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ABSTRACT

This statement discusses the activities of the Special Counsel for Immigration-Related Unfair Employment Practices, within the Department of Justice. The Counsel was created as part of the Immigration Reform and Control Act of 1986, which prohibits certain forms of discriminatory employment conduct. The Counsel receives charges of discrimination filed by private parties or Immigration and Naturalization Service Officers, and determines whether the charges warrant filing an administrative complaint. This report describes the types of cases that come under the jurisdiction of the Special Counsel in the Department of Justice. The Act applies to regular, repeated, and intentional activities of discrimination, and was added to the Immigration Act because of legislators' fears that employers would use the other provisions of the Act to discriminate against anyone "foreign-looking." (PS)

Department of Justice

STATEMENT

OF

MARK R. DISLER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

IMPLEMENTATION OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

ON

MARCH 24, 1987

Mr. Chairman and Members of the Committee:

I want to thank the Committee for the opportunity to explain the administration's efforts thus far to implement one specific part of the Immigration Reform and Control Act of 1986. As you know, the Administration strongly supported enactment of legislation designed to help us regain control of our borders. Because other Administration witnesses will be discussing other provisions of the Act, I will be limiting my remarks to the Administration's efforts thus far to implement the sections of the bill which prohibit certain forms of discriminatory employment conduct and establish a "Special Counsel" in the Department of Justice.

The Act makes it an "unfair immigration-related employment practice" to discriminate against an individual (other than an unauthorized alien) in hiring, discharging, recruiting or referring for a fee, "because of such individual's national origin, or in the case of a citizen or intending citizen... because of that individual's citizenship status". The Act excepts from these prohibitions (a) employers of three or fewer employees, (b) claims which are enforceable under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, and (c) employment actions based on citizenship status where the employer must

discriminate based on citizenship in order to comply with requirements imposed by statutes, regulations, executive orders, government contracts, or where the Attorney General determines citizenship status is essential for an employer to do business with a Federal, State, or local government agency or department.

As a means of providing government enforcement of these prohibitions, the Act created the position of "Special Counsel for Immigration-Related Unfair Employment Practices," located within the Department of Justice. The Special Counsel will receive charges of discrimination filed by private parties or Immigration and Naturalization Service officers, and determine whether the charges warrant filing an administrative complaint. When the Special Counsel determines that such action is justified, he or she may file a complaint with an administrative law judge seeking injunctive relief and, where appropriate, back pay or civil monetary penalties or both. Once the administrative law judge finds a violation and issues an order, the Special Counsel or charging party may file an action in federal court to enforce the administrative law judge's decision. Where the Special Counsel determines that the charge does not justify the filing of an administrative action, the Act gives the charging party the right to file his or her own action before an administrative law judge. Review of administrative law judges' orders may be had in the geographically appropriate federal circuit courts of appeals.

Our earlier opposition to inclusion in the bill of these nondiscrimination provisions, and creation of a Special Counsel,

was based largely on our assessment that any potential discrimination that might occur after enactment was already adequately addressed by existing law. Nonetheless, now that these provisions have become law, the Department is moving to establish the necessary structure for the Office of the Special Counsel. I should at the outset put to rest any fears that we lack commitment in this endeavor. The fact is that the Administration, the Justice Department and all of us involved in this project are dedicated to the full and faithful implementation of the new legislation, including vigorous enforcement of its prohibitions.

Our initial effort has been to examine the series of questions associated with creating and organizing the Office of Special Counsel. With that effort, we have been studying the language of the law and its legislative history to determine precisely what cases come within the office's jurisdiction. For example, the Act excludes from its coverage employers who employ 3 or fewer employees. It also excludes national origin discrimination against an individual which is otherwise covered by Title VII of the Civil Rights Act of 1964. Accordingly, national origin discrimination claims against employers with 15 of more employees do not come under the Act, but are reached by Title VII.

Further, the legislative history reflects that the Act's antidiscrimination provisions are aimed principally at discrimination occasioned by an employer's efforts to avoid sanctions for hiring undocumented aliens. The overriding concern of

legislators was that an employer would discriminate against anyone who looked or sounded foreign, or who is not a citizen, despite the fact that a denied individual may be lawfully entitled to work in this country and able to prove this fact with proper documentation.

As the Conference Committee Report noted, "the antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context." The antidiscrimination provisions were adopted "because of the concern of some Members that people of 'foreign' appearance might be made more vulnerable by the imposition of sanctions. While the bill is not discriminatory, there is some concern that some employers may decide not to hire 'foreign' appearing individuals to avoid sanctions." H. Rep. 99-1000, 99th Cong., 2d Sess. 87 (1986). Indeed, "if the sanctions are repealed by joint resolution, the antidiscrimination provisions will also expire, the justification for them having been removed." Id.

The Judiciary Committee stated that (H.Rep. 99-682, Part 1, 99th Cong., 2d Sess. 68 (1986)):

> Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics.

