

Third, it is always cheaper to reach a monetary settlement with the plaintiff than to risk loss of license -- which could happen if the FCC ever had before it the court record which led to a final order. If a court found in favor of a Title VII plaintiff and a court of appeals affirmed, any rational broadcaster would quickly offer the plaintiff \$1,000 more than the amount of the verdict in exchange for her confidentiality agreement, her consent to a motion to vacate the judgment, and her consent to the filing of a report with the FCC saying that the case had been settled for an undisclosed amount. No rational plaintiff would refuse to accept the extra \$1,000. Once the case is settled, the FCC's policy is to do nothing more.^{290/}

Thus, it is no wonder that the FCC has only learned of final orders of discrimination when the broadcaster or permit applicant was dishonest and got caught by a mutually exclusive applicant (Atlantic City), or had left the industry (WSM), or if the case was

^{290/} In every area of broadcast regulation except the NBC Policy, the Commission does not permit private parties, through settlement, to substitute their judgment of the public interest for the Commission's judgment. See WWOR-TV, Inc., 6 FCC Rcd 1524 (1991) and California Broadcasting Corp., 6 FCC Rcd 283 (1991) (rejecting settlements). Instead, in rendering its decision in an EEO case, the FCC will only review the facts of record which did not trace their origin to the Title VII charge. See Holiday Broadcasting Company, Debtor in Possession, 10 FCC Rcd 4500, 4502 n. 9 (1995) (Title VII charge was dismissed after it was settled; Commission chose not to investigate further absent a court finding of discrimination).

an aberration (WCTO). Not once in twenty years has the FCC had before it a final order of discrimination, in a non-aberrant case, involving a licensee over which it still had jurisdiction.^{291/}

Nonetheless, the Commission routinely renders affirmative holdings that renewal is appropriate because there were no individual allegations of discrimination, even if there was overwhelming anecdotal or statistical evidence of discrimination.^{292/} These holdings are untenable as long as the FCC blinds itself to the best evidence of discrimination.

The NBC Policy is the discriminator's best friend, and it should be repealed.^{293/} Twenty years of changes in the industry and in the EEOC have rendered the NBC Policy obsolete by

^{291/} The Bureau has left the door slightly open to the consideration of a Title VII charge before a final order. Recently, the Bureau held that discrimination charges are "generally events of little immediate significance in our assessment of the licensee's EEO compliance" (emphasis supplied; fn. omitted). The Bureau quite properly did not hold that these charges have no significance. McDonald Investment Company, Inc., unpublished and unnumbered MO&O (Chief, MMB, released August 8, 1996) at 4 ¶9 (fn. omitted). It cannot so hold, since the FCC/EEOC Agreement requires the FCC, when it receives an EEO complaint, to refer the charge to the EEOC "in addition to any separate action it may take to investigate such charges within the context of the public interest finding it must make on any broadcast application." Id., 70 FCC2d at 2331 §III(b) (emphasis supplied).

^{292/} See, e.g., KGET(TV), Inc., 11 FCC Rcd 4168 ¶5 (1996); Radio Ohio, 7 FCC Rcd at 6359 ¶25, South Carolina Renewals, 5 FCC Rcd 1704, 1708 ¶38 (1990) ("South Carolina Renewals").

^{293/} Repeal of the NBC Policy would not require the FCC to renegotiate the provision of the FCC/EEOC Agreement which calls for the FCC to generally defer to the EEOC's processing of Title VII charges. Id., 70 FCC2d at 2327. The FCC/EEOC Agreement already provides that "situations may arise in which the Commission may act before a court decision." Id. at 2328 ¶21; see also id. at 2327 (providing that the FCC may inquire into EEO complaints "even before the EEOC's conciliatory process ends", citing Report on Uniform Policy as to Violations by Applicants of Laws of the United States, 1 RR, Part 3, §91.495 (1951), 42 FCC2d 399 (1973)).

undermining the EEOC's ability to handle Title VII charges, or by undermining the FCC's ability to adjudicate discrimination allegations without access to Title VII charges:

- Discriminators have become so sophisticated that they seldom make the mistake of revealing their discriminatory policies and actions, and discriminators have become more virulent than ever before. See pp. 70-75 supra.
- Station valuations have gone through the ceiling in the past 20 years, and stations are being sold much more frequently. See pp. 67-68 supra. Thus, it behooves a station subject to a Title VII charge to resolve the litigation short of finality with a sealed settlement in order to prevent the FCC from ever learning of the discriminatory acts. See p. 238 supra.
- National organizations which had previously been able to help many discrimination victims are financially strapped. See p. 77 supra.
- The EEOC's enforcement budget has declined relative to its caseload. Delays in case processing and caseload per caseworker have skyrocketed. It typically requires seven years to conclude the processing of a relatively complex and adversarially adjudicated Title VII charge. See pp. 76-76 supra.
- EEO is the last remaining tool available to the Commission to promote diversity. Ascertainment, the Fairness Doctrine, program content guidelines, the minority ownership policies, competing applications and the duopoly and one to a market rules are gone. This heightens the need to construe and enforce the nondiscrimination requirements aggressively, so as to minimize the burdens on the discrimination victim. See pp. 77-84 supra.

