West Point Market: Managing a challenge from the EEOC

Todd A Finkle, The University of Akron
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Todd A. Finkle
Robert A. Figler
Kenneth A. Dunning

Russell Vernon, a second-generation owner and manager of West Point Market in Akron, Ohio, must decide whether to settle, go to court, or reconcile (mutually agreeable solution) with the Equal Employment Opportunity Commission on an allegation of racial discrimination. He firmly believes that he is innocent. If he chooses to reconcile or settle the case out of court, he could be construed as a racist. If he chooses to go to court and loses, he may lose his family business. This emotionally charged situation is presented as a management decision that must be based on an analysis of the facts. The case is especially interesting due to the perceptions that students have of “the role of governmental agencies” and “the use of racial-based quotas in the workforce.”

It all started with a letter from the Equal Employment Opportunity Commission (EEOC) on March 29, 1994, to Russell Vernon, the owner of West Point Market. The one-page letter stated that the federal government had “probable cause” to believe that two dozen minority job applicants were unlawfully turned away without being fairly considered for employment.

With this brief document, a drama began to unfold. The EEOC believed that they had a strong case because fewer than 10 percent of West Point Market’s employees were African-American, compared to 33 percent in the city of Akron. Vernon believed that he had a strong case because his staffing reflected the fact that there were very few blacks with the appropriate job skills in the areas surrounding his grocery store. The EEOC and West Point Market both felt passionately that they would win their case if they went to court.

Determining Russell Vernon’s guilt or innocence in this legal matter is outside the scope of this case. Vernon faced one of the biggest challenges of his life. How should he manage this legal challenge? What should he do about it? How should he invest his time and money in defending himself? Should he reconcile? Settle quickly out of court? Take the EEOC to court? Vernon thought that it was very possible that this incident could break his business.

RUSSELL VERNON AND HIS COMPANY

Russell Vernon was a tall, slim, energetic native of Akron, Ohio. Friends described him as intellectual and sincere. Born in 1942, he was married and had two sons, Rick and Mike. At the age of 36 he had become the president and sole stockholder of West Point Market, an up-scale food store founded in 1936 by his father and two partners.

Spring, 2001
Almost immediately upon taking control, Russell began to feature fine wines, cheeses, and candy in the store. Within a few years West Point Market established a reputation as Akron’s best store for wines and cheeses. The store also began to feature specialty breads and prepared foods, such as lasagna and chicken. Customers responded positively to these items and West Point Market’s profits increased dramatically with the higher margins that gourmet items customarily carry (Wilkinson & Frank, 1995).

West Point Market’s target market was two-income families and professionals who sought up-scale items and superior service. In 1995 the store dominated the gourmet retail business in the Akron metropolitan area, where 22 percent of the 250,000 households earned $50,000 or more per year.

In order to expand the store to its current size of 25,000 square feet, West Point Market had borrowed $2 million in the late 1980s. In 1991 its sales reached $8.1 million. From 1992 to 1994 sales increased 3-4 percent a year while net profits increased from $159,000 to $169,300. Exhibit 1 provides financial results for 1992 through 1996. In 1994 West Point Market had 83 full-time and 54 part-time employees, up from 64 and 44 in 1991.

Under Russell Vernon’s leadership the store gained a national reputation for its customer service. His accomplishments won attention in the popular press as well as in trade publications, academic articles, and textbooks. Dr. Leonard Berry, director of the Center for Retailing Studies at Texas A&M University, named West Point Market as one of the top ten service companies in the United States. His textbook on retailing described the store as “a master’s thesis on food retailing” because it offered a unique food-shopping experience (Berry, 1995). Writing in a special edition of Arthur Andersen’s national retailing newsletter, Russell Vernon described his business this way:

We are an entertainment center, a stage for the products we sell. Our ceiling heights, lighting and color create a theatrical shopping environment. Our signature products include Killer Brownies, Chocolate Raspberry Suicides, Peanut Butter Krazies. . . . We offer more than 100 mustards, 25 olive oils, and as many vinegars. Our music is classical; our restrooms feature turn-of-the-century art, residential fixtures, indirect lighting, and fresh flowers (Vernon, 1996).