> Representative Robert Garcia testified that "as a shorthand for a fair identification process, employers would turn away those who appear 'foreign', whether by name, race or accent."

Other portions of the legislative history further establish that the discriminatory acts Congress intended to prohibit are those in which the employer's actions are an attempt to avoid employer sanctions. For example, House Judiciary Committee Chairman Rodino emphasized this understanding on the House floor following issuance of the Conference Report. 132 Cong. Rec. H. 11148 (daily ed., Oct. 16, 1986).

It is against this backdrop that the President expressed his understanding of the antidiscrimination provision of the Act as requiring proof of intentional discrimination in order to obtain relief. This view is soundly based on the statutory scheme itself as well as its legislative history.

Indeed, the House Judiciary Committee stated, with respect to the private right of action, in its section-by-section analysis of the antidiscrimination provision: "[New Section 274B(d) a]uthorizes private action where the Special Counsel has not filed a complaint within 120 days based on a charge alleging knowing and intentional discriminatory activity or a pattern or practice of such activity." H. Rep. 99-682, Part 1, 99th Cong., 2d Sess. 93 (1986) (emphasis added). Further, in explaining the meaning of the term "pattern or practice" in the criminal sanctions portion of the Act, this Report stated that "the term 'pattern or practice' has its generic meaning and shall apply to

regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts. The same interpretation of 'pattern or practice' has its generic meaning and shall apply when that term is used in this bill with regard to the injunctive remedy that may be sought by the Attorney General for recruitment, referral or employment violations, as well as for certain unfair immigration-related employment practices." Id. at 59 (emphasis added).

This view was reflected by proponents of the antidiscrimination provision and the several examples they gave to underscore the need for such a provision. Senator Levin's statement captures well the point (131 Cong. Rec. S11436 (daily ed. Sept. 13, 1985) (emphasis added)):

> Mr. President, two types of discrimination may result from employer sanctions. First, employers seeking to avoid the consequences of hiring illegal aliens may simply refuse to hire foreign looking or foreign speaking persons. This type of discrimination -- discrimination based really on national origin -- is already covered by Title VII of the 1964 Civil Rights Act which prohibits discrimination on the basis of national origin. There are, however, a number of major gaps in Title VII coverage. As a result of these gaps in coverage, the potential for discrimination against foreign looking persons which arises under this bill will not often be remediable. This is because Title VII does not cover discrimination by employers who hire less than 15 workers and Title VII does not cover discrimination for those hired for less than 20 weeks, which excludes most agricultural workers. Thus, Title VII does not adequately protect those persons who may be discriminated against as a result of the employer sanctions established in S. 1200.
>
> Second, prospective employees may be discriminated against on the basis of their alienage as a result of the employer sanctions provisions in S. 1200. Because the bill makes it unlawful to knowingly hire illegal

aliens, employers may simply refuse to hire persons who are not U.S. citizens, although they are legally in the United States. While the bill establishes an affirmative defense to the charge of unlawfully hiring an illegal alien if the employer verifies that the employee is not an illegal alien, many employers may find it safer and easier to adopt a policy of refusing to hire persons who are not U.S. citizens, although those persons are legally in the United States.

Under the intent standard it is not sufficient to allege that a pattern or practice of activity results in discriminatory effects. Discriminatory intent may be proven by both direct and circumstantial evidence. The model of proof enunciated in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applicable. The discriminatory effect of a policy, including statistical proof in an appropriate case, can certainly be relevant to the question of whether an employer has intentionally discriminated. Thus, the discriminatory intent standard clearly encompasses more than just cases where employers have made blatantly bigoted remarks, or expressly stated either that they will not hire persons of a particular national origin, or will limit jobs to citizens.

Regarding the establishment of the Special Counsel's office, I understand that the search for a Special Counsel is in its final stages. We have requested funding for a thirty-person office for the balance of this fiscal year and funding to support a doubling of the staff in fiscal year 1988. The Department has been soliciting resumes for the staff positions, and those are being reviewed.

We are about to publish a notice of proposed rulemaking which sets out our proposal for the operating procedures and certain governing principles for the Office of Special Counsel and, to a certain extent, for the administrative law judges who will decide cases brought under the employment discrimination sections of the Act. The proposed rule also will describe the information that must be contained in written charges filed with the Special Counsel, along with other details about the way the office will function.

We are soliciting written comments from the public, and would certainly welcome such comments from Members of Congress. We invite careful attention to each part of the proposal, and stress that we consider the comment process as a valuable opportunity to receive public input.

As we have said earlier in hearings held while this legislation was under consideration, the methods employers must use to verify an individual's entitlement to employment are not difficult. There is no excuse for an employer to deny employment to those legally entitled to it in order to avoid hiring an individual whose employment could lead to sanctions. The Congress has determined that the threat of unfair employment practices is real enough to warrant the prohibitions included in the bill, and the Department is moving forward to be ready to enforce those prohibitions.