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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

Subject Card

In reply refer to
B-142233 (WAW)
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MAR 18 1977

Anthony W. Hudson, Director
Federal Equal Employment Opportunity
U.S. Civil Service Commission
Room 7530
1900 E Street, NW.
Washington, D.C. 20415

Dear Mr. Hudson:

This refers to the recent discussion in your office concerning the application of 5 C.F.R. Part 713 (1976) to excepted service employees in the legislative and judicial branches of the Federal Government. The view has been expressed by the Chief Appeals Officer of the Federal Employees Appeals Authority (FEAA) that the remedies provided by Part 713 do not apply to such excepted service employees. As support for this position he cited 5 C.F.R. § 713.201(b)(1)(ii) which provides, in pertinent part, that Part 713 applies:

> "(ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions." (Emphasis supplied.)

The statutory provision extending coverage of Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination) to Federal employees is 42 U.S.C. § 2000e-16(a) (Supp. II, 1972), which provides that:

> "All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in

> section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin." (Emphasis supplied.)

In our opinion, this section extends coverage of Title VII to all employees in those units of the legislative and judicial branches of the Federal Government which have any positions in the competitive service, not just to employees in the competitive positions. We believe that this interpretation of the section is required by the plain language of the section, the purposes and legislative history of the 1972 amendments to the Civil Rights Act of 1964, and other factors external to the statute.

Since our view of the coverage of Title VII is at variance with the view of the Chief Appeals Officer of the FEAA we hereby request that you review his position in light of the following materials.

Title VII of the Civil Rights Act of 1964, prohibiting racial discrimination in employment practices, as originally enacted, did not include Federal employees within its coverage. However, discriminatory employment practices in the Federal Government were prohibited by Executive Order 11478, August 8, 1969, 34 F. R. 12985. Section 6 of that order, sets out its coverage, and provides that:

> "This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those

portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States." (Emphasis supplied.)

This order clearly covered only employees in competitive service positions in the legislative and judicial branches.

The legislative history of the 1972 amendments provides evidence of congressional concern that Federal employees had no adequate administrative or judicial remedies for employment discrimination under the Executive order. See Chandler v. Roudebush, 425 U.S. 840 (1976); S. Rep. No. 92-415, October 28, 1971, 92d Cong., 1st Sess. The Supreme Court, in Chandler v. Roudebush, supra, at page 841, stated:

"A principal goal of * * * the Equal Employment Opportunity Act of 1972 [citation omitted] was to eradicate "'entrenched discrimination in the Federal service"', Morton v. Mancari, 417 U.S. 535, 547 * * *."

As a result of this concern, the 1972 amendments extended coverage of Title VII to Federal employees in 42 U.S.C. § 2000e-16(a). A comparison of the language of section 6 of E.O. 11478, and 42 U.S.C. § 2000e-16(a) reveals that the provisions are very similar. However, there is one significant difference. The clause "* * * and to the employees in those positions * * *" was not included in section 2000e-16(a). There is no indication in the legislative history as to why this clause was deleted. Congress was certainly aware of the wording of section 6, and of its effect on the coverage of the Executive order. It is unlikely that language so similar to that of section 6 would be adopted, and that this clause alone would be deleted unless there was some reason. See generally 2A Sands, Sutherland Statutory Construction, § 52.02 (1974); Bank of America v. Webster, 439 F.2d 891 (9th Cir. 1971).

In the context of the congressional purpose of eradicating Federal employment discrimination, it would appear that this

clause was deleted to extend coverage of Title VII to a greater number of Federal employees than had been covered by E.O. 11478. Any other explanation of this deletion, other than inadvertance, would seem to be contrary to the purpose of the amendments.

It has been suggested to us that the coverage of Title VII is limited to that of Executive Order 11478 by 42 U.S.C. § 2000e-16(e), which provides:

> "* * * Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government." (Emphasis supplied.)

The argument is that since agencies must still comply with the Executive order, they are also bound by section 6, which limits its coverage in the legislative and judicial branches to employees in competitive positions. The language of this section, however, seem to be expansive rather than restrictive. Agencies must comply not only with the 1972 amendments to Title VII, but also with any additional requirements regarding equal employment opportunity under E.O. 11478, other statutes, or the Constitution.

The analysis of section 2000e-16(e) in the section-by-section analysis of the Conference Report for the 1972 amendments states that:

> "This subsection provides that nothing in this Act relieves any Government agency or official of his or its existing equal employment opportunity obligations under the Constitution, other statutes, or under any Executive order relating to equal employment opportunity in the Federal Government. 118 Cong. Rec. 7169 (1972)" (Emphasis supplied.)

This analysis indicates that the purpose of the subsection is to prevent an agency or official from using a provision of the 1972 amendments to avoid an existing duty required by another law or

order. To allow an agency to use this subsection and the Executive order to limit the coverage of the 1972 amendments would appear to be contrary to the language and intent of the provision, and of the 1972 amendments taken as a whole.

There is also some direct support in the legislative history for interpreting § 2000e-16(a) as extending the coverage of Title VII to all employees in units of the legislative and judicial branches with positions in the competitive service. In a section-by-section analysis of the final version of S. 2515 (the Senate version of the 1972 amendments) introduced into the record by Senator Williams, one of the sponsors of the bill, the following explanation of the section (whose language was nearly identical to that of § 2000e-16a) was given:

> "This subsection would make clear that all personnel actions of the U. S. Government affecting employees or applicants for employment shall be made free from any discrimination based on race, color, religion, sex, or national origin. All employees of any agency, department, office or commission having positions in the competitive service are covered by this section." 118 Cong. Rec. 4943 (1972) (Emphasis supplied.)