HUMAN RESOURCES MANAGEMENT AT WEST POINT MARKET

In addition to its products, atmosphere, and store design, writers often reported on West Point Market’s hiring practices. The company’s employee turnover was one-third of the industry average. As Vernon explained to the casewriters,

We have achieved our success through our employees. We do that by empowering our employees to satisfy the customer. We expect employees to be enthusiastic, have excellent communication skills, and be friendly and supportive. Hiring decisions are based on the interviewee’s demeanor, enthusiasm, hygiene and grooming, appreciation for West Point Market’s commitment to great service, availability for work and desired level of pay. We hire a unique type of employee. We do not just hire clerks, but associates that have an investment in the company. They take care of our business in a very personal and individual way.

Hiring knowledgeable, service-oriented employees was an essential goal of West Point Market. The company hired Vernon’s son, Mike, in January 1992 as its first full-time director of human resources. Vernon wanted his son in the position because Mike had 15 years of experience in a variety of positions within the company and Russell
trusted him. Until then the store’s general manager had taken care of all matters related to employees. Mike Vernon served as director of human resources until January 1993. When Debra Leidy took over the job. At that point, the company had no formalized policies for recruitment or hiring. According to Mike Vernon, “We tried putting the procedure in writing at one point, but it was just an extra step.” Leidy described West Point Market’s recruiting process in 1993:

When we recruit applicants for job openings we do some advertising, but not a lot. We primarily rely on people who come to the store looking for work and word of mouth referrals. Twenty-five percent of our applicants come from word-of-mouth advertising from present employees. If they are hired, the employee receives a $25 referral fee. When advertising is done, the ads are placed primarily in the Akron Beacon Journal, and sometimes in the Cleveland Plain Dealer, Senior Focus (a local paper for senior citizens), and The West Side Leader.

In general, we advertise for skilled job vacancies, such as chefs, bakers, and meat Cutters. There is generally no need to advertise for retail employees, as there is a steady flow of walk-in applicants for these positions. If a person comes in looking for work, he/she will generally be brought into my office and given an application. I look over the application and if they meet the basic job qualifications, I contact their references. If the applicant makes it past this stage, the department head and I decide whether or not to personally interview the applicant.

The department head and myself conduct the interviews. The interviews are not in a specific protocol and generally last one half to one hour. No notes are taken, and no records are kept. We both have equal authority in the hiring process. After the process is over, the applications are kept on an “active file” for 60 days and an “inactive file” for one year. During this time frame, the applicants are still available for job openings.

West Point had 10 to 15 department heads. Examples of departments included seafood, meats, cheeses, wine, bakery, candy, and fresh produce. Directly underneath the department heads were associates. In many cases, employees needed specific job knowl-

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<table>
<thead>
<tr>
<th>1993</th>
<th>% Sales</th>
<th>1994</th>
<th>% Sales</th>
<th>1995</th>
<th>% Sales</th>
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<tr>
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<td>$8,340</td>
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* 1993 & 1996 are estimated.
edge or educational experience. For instance, a sales associate in the cheese department would be expected to have knowledge of 350 different cheeses from around the world and 26 signature cheese spreads made by West Point Market. Wine sales associates were also expected to have knowledge of the variety of wines from all over the world. Furthermore, it was not uncommon for employees to travel to Europe to find new brands to sell in the store.

Entry-level positions fell into five categories: cook, cashier, miscellaneous food preparation, office, and sales. For a listing of the job groups, their titles, and the number of people hired from July 1991 through March 1994, see Exhibit 2.

THE CENTRAL EVENTS

On March 31, 1991, three years before the EEOC contacted Russell Vernon, a memorable scene occurred in the store. This is how Vernon recalled it: James Ford, a local African-American civil rights attorney, entered West Point, walked over to an African-American courtesy clerk and grabbed her by her arm. He asked her why she was not a cashier. Without waiting for an answer, Attorney Ford shouted, “I want to see all the African-Americans who work here right now!” Vernon quickly greeted Ford and attempted to talk with him. Vernon remembers “defusing” the situation, but coming away with the feeling that the scene had created a strongly negative impression on everyone present.

