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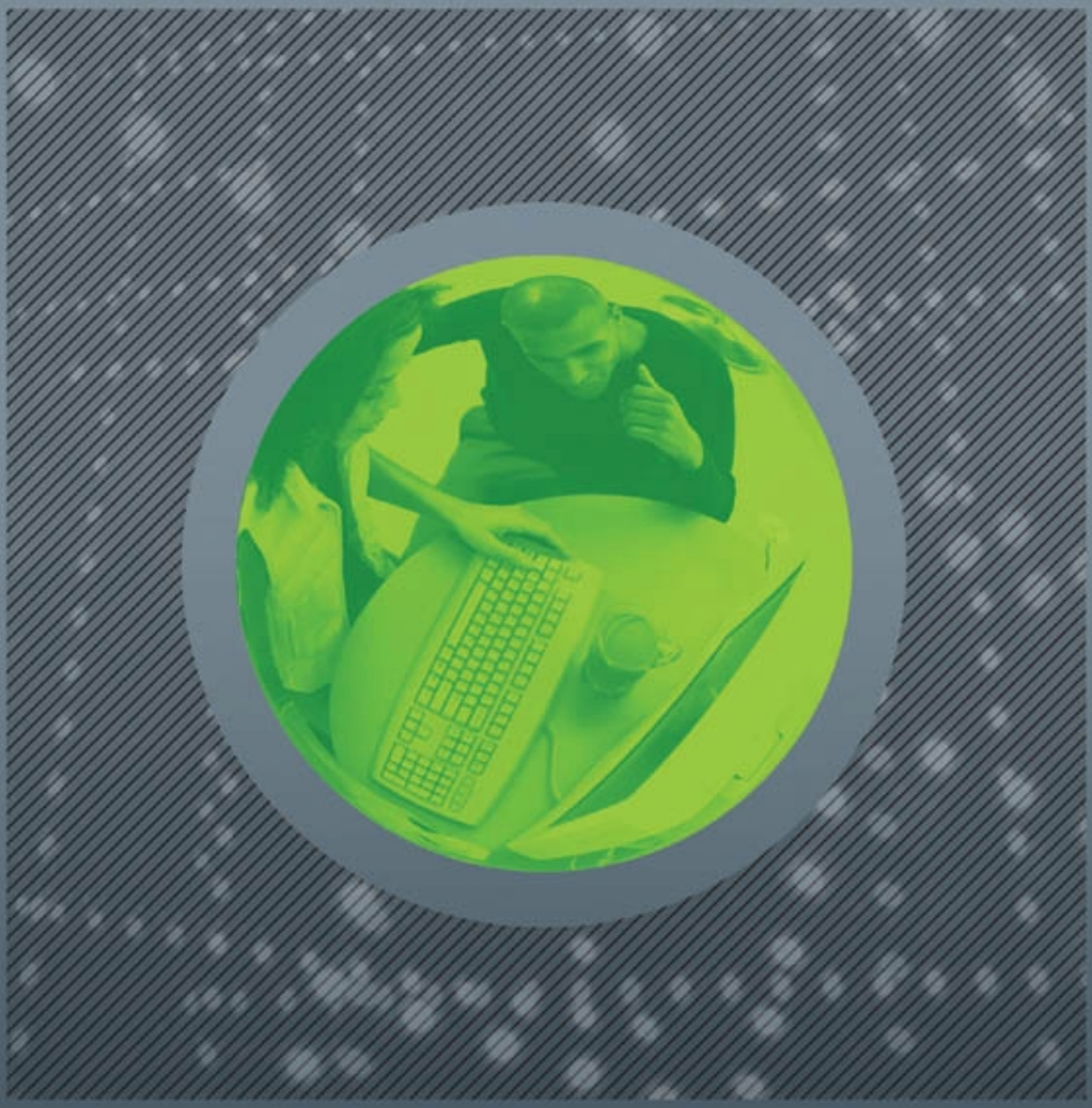

Human Resources Administration in Educat
A Management Approach

Ronald W. Rebore

Ninth Edition

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2. With the concurrence of the EEOC, the employer may extend an offer to the charging party. If the charging party rejects the offer, the EEOC issues a *notice of right to sue*, which gives the charging party ninety days to bring legal action against the employer.

3. The employer and the charging party may agree to a settlement for a single individual. However, if the investigation by the EEOC reveals a discriminatory practice against a class of persons such as females or persons with disabilities and if the employer and the EEOC are unable to reach an agreement on a class determination, such is considered a *failure of conciliation*, and the case is referred to the litigation division of the EEOC.