The NBC Policy is the antithesis of sound law enforcement because it prevents the FCC from learning of violations of its rules in a timely manner,^{294/} and because it prevents the FCC from

^{294/} A licensee's statements to one agency certainly may shed light on that licensee's concurrent policies as reported to another agency. See, e.g., Fox Television Stations, Inc., 10 FCC Rcd 8452, 8519-22 (1995) (disparities between FCC and SEC filings).

fully enforcing its most important character and diversity rule.^{295/} Moreover, the NBC Policy is illogical and inconsistent with a policy of Zero Tolerance for discrimination. It has never made any sense for the Commission to refuse to consider evidence of a violation of the EEO Rule from persons who are the best witnesses to those violations -- persons so motivated by righteous indignation that they have placed their careers and personal reputations on the line by filing Title VII charges.^{296/}

Nonetheless, if the Commission is not prepared at this time to repeal the NBC Policy, it should, at a minimum, state that the NBC Policy would not be a bar to considering three narrow but important types of allegations arising in Title VII cases: (a) allegations are so egregious that they shock the conscience; (b) allegations against the same licensee which are so numerous that they demonstrate a pattern of compliance; and (c) allegations which, although directed primarily to discrimination, also reveal substantial violations of the affirmative action sections of the

^{295/} See BBC, 556 F.2d at 62 (holding that it was an abuse of discretion for the FCC to disregard "allegations of overt discrimination in hiring and firing" which "remained contested and unsatisfied.")

^{296/} Ironically, if the same person, with the same evidence, filed a complaint with the FCC but did not file a Title VII charge, the NBC Policy would not apply and the FCC would have to consider the evidence.

EEO Rule.^{297/} In all of these cases, a review of the pleadings at the FCC and EEOC should first convince the FCC that the allegations are specific enough to ring authentic and sufficient to make eventual success on the merits likely.^{298/}

a. **The allegations are so egregious that they shock the conscience**

Among the "situations [which] may arise in which the Commission may act before a court decision", FCC/EEOC Agreement, 70 FCC2d at 2328 ¶21, are cases in which the allegations literally shock the conscience.

No two consciences are alike. However, we offer these guidelines to help identify those cases which should be deemed to shock the conscience of an ordinary person:

^{297/} When the FCC reviews evidence from a Title VII charge, it should follow the procedures the EEOC follows to protect charging parties and witnesses against retaliation. See 42 U.S.C. §704(a) (1996).

We note that some broadcasters have developed a way to guarantee that there will never be a final judgment in a discrimination case. Unfortunately, the procedure is not to simply eschew discrimination. Instead, it is to require an employee, as a condition of employment, to sign a one-sided document preventing the filing of a Title VII charge and requiring the employee to submit to binding arbitration on terms dictated by the broadcaster -- or to forfeit her employment. These draconian contracts completely undermine the EEO Rule, the FCC/EEOC Agreement and the NBC Policy. They must be outlawed immediately, in the strongest possible terms. See pp. 305-312 infra.

^{298/} We would have no quarrel with the FCC's election not to examine, in detail, a single EEO complaint which is unexceptional.

1. The RKO Test: the allegations make out a case that the deliberate policy of a company, approved at the highest levels, is to disobey or disregard Title VII and the EEO Rule; or
2. The Beaumont Test: the allegations show that a wide class of persons is affected by the discrimination, including individuals who would not know that they have been affected; 299/ or
4. The Stomach Test: the allegations are so sickening that any fair-minded person reading them would become ill.

b. Several charges are pending against the same licensee

The FCC's use of the NBC Policy to shield broadcasters from the allegations of EEO complainants reached extreme proportions in the mid-1980's. In Banks, FCC 85-122, 22 of the 23 Black employees came forward with Title VII charges, and the Commission ignored them all. In WAVY, 53 RR2d at 658, eleven of the station's fourteen Black employees came forward with Title VII charges. The Commission ignored them as well.300/

When the majority of a station's minority or female employees -- persons familiar with FCC requirements -- put their careers on the line to file Title VII charges, something has gone terribly wrong. It is virtually inconceivable that such a station violated no FCC rule or policy.

