ARE THE CURRENT FCC EEO RULES EFFECTIVE?

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The FCC's Former Rules Are Struck Down In 1998 And 2001

The original EEO rules, adopted in 1971, brought about an increase in minority broadcast employment from 5% in 1971 to 19% in 1997, and from 12% to 43% for women during that period. There was not a single complaint alleging that a person had been subjected to "reverse discrimination." With one exception, every FCC commissioner endorsed the rules.

The FCC and citizens looked at a station's employment profile and discerned that if a station hired minorities and women, it most likely had been successful in recruiting them; after all, the minority and women employees had to have come from somewhere. However, unless it had evidence of actual non-recruitment, the Commission never concluded that low minority or female employment was caused by a failure to recruit minorities and women.

Perhaps the most important principle established during the first generation of EEO enforcement was that generating referrals primarily by word of mouth from members of a station's homogeneous staff is inherently discriminatory. See Jacor Broadcasting Corporation, 12 FCC Rcd 7934 (1997) ("Jacor") and Walton Broadcasting, Inc. (KIKX, Tucson, AZ) (Decision), 78 FCC2d 857, recon. denied, 83 FCC2d 440 (1980) ("Walton"). This principle undergirds most of the Bureau's 2004-2007 EEO enforcement orders (see p. 3 infra), although none of these recent decisions cites Jacor or Walton.

In 1994, the Commission found that "there continues to be evidence...that minorities are still not recruited for a significant number of positions .... in many of these cases ... positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry" (fn. omitted). Implementation of the Commission's Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276, 6314-15 ¶79 (1994).

In Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) and MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTC v. FCC, 534 U.S. 1113 (2002), the Court struck two sets of EEO rules on equal protection grounds.

Lutheran Church and MD/DC/DE Broadcasters prevented the Commission from drawing compliance inferences from a company's minority employment or recruitment pool levels. However, the decisions did not require the Commission to diminish its enforcement of permissible EEO rules. Nor did these decisions prevent the Commission from increasing its already-modest enforcement levels to compensate for the narrowed scope of permissible EEO rules.

New Rules Are Adopted In 2002, With Enforcement Premised On Audits

In 2002, the Commission adopted new EEO rules responsive to MD/DC/DE Broadcasters, with enforcement driven by audits of recruitment efforts. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018 (2002) (recon. pending). Audits were to be conducted on 5% of employment units in a given year.

State broadcasters associations strenuously opposed the audit program; 45 of the 50 associations sought mandamus to prevent the program from commencing. Even after mandamus was not granted, the FCC performed no audits for 14 months, commencing them only after the Office of Communication of the United Church of Christ, Inc. and MMTC objected.

In 2004, the Commission re-authorized annual EEO reports, but it is still considering whether to make the reports publicly available. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Third R&O and Fourth NPRM), 19 FCC Rcd 9973 (2004). The Commission has not decided whether to resume publication of the series of longitudinal EEO data it published annually from 1971-1997 and in 2000. Thus accurate industrywide EEO statistics are difficult to assemble. Asked at the July 16, 2007 MMTC Access to Capital and Telecom Policy Conference about the desirability of EEO and minority ownership statistical reports, Commissioner McDowell declared that "the more information we have, the better."

EEO Cases Decided From 2004 To 2007

Emmis Television License, LLC (NAL), 20 FCC Rcd 13860 (2005): Broadcast audit case. $18,000 fine and reporting conditions for failing to recruit for 11 of 51 vacancies, failing to retain or report data on interviewees or referrals, and failing to self-assess adequately

KDAY(FM) (NAL), 20 FCC Rcd 20130 (December 20, 2005; unpublished erratum issued December 21, 2005): Broadcast renewal case. $20,000 fine and reporting conditions for failing to recruit adequately for 46 of 54 vacancies. The Bureau found that the EEO violations "do not constitute 'serious violations' of the Commission's rules of such gravity that they warrant designation for evidentiary hearing. Although it does not excuse the violations, the Unit through its counsel has reported to Commission staff that it believed it did not need to recruit for all openings as required by the Commission's rules because it maintains that it frequently received unsolicited employment inquiries from a diverse pool of applicants." Id. at 20133. Thus, as a practical matter, and notwithstanding MD/DC/DE Broadcasters, the Bureau considers an applicant's receipt of "a diverse pool of applicants" as sufficient to justify renewal even where the Bureau also finds that the applicant essentially failed to operate an EEO program.

Viper Communications (NAL), 20 FCC Rcd 20254 (2005): Broadcast renewal case. $8,000 fine and reporting conditions where licensee engaged in no EEO outreach activities for 1½ years. The fact that there were no upper-level openings during that time did not excuse the omission.

New Northwest Broadcasters LLC (NAL), 21 FCC Rcd 10748 (2006): Broadcast renewal case. $5,000 fine and reporting conditions for failing to recruit adequately for 13 of 25 positions.

Three Trees Communications, Inc. (NAL), 22 FCC Rcd 2027 (2007): Broadcast audit case. $13,000 fine and reporting conditions for failing to document that the licensee had a recruitment program for 1½ years.