4. If the employer, charging party, and EEOC are unable to reach an agreement, this also is considered a *failure of conciliation*, and referral is made to the litigation division.

The Litigation Division When conciliation fails, the litigation division evaluates the case to determine if there is a significant legal issue involved or if the case could have a significant impact on systematic patterns of discrimination. If one or both of these conditions exist, the EEOC will most likely bring a lawsuit against the alleged discriminating employer.

The vast majority of employment discrimination lawsuits filed in federal courts, however, are instigated by private individuals or are class action suits filed by a group of citizens. The prerequisites to filing an individual claim of employment discrimination in federal court are as follows: the charge must be filed first with the EEOC within the required time, the EEOC must issue a notice of right to sue, and the charging party must file suit within ninety days from receipt of the notice.

A notice of right to sue, which allows the charging party to pursue his or her claim through the courts, is usually issued by the EEOC under three circumstances: (1) when a charge of discrimination is determined by the EEOC to have a "no cause" status, (2) when the litigation division of the EEOC rejects a case for legal action, and (3) when the EEOC enters into a conciliation agreement with an employer that does not include the charging party's claim.

If a federal court rules in favor of the charging party, it may grant any award it deems equitable. An injunctive remedy requires an employer to do something such as modifying a promotional policy that does not follow affirmative action guidelines and discriminates against minorities. In an individual case of discrimination when back pay is involved, the court may award back pay for a period of up to two years prior to the date when the charge was filed with the EEOC.

Bona Fide Occupational Qualification

Discrimination by sex, religion, or national origin is allowed by the Equal Employment Opportunity Act under one condition, stated in the law as follows:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment

> practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[11]

Therefore, a school district's personnel administrator has the right to specify a female for the position of swimming instructor when part of the job description includes supervising the locker room used by female students. In like manner, a Lutheran school official may hire only those applicants who profess the Lutheran creed because the mission of the school is to propagate that particular faith.

In certain school districts, the national origin of teachers is extremely important. If in a particular school district over 30 percent of its student population has Spanish surnames, being of Hispanic origin could be a bona fide job qualification for certain teaching positions in that school system.

Judicial Review of Affirmative Action

Court decisions have further modified affirmative action regulations. Although the courts will continue to refine the interpretation of the Civil Rights Act and the Equal Employment Opportunity Act, certain basic conclusions have emerged and provide direction to school districts in their efforts to construct and implement an affirmative action program.[12]

1. Discrimination has been broadly defined, in most cases including a class of individuals rather than a single person. Where discrimination has been found by the courts to exist, remediation must be applied to all members of the class to which the individual complainant belongs.

2. It is not the intent but rather the consequences of employment practices that determine if discrimination exists.

3. Even when an employment practice is neutral in text and impartially administered, it constitutes unlawful discrimination if it has a disparate effect upon members of a protected class (those groups covered by a law) or if it perpetuates the effects of prior discriminatory practices.

4. Statistics that show a disproportionate number of minorities or females in a job classification relative to their presence in the workforce constitute evidence of discriminatory practices. When such statistics exist, the employer must show that this is not the result of overt or Intentional discrimination.

5. To justify any practice or policy that creates a disparate effect on a protected class, an employer must demonstrate a *compelling business necessity*. The courts have interpreted this in a very narrow sense to mean that no alternative nondiscriminatory practice can achieve the required result.

6. Court-ordered remedies not only open the doors to equal employment opportunity but also require employers to "make whole" and "restore the rightful economic status" of all those in the affected class. In practice, courts have ordered fundamental changes in almost every aspect of employment.

Two U.S. Supreme Court decisions from the late 1970s have had an indirect effect upon affirmative action programs in school districts. The first case, *Regents of the University of California v. Bakke*, was decided in 1978 and dealt with admission quotas to a medical school. The second, *United Steelworkers v. Weber,* was decided in 1979 and dealt with a voluntary race-conscious affirmative action plan in private industry. Both cases could be viewed as establishing precedents in future lawsuits involving school districts. Thus boards of education might avoid such litigation through policy development that mitigate the possibility of reverse discrimination.