299/ Discrimination commonly involves practices aimed at groups rather than at specific individuals. See, e.g., Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973). Thus, the informed allegations of one highly motivated, reliable individual may reveal that a company discriminates against an entire group.

300/ The Commission considered ten Black former employees' allegations in Beaumont, but failed to credit their accounts even in the face of multiple inconsistent accounts by the licensee. See Beaumont, 854 F.2d at 507.

The FCC should do to Banks and WAVY what Brown I did to Plessy. Never again should the Commission refuse even to listen to a complaint by most of a station's minority or female employees.

**c. The allegations reveal substantial
violations of affirmative action
sections of the EEO Rule**

The FCC/EEOC Agreement is aimed at preventing jurisdictional overlap in cases involving discrimination. No such overlap exists between Title VII, or any EEOC rule or policy, and Sections 73.2080(b) and (c) of the EEO Rule. The EEOC is powerless to act on those elements of a Title VII charge which contain allegations of affirmative action noncompliance. Since there can be no final EEOC adjudication of these allegations, there is no reason to hold these allegations hostage to finality on the discrimination allegations. Consequently, the FCC should sever the affirmative action allegations from the Title VII charge and consider them.

5. **Nonresponsiveness or evasion in answering a Bilingual inquiry**

The inference of noncompliance from nonresponsiveness is fundamental in any system of regulation. See McCormick on Evidence §2272 (1984) ("if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that it does not do it creates the presumption that the testimony, if produced, would be unfavorable"), quoted in Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev. Bd.), recon. denied, 3 FCC Rcd 5631 (Rev. Bd. 1988), affirmed, 5 FCC Rcd 5561 (1990). In the EEO arena, misrepresentations commonly result in hearing issues, usually because more minority or female employees were claimed on Form 395 than really were employed. See, e.g., Dixie (HDO), 7 FCC Rcd at 5638; WXBM-FM, Inc., 6 FCC Rcd at 4782 (1991). The Commission has had little difficulty distinguishing misrepresentations from garbled mathematics. Compare Dixie (HDO) (misrepresentations) with Metrogeneral Communications of Nashville, Inc., 99 FCC2d 256, 261 (1984) (math).

The inference of discrimination from misrepresentations is an easy one because applicants cannot claim lack of notice of what the Commission requires. The rule against misrepresentations long predated the EEO Rule. See Character Policy Statement, 102 FCC2d 1179, 1201-11 (1986).

However, the Commission may have inadvertently sent the wrong signal to the industry by the predominance of misrepresentations as a route to an EEO hearing. It is understandable that prosecutors might follow the path of least resistance, and we certainly do not want the Commission to stop inferring discrimination from

misrepresentations. However, the narrowness of the Commission's theory of misrepresentations may have sent the wrong signal to the industry by permitting slippery and evasive discriminators to escape scrutiny while only the most careless, brazen or unimaginative liars are held accountable.

To correct this problem, the Commission should declare that nonresponsive answers or omissions on Form 396, in pleadings or in answers to Bilingual letters, even if technically true, will be read as evidence of possible discriminatory intent.

A common indication of nonresponsiveness is a licensee's claim that it did not know it had to maintain written EEO records.^{301/} This claim is usually little more than thinly-veiled fraud, put forth in the recognition that a sanction for poor recordkeeping is preferable to a sanction for discrimination. The Commission can do two things to put an end to these claims of ignorance: (1) periodically send every current and new licensee a certified mail notice spelling out the recordkeeping requirement; and (2) when this claim of ignorance is made, interview those with personal knowledge and reconstruct the "missing" records. In a station which has had few minority employees or applicants, it would be quite rare for a modest, nonintrusive interview with the general manager and the personnel director not to yield evidence of the station's recruitment, hiring and promotion practices.

^{301/} Sometimes a claim of poor recordkeeping may be made to conceal deliberate destruction of inculpatory documents. Such behavior is a serious abuse of process, being comparable to the fabrication or suppression of evidence. See WWOR-TV, Inc., 7 FCC Rcd 636, 641 ¶40 (1992) (fabrication of evidence); Dorothy O. Schulze and Deborah Brigham, 6 FCC Rcd 4218 ¶2 (1991) (advising non-parties against attending depositions). To learn whether this happened, the Commission should ask which former employees helped maintain these documents, then interview these former employees.