Additionally, the section-by-section analysis of the Conference report, in which the language of the section was not changed substantially from that of S. 2515, states:

> "This subsection provides that all personnel actions of the U. S. Government affecting employees or applicants for employment shall be free from discrimination based on race, color, religion, sex or national origin. Included within this coverage are executive agencies, the United States Postal Service, the Postal Rate Commission, certain departments of the District of Columbia Government, the General Accounting Office, Government Printing Office and the Library of Congress." 118 Cong. Rec. 7169 (1972). (Emphasis supplied.)

Both of these references explain the coverage of the Act as applying to employees of units of the legislative and judicial branches with positions in the competitive service, not just to those positions.

While it might be argued that the term "unit" refers to an entity smaller than an agency, the above two excerpts from the legislative history refer to agency-sized "units." The section analysis of the S. 2515 provision refers to "* * * any agency, department, office, or commission." The section analysis from the Conference report lists agencies of the Government covered by the Act, including GAO, and certain departments (those with competitive positions) of the government of the District of Columbia. Additionally, for the purposes of developing and submitting affirmative action plans under 5 C.F.R. § 713.203 GAO is treated as a "unit" of the legislative branch.

An additional reason to interpret the coverage of this section broadly is that remedial statutes, as this is, are to be read broadly to effectuate the purposes for which they were enacted. See Hamm v. Rock Hill, 379 U.S. 306 (1964); Pullen v. Otis Elevator Co., 292 F. Supp. 715 (1968); 3 Sands, Sutherland Statutory Construction, §§ 60.01, et seq., § 72.05. The major purposes of this Act were to eliminate discrimination in Federal employment, and to provide effective remedies for aggrieved employees, both private and Federal. To best effectuate these purposes, section 2000e-16(a) should be read as including employees in excepted positions in the legislative and judicial branches within the coverage of Title VII, if the unit or agency in which they are employed has positions in the competitive service.

Aside from the language of the statute and the legislative history, there are several factors external to the statute which support our interpretation. First, 31 U.S.C. § 46a (1970) provides, in pertinent part:

> "* * * any * * * general legislation enacted governing the employment, compensation, emoluments, and status of officers and employees of the United States shall apply to officers and employees of the General Accounting Office in the same manner and to the same extent as if such officers and employees were in or under the executive branch of the Government."

Since the 1972 amendments are general legislation governing the employment of employees of the United States, they should be applied to employees of GAO in the same manner as to employees of the executive branch. While 31 U.S.C. § 46a, being a general statute, would not be applicable where a specific statute treated GAO differently, in this case GAO is not treated differently if section 2000e-16(a) is given its apparent meaning.

Another compelling reason for including all employees of units in the legislative and judicial branches with positions in the competitive service within the coverage of Title VII, is that otherwise they may be left with no remedy for employment discrimination. This is a result of the Supreme Court's decision in Brown v. G.S.A., 425 U.S. 820 (1976), which held that the remedy provided in Title VII is the exclusive judicial remedy for Federal employment discrimination. The Fifth Circuit Court of Appeals, in Davis v. Passman, No. 75-1691, January 3, 1977, interpreted Brown v. G.S.A., supra, as barring alternative remedies only for those Federal employees covered by the 1972 amendments, and implied a damages remedy from the Fifth Amendment for excluded Federal employees. However, more recently the United States District Court for the District of Columbia stated, in denying a motion to dismiss in Beeman v. Middendorf, No. 76-809, January 18, 1977, 45 U.S.L.W. 2351, that Title VII preempted all other remedies for Federal employment discrimination, including remedies based on the Fifth Amendment. In that case, however, the court ruled that the plaintiff was covered by Title VII. Whether the Davis v. Passman, supra, remedy will be upheld, and, if so, will be effective is far from clear. Thus, there is still serious doubt as to whether employees excluded from the coverage of Title VII have any remedy for employment discrimination.

This would appear to be a constitutionally untenable position. While employees in excepted positions in the executive branch would have both administrative and judicial remedies for the infringement of a statutory and constitutional right (the right to be free from discrimination on the basis of race, sex, religion, etc.), employees in the same types of positions in the legislative and judicial branches would have no remedy. This seems to be a violation of the Due Process Clause of the Fifth Amendment, which could render § 2000e-16(a) unconstitutional. Since statutes should be interpreted in a manner which will preserve their constitutionality, if at all possible, § 2000e-16(a) should be read as including excepted

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position employees in the legislative and judicial branches. See Blasecki v. City of Durham, North Carolina, 456 F.2d 87 (4th Cir. 1972); 2A Sands, Sutherland Statutory Construction, § 45.11.

For all of the above reasons we believe that 42 U.S.C. § 2000e-16(a) (Supp. II, 1972) includes all employees of any units of the legislative and judicial branches which have any positions in the competitive service.

We request that we be advised of the results of your review of the FEAA's current interpretation of section 2000e-16.

Sincerely yours,

F. H. BARCLAY, JR.

F. Henry Barclay, Jr.
Associate General Counsel

cc: Mr. Silva
Director, EEO
U.S. General Accounting
Office

EQUAL EMPLOYMENT OPPORTUNITY
Nondiscrimination
Applicability
Civil Rights Act, Title VII
Excepted service employees
Legislative and judicial branches

OFFICERS AND EMPLOYEES
Equal employment opportunity
Excepted service employees
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CIVIL RIGHTS ACT
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WORDS AND PHRASES
"Units in legislative and judicial branches"