In June 2003, two U.S. Supreme Court rulings addressed a fundamental legal question that is at the heart of the affirmative action issue. The question concerned whether or not the U.S. Constitution permits affirmative action policies. The answer to the question is a resounding yes. In *Grutter v. Bollinger*, the Court upheld a Michigan law school's admissions policies, stating that the school had a compelling interest in enrolling a racially and ethnically diverse student body because such diversity provides a significant educational benefit. However, though the Court upheld the importance of affirmative action in *Gratz v. Bollinger*, it ruled that Michigan's undergraduate admissions practice placed too much emphasis on race in assessing applicants. The university used a point system that automatically gave substantial bonuses to members of certain minority groups.[13] The implication of these two rulings for human resources administrators is that affirmative action policy is constitutionally permissible, but the practices that implement that policy must be defensible.

Exhibit 2.4 is a sample policy that has been developed to illustrate how school districts can comply with the intent of federal legislation and litigation set forth in this chapter.

EXHIBIT 2.4 Board of Education Policy on Equal Employment Opportunity and Affirmative Action

The board of education recognizes that implementation of its responsibility to provide an effective educational program depends on the full and effective utilization of qualified employees regardless of race, age, sex, color, religion, national origin, creed, ancestry, or disability.

The board directs that its employment and human resources policies guarantee equal opportunity for everyone. Discrimination has no place in any component of this school system. Therefore, all matters relating to recruitment, selection, placement, compensation, benefits, educational opportunities, promotion, termination, and working conditions shall be free from discriminatory practices.

The board of education further initiates an affirmative action program to be in compliance with Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. This program shall insure minority and female proportional representation and participation in all employment opportunities; that civil rights will not be violated, abridged, or denied; that recruitment and selection criteria will be unbiased; that information relative to employment and promotional opportunities will be disseminated on an equal basis; and finally, that every employee has a right to file an internal or external complaint of discrimination and to obtain redress therefrom based on the finding of facts substantiating the complaint.

The following school district administrators are responsible for the effective implementation of the affirmative action program.

Superintendent of Schools. As the chief executive officer of the school system, the superintendent is directly responsible for exercising a leadership role in formulating and implementing procedures that are in keeping with this policy.

Director of Affirmative Action. Under the supervision of the superintendent, the director is responsible for the administration of the affirmative action program.

Civil Rights Act of 1991

The passage of various civil rights legislation during the 1990s set school districts on a new path. This has been particularly true with regard to the Civil Rights Act of 1991.[14] The law for the first time extends punitive damages and jury trials to employees who have been discriminated against because of their race, national origin, sex, disability, or religion. Thus, school districts must be vigilant in adhering not only to the provisions of this act but also to the spirit of the legislation.

There have been two significant procedural changes. First, the law allows expanded compensatory damages as well as punitive damages. Prior to passage of this law and with few exceptions, plaintiffs' compensatory remedies were limited to lost pay and benefits, reinstatement, and attorney fees. After passage, plaintiffs can also receive compensatory damages for emotional pain, inconvenience, and mental anguish. Further, if the plaintiff can prove that the employer acted with "malice" or with "reckless indifference," he or she may be awarded punitive damages. The major consideration for superintendents, assistant superintendents, and school board members has been that they can be named as codefendants in an action brought against a school district under the Civil Rights Act of 1991. The reason for this is that punitive damages cannot be levied against a school district because it is a governmental agency, but punitive damages can be levied against individuals such as administrators and school board members.

Limits on the amount of compensatory and punitive damages have been established as follows:

- Plaintiffs may be awarded damages up to $50,000 if the school district has at least 15 but not more than 100 employees.
- Plaintiffs may be awarded damages up to $100,000 if the school district has between 101 and 200 employees.
- Plaintiffs may be awarded damages up to $200,000 if the school district has between 201 and 500 employees.
- Plaintiffs may be awarded damages up to $300,000 if the school district has more than 500 employees.

There are two exceptions to these limits. For age discrimination, the limit is twice the amount of lost pay and benefits, and for race discrimination, there is no limit. There is another liability for a school district that has not been available in the past in relation to damages. A plaintiff who prevails may also recover the cost of expert witness fees.

The second significant procedural change involves the right of a complainant to receive a jury trial in an employment discrimination case in which compensatory and/or punitive damages are being sought. Jury trials were seldom allowed in employment discrimination cases prior to this law. The major considerations concerning this issue are not only the unpredictability of juries but also the perceived bias of juries against employers.

Because of this law, there is also a significant substantive change in the way in which the school human resources function is managed. The Civil Rights Act of 1991 overruled several U.S. Supreme Court decisions that appeared to be pro-employer. School districts are now charged with the burden of proof when a seemly neutral act has resulted in discrimination against an employee from a protected class.