6. **Deliberate and systematic violations of affirmative action requirements which are evident even without "self-assessment"**

Nearly twenty years ago, the D.C. Circuit held that where "serious factual disputes raise a question about whether a licensee's affirmative action program systematically and positively encourages minority hiring, training, and advancement, a hearing must be held on the licensee's compliance with its affirmative action obligations[.]" BBC, 556 F.2d at 64-65. Since then, hundreds of licensees have been sanctioned for affirmative action violations. However, only a handful have gone to hearing on this issue, and when the issue is designated it tends to be as a nondisqualifying afterthought to other issues.^{302/}

The time has come to begin to designate disqualifying hearing issues in instances of deliberate and flagrant violations of Sections 73.2080(b) and (c) of the EEO Rule.^{303/}

Affirmative action violators very often are discriminators. As we have shown, in virtually every instance in which a discrimination issue was designated for hearing, the evidence giving rise to the issue became known in the course of the Commission's investigation of an affirmative action violation. See pp. 176-188 supra. Applying what is known as the "Craik Principle," courts have long held that a deliberate and systematic

^{302/} See, e.g., Dixie (HDO), 7 FCC Rcd at 5640 ¶15.

^{303/} The Commission almost rendered this holding in Leflore Broadcasting Company, Inc., 65 FCC2d 556 (1977), aff'd, 636 F.2d 454 (D.C. Cir. 1980), but has never squarely decided this question. See Beaumont, 854 F.2d at 507. It is the single most potentially significant question of first impression in broadcast EEO jurisprudence.

failure to abide by easy-to-follow affirmative action requirements may reveal intentional discrimination.^{304/}

The Craik principle applies with great force to broadcasters, owing to their special public interest obligations and longstanding notice of the EEO Rule's requirements.^{305/} Craik-type discrimination is often called "unintentional" only because scienter is difficult to extract from unwilling witnesses.^{306/} In

^{304/} Craik v. Minnesota State University Board, 731 F.2d 465, 472 (8th Cir. 1984) ("Craik"); see also Garland v. USAir, 767 F.Supp. 715, 726 (W.D. Pa. 1991). At a minimum, the tribunal must consider the probative value of such evidence. Gonzalez v. Police Dept., City of San Jose, California, 901 F.2d 758 (9th Cir. 1990); Yatvin v. Madison Metropolitan School District, 840 F.2d 412, 415-416 (7th Cir. 1988); Taylor v. Teletype Corp., 648 F.2d 1129, 1135 n. 14 (8th Cir.), cert denied, 454 U.S. 969 (1981); Chang v. University of Rhode Island, 606 F.Supp. 1161, 1183 (D.R.I. 1985).

^{305/} The Bilingual II court understood this, noting that it has never agreed with "the assumption that unzealous prosecution of an affirmative action plan can never constitute evidence of intentional discrimination sufficient to require a renewal hearing." Id., 595 F.2d at 633 n. 49. As Judge Robinson declared in his partial dissent in Bilingual II, 595 F.2d at 643 n. 61: "unlike most other employers, broadcasters operate under a requirement that they make affirmative efforts to increase their employment of women and minority individuals....Thus a disparity in a broadcaster's employment profile is less likely to be the result of unintentional practices than would be the case for such differentials in the figures for other employers."

^{306/} The U.S. Commission on Civil Rights has long recognized that "'systemic discrimination,' i.e., discriminatory practices - most, but not all, unintentional - [are] built into the systems and institutions which control access to employment opportunity." U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities (February, 1973) at 3. In the seminal article on fair recruitment under Title VII, Alfred W. Blumrosen explains:

[n. 306 continued on p. 249]

a never-overruled holding, the Commission recognized that "it is the consequences of the licensee's employment practices, not the intent, which determines whether discrimination requiring remedial action exists" (emphasis in original).^{307/}

The persistence of so-called "unintentional" discrimination, manifesting itself as affirmative action violations, can only be addressed by holding the licensee to be just as accountable for affirmative action violations as it would be for open and notorious discrimination.

That is why the Commission should stop indulging the fiction that if only broadcasters would "self-assess", they would become aware of the compositions of their own hiring pools and staffs, and would become conscious of their own biased recruiting, selection and hiring practices. The Commission should recognize that sophisticated businesspeople are always very much aware of their

^{306/} [continued from p. 248]

No subjective prejudice or negative feeling toward minorities is required under the statute. Few employers purposefully seek or desire to discriminate against minorities.... Title VII is not a criminal statute requiring mens rea. It is regulatory social legislation designed to change conduct and eradicate discriminatory practices. Its operation does not turn on the subjective feelings of employers, unions, and other respondents.

Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964," 22 Rutgers L. Rev. 465, 475 (1968).