Liberman Television of Dallas License Corp. (NAL), 22 FCC Rcd 2032 (2007): Broadcast audit case. $20,000 fine and reporting conditions for failing to recruit for 30 of 54 vacancies and failing to adequately document the station's EEO program.

Inland Empire Broadcasting Corp. (NAL), 22 FCC Rcd 2656 (2007): Broadcast renewal case. $5,000 fine and reporting conditions for failing to recruit for four of 10 vacancies.

Waitt Omaha, LLC (NAL), 22 FCC Rcd 2660 (2007): Broadcast renewal case. $8,000 fine and reporting conditions for failing to document recruiting sources and interviewees for 14 of 36 positions.

James Shelton (Time Warner Cable), 22 FCC Rcd 4545, modified, 22 FCC Rcd 6707 (2007): MVPD Complaint. Admonishment for failing to maintain EEO files at system offices, rather than just at the parent company's headquarters.

RCN Corp., 22 FCC Rcd 11182 (2007): MVPD Audit Case. RCN conducted no EEO initiatives for three years and apparently dissembled during the Bureau's investigation. The Bureau held that "Section 503(b)(6)(B) of the Act, however, limits the time period within which the Commission can initiate a forfeiture proceeding against non-broadcast entities to only those violations that occur within one year of the issuance date of a notice of apparent liability for forfeiture. Because the violations here occurred more than 12 months ago, the statute of limitations prohibits us from initiating a forfeiture proceeding against RCN. For this reason, we admonish RCN for these violations. But for the running of the statute of limitations we would have initiated a forfeiture proceeding in this case (fn. omitted)." Id. at 11185. Compare Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue" (NAL), FCC 08-25 (January 25, 2008) (imposing nearly $1.5 million in forfeitures for indecency violations that allegedly occurred during a February 25, 2003 broadcast. The decision was issued one month before the five year statute of limitations would have expired).

The Commission's Current EEO Enforcement Program Is A Failure

The FCC's EEO enforcement program is a shell of its former self. MMTC examined all 300 of the Bureau's 2003 and 2004 broadcast audits, and found that only 12% of the recruitment sources were minority-targeted while 36% of the job notices still did not contain an "EOE" tag. Yet every one of the stations passed its audit anyway. Comparison of 2004-2007 EEO enforcement with 1994-1997 EEO enforcement reveals that:

- 1994-1997: 251 cases decided; 86 of which resulted in forfeitures totaling $2,149,000, or $312,250 per year. Mean forfeiture per forfeiture decision was $3,631.

- 2004-2007: 10 cases decided, eight of which resulted in forfeitures totaling $97,000, or $24,250 per year. Mean forfeiture per forfeiture decision was $12,125.

Thus, while current enforcement efforts yield much higher forfeitures in particular cases than those issues a decade ago, the size of the Commission's EEO docket is down 96% (from 251 cases from 1994-1997 to 10 cases from 2004-2007), and the total forfeiture amounts imposed annually have also decreased 96% (from $312,250 in 1994-1997 to $12,125 in 2004-2007).

Many broadcasters still omit EOE notices in broadcast job openings. Until 1998, essentially all broadcast job postings contained "EOE" tags. Emboldened by Lutheran Church and MD/DC/DE Broadcasters, many broadcasters actually went to the trouble to omit these race-neutral initials that signaled that all applicants are welcome. In October 2002, MMTC found that 42% of 837 job postings on state broadcast associations' websites contained no EOE notice. On February 4, 2008, MMTC found that 11.5% of 1,545 job postings on state broadcast associations' websites still had no EOE notice. This practice of omitting the formerly ubiquitous EOE notices demonstrates the length to which many licensees will go to let it be known that they do not want minority and women job applicants.

Discrimination remains a factor in the broadcast job market, even among college graduates. The Cox Center of the University of Georgia's 2006 Annual Survey of Journalism and Mass Communication graduates found that "students who are members of minority groups had a harder time finding a job."

Employment of women is stagnant. MIW performs a gender analysis of radio station management trends in the top 100 markets. MIW found that:

- General Managers: Women went from 14.8% in 2001 to 16.7% in 2007
- Sales Managers: Women went from 29.7% in 2001 to 32.5% in 2007
- Program Directors: Women went from 10.4% in 2001 to 9.8% in 2008

Minority broadcast employment is stagnant, and minority radio news employment has undergone a purge. RTNDA's 2007 report also found that minorities comprised 21.5% of local television news staffs in 2006, down from 22.2% in 2005. At non-Hispanic stations, the minority workforce was 19.4%, down 1% from the previous year. Only 3.6% of non-Hispanic television stations have minority general managers. In 1995, minorities were 14.7% of radio news employees; that number had declined to 6.2% by 2007. Starting from this percentage, MMTC has calculated that minority news employment at non-minority owned, English language radio stations is statistically zero – about where it was in 1950.

Importing EEO Jurisprudence Into The Commission's New Civil Rights Initiatives

Nondiscrimination in broadcast transactions

Nondiscrimination in broadcast advertising