Equality for People with Disabilities

Title V of the Rehabilitation Act of 1973 contains five sections, four relating to affirmative action for individuals with disabilities and one dealing with voluntary actions, remedial actions, and evaluation criteria for compliance with the law. The congressional intent of the Rehabilitation Act is identical to the intent of other civil rights legislation, such as the Civil Rights Act of 1964 (covering discrimination based on race, sex, religion, or national origin) and Title IX of the Education Amendments of 1972 (covering discrimination based on sex in educational programs). However, when the then U.S. Department of Health, Education, and Welfare (HEW) published the regulation implementing the Rehabilitation Act in the Federal Register, it emphasized a fundamental difference of that act:

> The premise of both Title VII (Civil Rights Act) and Title IX (Education Amendments) is that there is no inherent difference of equalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of federal programs. Section 504 (Rehabilitation Act), on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected.[15]

Subpart B of Section 504 of the Rehabilitation Act specifically refers to employment practices. It prohibits recipients of federal financial assistance from discriminating against qualified individuals with disabilities in recruitment, hiring, compensation, job assignment/ classification, and fringe benefits. Employers are further required to provide reasonable work environment accommodations for qualified applicants or employees with disabilities unless they can demonstrate that such accommodations would impose an undue hardship. The law applies to all state, intermediate, and local educational agencies. Finally, any agency that receives assistance under the Individuals with Disabilities Education Act must take positive steps to employ and promote qualified persons with disabilities into programs assisted under this act.

Reasonable Accommodation

The requirement that employers make "reasonable accommodations" in the work environment for applicants and employees with disabilities has created a great deal of confusion. Reasonable accommodations include providing employee facilities that are readily accessible to and usable by persons with disabilities and taking actions such as restructuring jobs, modifying work schedules, modifying and/or acquiring special equipment or devices, and providing readers.

In order to determine whether an accommodation imposes an undue hardship on an employer, the following factors should be considered: (1) the size of the agency or company with respect to the number of employees, (2) the number and type of facilities available, (3) the size of the employer's budget, (4) the composition of the workforce, and (5) the nature and type of accommodation needed. If an employer believes that reasonable accommodations would impose a hardship, the burden of proof rests with the employer.

Employment Criteria

The Section 504 regulation in concert with the guidelines on selection procedures developed by the EEOC, prohibits the use of any employment test or other criteria that screen out or discriminate against persons with disabilities unless the test or selection criteria are proven to be job related. Therefore, in selecting and administering tests to an applicant or employee with a disability, the test results must accurately reflect the individual's job skills or other factors the test purports to measure, rather than the person's impaired sensory, manual, or speaking skills, except when these skills are required for successful job performance.

The term *test* includes measures of general intelligence, mental ability, learning ability, specific intellectual ability, mechanical and clerical aptitudes, dexterity and coordination, knowledge, proficiency, attitudes, personality, and temperament. Formal techniques of assessing job suitability that yield qualifying criteria include specific personal history and background data, specific educational or work history, scored interviews, and scored application forms.

School district administrators must realize that they may be called on to present evidence concerning the validity and reliability of the testing procedures they use in selection and promotion processes. Casual techniques, of course, are very difficult to defend.

Preemployment Inquiries

Section 504 of the Rehabilitation Act specifies that recipients of federal financial assistance should take (a) remedial action to correct past discrimination, (b) voluntary action to overcome the limited participation of individuals with disabilities, and (c) affirmative action to employ people with disabilities. An employer may use preemployment inquiries to determine progress in complying with the Rehabilitation Act. Subpart B also contains the following provision: An employer must state on all preemployment written questionnaires or, if no written questionnaire is used, must tell applicants that preemployment information is being requested for the purpose of implementing remedial, voluntary, or affirmative action programs; the employer must state that the information is being requested on a voluntary basis, that it will be kept confidential, and that refusal to provide such information will not subject the applicant or employee to any adverse treatment.

Nothing in Subpart B prohibits an employer from making employment conditional on the results of a medical examination prior to the assumption of duties by a person with disabilities. However, this condition can be applied only if all entering employees are required to have a medical examination and only if the results of such examinations are used in accordance with appropriate remedial, voluntary, and affirmative action programs.

The medical information collected must be maintained on separate forms from other employment data and must be accorded the same confidentiality as medical records. This information may be used by supervisors and managers to determine the restrictions in the duties of employees with disabilities and to determine necessary accommodations. First aid and safety personnel may also use this information when emergencies occur. Finally, government officials may have access to such information when investigating an employer's compliance with the Rehabilitation Act.

Organizational Action Required

Section 504 does not require school districts to develop an affirmative action program for those with disabilities, it does require three types of organizational activities: remedial