^{307/} Federal (HDO), 59 FCC2d at 364 ¶27 (emphasis in original), citing, inter alia, Diaz v. Pan American Airways, 422 F.2d 385 (D.C. Cir. 1971) ("Diaz").

own personnel practices and personnel outcomes.^{308/}

If we are ever to complete the task of remedying the present effects of past discrimination, all broadcasters must pull their weight. Broadcasters must know that their licenses will be at stake if they deliberately violate the affirmative action policies with impunity.^{309/}

^{308/} The premise of the "self-assessment" concept is that a systemic affirmative action violator is blissfully unaware of its own hiring practices: if only it would look around and discover that lo and behold, it has an all-White workforce, it would have known that corrective action was necessary. The "self-assessment" concept assumes that nobody in business thinks consciously about racial isolation, which is absurd. Race crosses every businessperson's mind daily, although many will deny it. For some, it is a source of discomfort, evasion, and avoidance, if not outright prejudice.

The effect of the "self-assessment" concept is that guilty broadcasters are rescued from having to go to hearing. The prototypical "self assessment" case is Miami Renewals (WLVU-AM-FM), 5 FCC Rcd 4893 (1990) ("Miami"), recon. denied, 8 FCC Rcd 398, 399-401 (1993), aff'd, Florida NAACP, 24 F.3d at 271. In Miami, the Commission held that

the licensee did not maintain adequate records and does not appear to have engaged in meaningful self-assessment of its EEO program. Had it done so, it would have discovered that its recruitment efforts were not productive. WLVU/WLVU-FM hired no minorities for any of the 54 hiring opportunities during the license term in an area where the available labor force is 15.2% minority (emphasis in original, with a straight face).

Id. at 4898 ¶43. This was "self-assessment" run riot. Respectfully, one has to ask "what part of 'no minorities in 54 vacancies' did this licensee have to 'discover'?"

^{309/} We have in mind broadcasters who deliberately evade their compliance obligations. We do not have in mind the very rare broadcaster who genuinely believes that compliance is unconstitutional, requests a declaratory ruling to that effect, and gives the Commission advance notice of its intention not to comply while awaiting the declaratory ruling. That broadcaster's licenses should not be put at risk, for its actions, although wrong, would have been honorable. On the other hand, one who discovers the Constitution only after deliberately violating the law should be treated like any other lawbreaker.

7. **Failure to recruit through minority sources where these sources are readily available**

In South Carolina Renewals, 5 FCC Rcd at 1709 n. 8, the Commission held that "where a licensee does not obtain meaningful results from general sources and the licensee also has failed to contact minority specific sources, questions will be raised concerning the extent to which the licensee has engaged in adequate efforts to obtain minority applicants." We refer to this much-cited policy as "Footnote Eight".

Footnote Eight allows a broadcaster to decline to use minority-specific sources for recruiting if its nonminority sources generate a "meaningful[ly]" diverse pool of applicants. Id. Otherwise, the licensee's choice not to use minority-specific sources would be unreasonable.^{310/}

Footnote Eight has not worked in practice, and it should be modified substantially. A station's recruiting list, consisting entirely of nonminority recruiting sources, is often essentially the same list it used thirty years ago to develop an all-White staff in the first instance. By the time the license term is over and the licensee is filling out Form 396 for the first time in eight years, he may "discover" that his entirely nonminority roster of sources did not yield very many minority applicants. Then he will propose to contact minority sources in the future, and perhaps he will actually follow through. However, this 11th hour correction does nothing to repair the harm done to the minorities

^{310/} See, e.g., Golden West Broadcasters, 10 FCC Rcd 1602, 1605 n. 12 (1995) (licensee not saved by Footnote Eight when it "failed to recruit minorities or contact any sources, general or minority, for a significant number of vacancies.")

who lost an opportunity to learn of job openings at the station during the preceding eight years.^{311/}

Footnote Eight unintentionally conveys the impression that contacting minority-specific sources is so distasteful that broadcasters can only be compelled to undertake it when nothing else works. Actually, there is no good reason not to require a licensee to use minority-specific sources as a first line of EEO defense rather than as a last resort. Moreover, for many broadcasters, such a requirement will cause them to develop good working relationships with people they wouldn't ordinarily meet and may not have spoken to since ascertainment was abolished.

At a minimum, the Commission should expect licensees to contact obvious minority sources in their communities, such as minority owned broadcast training schools or historically Black colleges. There is no reason at all why a broadcaster in Durham, who recruits at Duke, should not also be telling the Radio/Television Department at Shaw University that it has a job available.

^{311/} Footnote Eight allows a broadcaster to compile an applicant pool in which minorities may constitute a miniscule fraction of the total number of applicants. An example is provided by a television station in Mobile, Alabama, which has a 25.5% Black labor force. However, minorities only represented 4.3% of the overall applicant pool. Of 250 upper-level applicants, the licensee received only three minority referrals. See Clear Channel Television, Inc. (WPMI-TV, Mobile, AL), (MO&O/NAL), 11 FCC Rcd 4077 (1996), slip opinion, FCC 96-128 (released April 4, 1996) at 4 (Concurring Statement of Commissioner Andrew C. Barrett [not contained in the FCC Record]).

