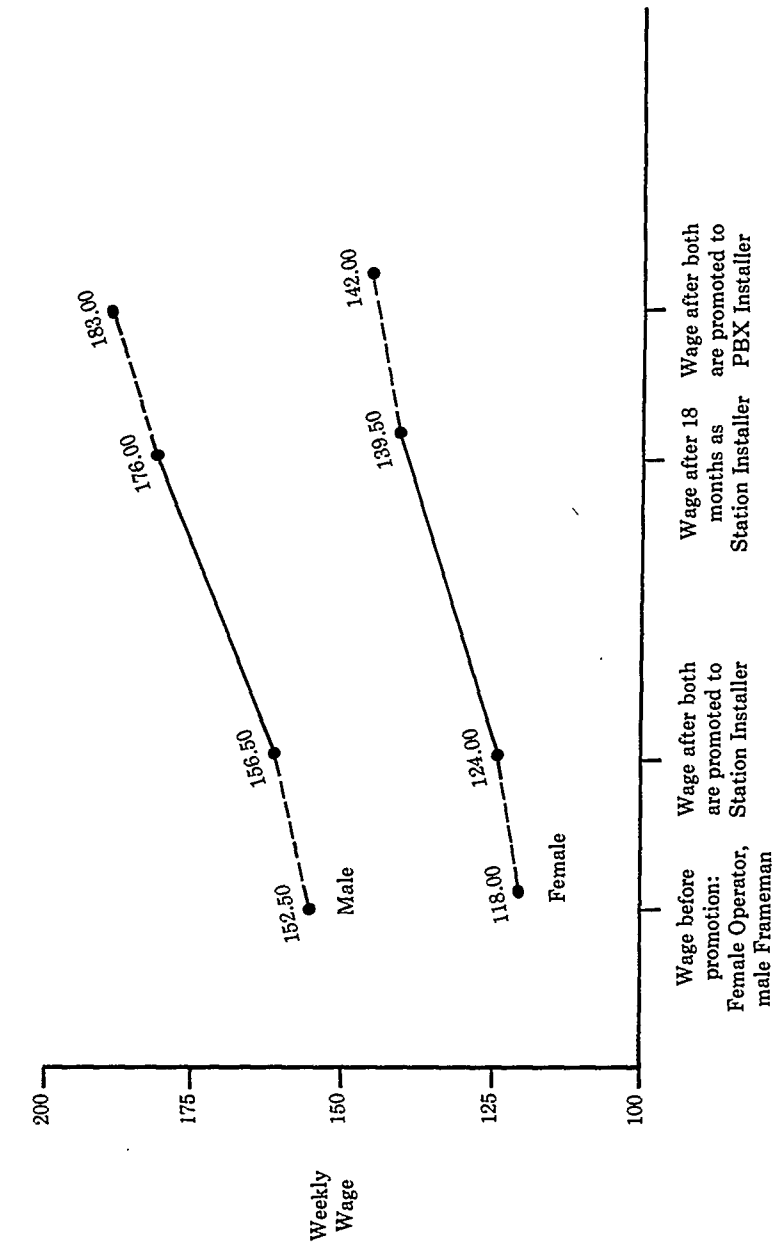
Case law under Executive Order 11,246 has resulted in the recognition of an expansive definition of discrimination that includes employment practices that, though neutral on their face, have the effect of perpetuating past discriminatory treatment. The AT&T Memorandum of Agreement not only applied an expansive concept of discrimination, but also fashioned creative remedial relief through the interaction of Title VII of the Civil Rights Act of 1964, Executive Order 11,246, and the Equal Pay Act of 1963.

On the other hand, *Bethlehem* and *AT&T* raised many issues concerning the impact of these enforcement proceedings upon the collective-bargaining process, including the role of the collective-bargaining representative in negotiations between employers and the government; the right of an employer to seek contribution from a union when sued by an employee for alleged discriminatory employment practices that are established pursuant to a collective-bargaining agreement; and the vast number of issues involving the effect of affirmative action requirements upon the rights of the parties to a collective-bargaining agreement as regulated by the NLRA.

These and other problems require a sensitivity to the valid interests of the parties while effectively enforcing the equally vital goal of abolishing employment discrimination based on race, color, religion, sex, and national origin. To this end, the Department of Labor and the other federal equal employment opportunity agencies are firmly committed to the affirmative action mandate.

APPENDIX I

WAGE TREATMENT FOLLOWING PROMOTION IN PACIFIC TELEPHONE, JANUARY 1, 1971



Source: EEOC C-52, EEOC C-55, EEOC R-56.

APPENDIX II

EXAMPLES OF WAGE TREATMENT
UPON PROMOTION

SOUTHWESTERN BELL

	Wage at 42 mos. service	Wage after promotion to top craft
Grade 2 Clerk (6397 employees— 99.7% female)	131.50/wk	140.50/wk
Frameman (1309 employees— 12.2% female)	175.50/wk	175.50/wk

Total wages lost over 42 month period—$5616

Frameman reaches top craft pay after 60 months NCS.
Clerk reaches top craft pay after 84 months NCS.

PACIFIC TEL. AND TEL.

	Wage at 42 mos. service	Wage after promotion to top craft
Operator (19,467 employees— 97.5% female)	133.00/wk	153.00/wk
Frameman (2274 employees— 11.0% female)	159.00/wk	167.00/wk

Total wages lost over 42 month period—$2678

Frameman reaches top craft after 72 months NCS.
Operator reaches top craft after 84 months NCS.