Unfortunately, Form 396 does not disclose the representation of minorities in the applicant pool, since it only asks the renewal applicant to identify minority and female applicants -- not all applicants. See pp. 325-327 infra (proposing appropriate corrections to Form 396).

8. Relegation of minorities or women to low pay, specialized format or parttime positions

The Commission should express Zero Tolerance for any two-tier, Jim Crow system of work assignments. In its most extreme manifestation, an EEO program exhibited an "apparent classification of only some positions as 'suitable' or 'feasible' for minority applicants." Rust (HDO), 53 FCC2d at 363. The Commission declared:

This limitation is diametrically opposed to the policies which give rise to our rules, particularly the concept that equal employment, as a minimum, requires that minorities be considered for all job openings. We are further troubled by the callousness inherent in this program, which lessens the licensee's efforts to recruit minorities in the face of three years of zero minority employment. Under these circumstances, we believe that a prima facie case of employment discrimination has been established.

Id. at 363-64.^{312/} The relegation of minorities or women to bottom-five category employment is especially abhorrent, both because it may be indicative of discrimination^{313/} and because it undermines the EEO Rule's goal of promoting diversity. A secretary, janitor or parttime night-shift announcer has little influence on program service. Furthermore, as we've demonstrated,

^{312/} See BBC, 556 F.2d at 63-64 n. 19 (discussing Rust, and noting that even where the licensee didn't use the words "suitable" or "feasible", its actions -- in this case, a training program which was not designed to help Blacks move into professional and managerial jobs -- amounted to "limiting advancement to those it deems 'suitable' for training."

^{313/} See, e.g., U.S. v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969) (extreme patterns of assigning Blacks only to low-skilled jobs and Whites only to high-skilled jobs may compel an inference of discrimination).

minorities and women no longer need affirmative assistance to secure employment in these categories. See Table 2 and discussion at p. 38 supra. Continued FCC attention to these positions for EEO regulatory purposes only encourages EEO-noncomplying broadcasters to employ minorities in these categories in the hope that they might escape accountability for not employing minorities and women in significant positions.^{314/}

Two-tier employment systems are usually more subtle than the one in Rust. For example, an EEO program may be directed only to certain departments in a station.^{315/} In another permutation of two-tier systems, a duopoly may channel virtually all of the minority applicants to the minority-format station, where employees often have lower job status and earn lower pay than their counterparts across the hall who do exactly the same work.^{316/}

^{314/} See, e.g., Northeast Kansas, 11 FCC Rcd at 4084 ¶¶10-11 (rejecting applicant's attempt to invoke low-status employment of minorities in mitigation of failure to employ minorities in high status positions).

^{315/} See, e.g., Carolina Radio of Durham, 74 FCC2d 571 (1979). However, in BBC License Subsidiary, 10 FCC Rcd at 10975 ¶37, the Commission held that "rather than examining each job category individually, it evaluates a station's overall employment, including all upper-level job categories, in assessing a station's EEO performance." See also Metromedia, Inc. (KNEW/KSAN, Oakland/San Francisco), 43 RR2d 583, 587-88 ¶13 (1978) ("Metromedia") (to the same effect). That was a mistake. As we explain infra, the Commission should begin to develop an EEO regulatory initiative aimed at "Second Generation" issues such as promotion and work assignments. See pp. 313-320 infra. It should overrule its holdings in BBC License Subsidiary and Metromedia.

^{316/} See Independence, 53 FCC2d at 1166 ¶19 ("the facts before us imply that the licensee has limited its consideration of minority persons to WHAT. Such segregation would be contrary to the letter and spirit of our equal employment rules." (emphasis supplied)). See also Babrocky v. Jewel Foods, Inc., 773 F.2d 857 (7th Cir. 1985) (employer maintained sex-segregated job classifications, e.g., only men were hired as meat cutters and only women as meat wrappers).

The most subtle two-tier practice is the relegation of minorities to parttime employment. Parttime employees "constitute a significant portion of the total workforce at most broadcast stations," Broadcast EEO - 1987, 2 FCC Rcd at 3970 ¶21. The Commission has recognized the value of an integrated parttime workforce as a source of candidates for promotion to fulltime jobs.^{317/} On the other hand, parttime employees typically earn no benefits, receive low pay, work the least desirable shifts -- and worst of all, enjoy little interaction with the rest of the staff and thus have little impact on diversity. Parttime employment of minorities is factored into EEO decisions as a minor mitigating factor, see, e.g., WFSO(FM), 7 FCC Rcd 6056, 6046 ¶8 (1992); Century Broadcasting Corp., 40 RR2d 1019 (1977), but not as an aggravating factor, see Radio Chattanooga, Inc., 7 FCC Rcd 2929 (1992), recon. denied, 10 FCC Rcd 9773, 9774 ¶8 (1995). To be consistent, parttime employment should be considered both as a mitigating and an aggravating factor. Failing to hire minorities for fulltime jobs is aggravated where the station hires minorities

^{317/} See Alabama/Georgia Renewals, 6 FCC Rcd 5968, 5972 ¶34 (1991) ("we would not consider such employment as a substitute for the licensee's failure to employ Blacks, the dominant minority, in full-time positions until the last year of the license term or as mitigation for a record of substantially inadequate efforts to recruit more minorities for full-time positions. Second, no evidence exists that minority part-time employees have ever been promoted to full-time positions.")

only for parttime jobs or, worse yet, does not hire minorities even for parttime jobs.^{318/} Thus, the NPRM's proposal to consider only fulltime positions as "vacancies" should be rejected because it prevents the development of a complete record on an important issue. See NPRM, 11 FCC Rcd at 5174 ¶44. The Commission should instead follow the approach taken in its 1994 EEO Report, which concluded that "the total number of employees, whether full-time or part-time, may play an important rule in assessing an entity's overall employment profile." EEO Report - 1994, 9 FCC Rcd at 6315.

^{318/} We are aware of instances in which stations reported a minority person as a parttime employee even though the individual was a one hour per week sports stringer or a half hour per week program host and an independent contractor. The Commission should expect a parttime employee to be subject to FICA withholding and to be employed at least ten hours per week, some of which should be on-site, interacting with other employees.

9. **The use of undocumented excuses suggestive of impermissible race or gender prejudice**

If any evidence of race or gender prejudice should be fully reviewed in hearing, it is the irrational excuses for EEO nonperformance which broadcasters file with the agency itself. Prepared with the benefit of private contemplation and with the assistance or availability of specialized counsel, these statements are carefully crafted to avoid the appearance of discriminatory animus. What always gives these statements away is their lack of logic^{319/} and their total lack of documentation.^{320/}

When confronted with these pretextual statements, the Commission should go on heightened alert for the presence of discrimination,^{321/} initially by seeking instances in which the licensee's pretextual excuses may have been translated into

^{319/} The typical pretextual statement attributes to minorities or women a habit or characteristic found among everyone. Classic examples include claims that minorities or women don't like to work for low pay (see p. 265 infra) or that that minorities or women are hired away by stations in larger markets (see p. 267 infra). A substitution of the words "White males" for "minorities" or "women" in these statements easily illuminates the race or gender stereotypes embedded in them.

^{320/} See Beaumont, 854 F.2d at 508 (although the licensee claimed that most Blacks weren't qualified for radio jobs in its area, and it could not outbid competitors because of its financial position, "nowhere in the record is either assertion corroborated, and the Commission appears to have made no independent attempt to do so.") See also Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) ("[t]hose who can demonstrate no legitimate reason for acting more likely than not acted for a discriminatory reason.")

^{321/} See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 and n. 10 (1981) (pretextual statements almost always are indicative of discriminatory intent). See also Milles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985) (subjective standards by an employer whose practices have a substantial adverse impact on a protected group have often been held to violate Title VII).

disparate treatment of specific individuals.^{322/} Carefully drawn followup document production requests will often yield evidence that statements originally made in writing to the agency are only the beginning of a long paper trail of discrimination.^{323/}

^{322/} Judge Robinson has illuminated the connection between pretext and disparate treatment. He explains that "disparate treatment" means

not only consciously plotted acts that result from racial animus, but also conduct arising from the thoughtlessness of stereotypes and irrational generalizations. Both conscious purpose and subconscious purpose - neglect - can fall within this category, for behind today's failure to think of minority interests is yesterday's deliberate decision to discriminate....It makes little difference whether a licensee purposely calculated that an applicant was unable to handle the responsibilities of a position because of his race or whether the licensee's socialization was so imbued with the stereotype that it simply never occurred to him that the applicant could do the job....As has been said in another context, "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Hobson v. Hansen, 269 F.Supp. 401, 497 (D.D.C. 1967), aff'd as modified sub nom. Smuck v. Hansen, 408 F.2d 175 (en banc 1969).

Bilingual II, 595 F.2d at 637 n. 14 (Robinson, S., Dissenting in Part).

^{323/} See Gallo v. Prudential Residential Services, Ltd. Partnership, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("[b]ecause writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.")

Careful scrutiny of pretextual statements is essential if the Commission is to break its unfortunate pattern of inferring discrimination only from misrepresentations. See pp. 245-46 supra.^{323/} By developing other sources of inferences of discrimination, the Commission can avoid sending the wrong signal to the industry that truth-telling discriminators are immune from loss of license.

We present here seven common categories of pretextual excuses for the failure of an EEO program.

^{323/} See, e.g., Dixie (HDQ), 7 FCC Rcd at 5638; Albany, 97 FCC2d at 519; Metroplex, 96 FCC2d at 1090.

a. Claims that minorities prefer not to work in a particular format

The Commission long ago recognized that minorities can and should work at any station in any community, and indeed can and should own any type of station in any type of community in order to promote diversity. Waters, 92 FCC2d at 1265. Thus, the suggestion that broadcast professionals of one race are uninterested in getting work at a broadcast station that doesn't primarily play "their" music, or are less qualified to do that work, is perhaps the single most horrible manifestation of discrimination known to the Commission. We refer to this contention as the "Format Pretext."

In Lutheran (HDO), 9 FCC Rcd at 923 ¶25, the Commission recognized that the suggestion that minorities are less able to work in classical music than Whites is "inherently discriminatory." Unfortunately, when faced with virtually identical facts involving stations with other formats, the Commission has admonished the broadcaster, but has not designated the renewal application for hearing.^{324/}

Nor has the Commission designated an application for hearing when the Format Pretext was more carefully worded as a suggestion that it is difficult to compete with minority format stations for minority employees, even though this formulation of the Format Pretext also embeds within it the assumption that minority

^{324/} See, e.g., Stauffer Communications, Inc., 9 FCC Rcd 879, 884 ¶12 and n. 7 and 885 ¶15 and n. 9 (1994) (news); Double L Broadcasting, 7 FCC Rcd 6435, 6442 n. 12 (1992) (Big Band); WINEAS, Inc., 5 FCC Rcd 4902, 4902-03, 4904 n. 7 (1990), recon. denied, 8 FCC Rcd 3897 (1993) (country-western); Delaware Broadcasting Co., 58 RR2d 1297, 1299 n. 6 (1985) (country-western); Bob Jones, 25 FCC2d at 723 (1970) (religious and classical).

broadcast professionals are unable or uninterested in working outside of "their" music.^{325/} While minority format stations usually do employ high proportions of minorities, they are able to do so because they offer minorities an antidiscrimination sanctuary -- a reliable opportunity to work. However, stations in other formats have the bulk of the industry's jobs, and no minority broadcast professional we have ever encountered turns down a genuine opportunity to earn a living. It would be absurd for the Washington Post to claim that it has difficulty hiring Black reporters because they prefer to work for the Washington Afro-American.

Because the Format Pretext is so invidious, the Commission should announce, as part of its Zero Tolerance Policy, that in the future it will apply the rule of Lutheran (HDO) to all other formats and to any pretextual contentions that minorities prefer working at minority format stations.

^{325/} See, e.g., Eagle Radio, Inc., 9 FCC Rcd 836, 855-56 ¶39 and 856 n. 37 (1994) (subsequent history omitted) (claim that country-western format made recruitment more difficult). See also GAF Broadcasting Company, Inc., 10 FCC Rcd 10760, 10764 ¶8 and n. 7 (1995) (to the same effect; classical format).

b. **Claims that central city residents
won't commute to the suburbs**

Suburban stations benefit economically from their proximity to a large city. Unfortunately, some suburban stations are happy to take advertising dollars from a central city, but are unhappy at the prospect of drawing employees from the central city.

Some suburban stations contend that minorities (or, more charitably put, "central city residents" -- code for minorities) find it difficult to commute to work: the highways are bad, there's not much bus service, the low pay doesn't justify the commute. Almost never is any documentation provided to support this argument.

Central city stations never claim that suburbanites can't make the same thirty mile commute into the city -- even though driving downtown in rush hour traffic usually takes longer than driving in the other direction. However, some suburban stations find it tempting to forego minority recruiting throughout the renewal term, then claim, at renewal time, that they thought they didn't have to recruit because they're not situated in front of a city bus stop.

The Commission usually rejects this reverse-commuting argument.^{326/} However, the NPRM proposes to expand the range of

^{326/} See Buckley Broadcasting Corp., 9 FCC Rcd 2099, 2101 ¶¶16-18 (1994) (subsequent history omitted) ("Buckley") (stations were 20 miles from Syracuse and three of the 14 employees lived more than 20 miles away) WXBM-FM (HDO), 6 FCC Rcd at 4784 ¶15 (rejecting licensee's claim that Blacks won't drive 13 miles to work); Suburban Washington, D.C. Renewals, 77 FCC2d 911 (1980) (30 miles is a reasonable commute).