Several weeks later, the local chapter of the National Association for the Advancement of Colored People (NAACP) stated the following in a letter to Vernon, “We would like to meet with you to discuss the steps that West Point Market can take to include more African-Americans on your staff.” Russell Vernon and his son Mike both attended the meeting; James Ford (the civil rights attorney) did not. The meeting resulted in a list of ideas to increase the number of African-Americans in the store, and a commitment to the following in 1992:

- Establish a new human resources department that is geared to the care and success of current and future employees.
Russell Vernon sent a letter with the statement of commitment and a list of specific ideas to the address that the NAACP representative had given to him. The post office returned the letter to him with a notice that the address was unknown. Vernon attempted to verify the address, but the post office employee stated that he had no record of address for the NAACP. Vernon assumed that the NAACP would contact him, and so he placed the Equal Opportunity Employment (EEO) label on all future job ads. Establish working relations with the NAACP and other affiliated groups that will work to provide West Point Market with qualified black applicants.

Spring, 2001
For all West Point Market, Inc. facilities during the period March 29, 1991 to the present, please submit the following:

1. List the name, address, phone number, and number of employees for each facility.

2. a) Provide description and copy of the recruitment and selection policies. Provide a copy of all related documents such as employment applications, test, interview forms, applicant logs, etc.

   b) If not stipulated in the policies requested above, describe the recruitment and selection process (how are applications/resumes accepted, and how are they organized, how long are they considered active, how long are they retained, the screening process, etc.) for all retail positions, including management positions. Specify any differences in policies or procedures for different job groups, if appropriate.

   c) State the name, race, and title of the persons involved in each stage of the recruitment and selection process referred to in Item 2(b).

   d) State the name and title of the person(s) who is the custodian of the records designated in this request for information, and the physical location of these records.

3. List all recruitment efforts, including but not limited to school placements, outside organizations, and employment agencies utilized for all retail positions.

4. Copies of all job ads for positions which were published during the period March 29, 1991 to the present. Indicate for each job ad the name of the publication, the dates of publication, and the contact person.

5. Copies of all employee handbooks in effect during the relevant period.

6. Copies of all union agreements covering retail employees which were in effect during the relevant period.

7. Copies of all job descriptions for all positions and the minimum qualifications for each job.

8. Copies of all applicant logs for the relevant period.

9. Provide list (separately by each facility) of all retail vacancies filled from March 29, 1991 to the present, by name, person hired, race, date of hire, job title, EEO-1 category, (sales worker, clerical etc.) job status (full or part-time) and date of termination if applicable.

10. Grouped separately by each store, and within each store by job sought, provide a copy of all employment applications submitted during the period March 29, 1991 to the present. Attach all interview notes and any other screening documents to the original employment application.

   Additionally, separate for each store the applications of those hired from those not hired.
EXHIBIT 5

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Russell Vernon, President
West Point Market, Inc.
1711 W. Market Street
Akron, Ohio 44313

NOTICE OF CHARGE OF DISCRIMINATION

(Sign reverse side of this notice for additional information)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

☐ Title VII of the Civil Rights Act of 1964.
☐ An Equal Pay Act (29 USC §206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

☐ No action is required on your part at this time.

☐ Please submit by 4-14-01 a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. You are hereby notified that an Equal Employment Opportunity Commission Investigator has been designated to conduct and complete this investigation of this charge.

☐ Please respond fully by 4-14-01 to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Loretta Keller, Systemic Supervisor
(Commission Representative)

216/522-7678
(Empl#)

Enclosure: Copy of Charge

Basis of Discrimination: [ ] RACE [ ] COLOR [ ] SEX [ ] RETALIATION [ ] AGE [ ] RELIGION [ ] NATIONAL ORIGIN

Circumstances of Alleged Violation:

☐ 3/31/94

Previous editions of this form are obsolete and must not be used

EEOC RULES AND REGULATIONS

Section 1601.15 of the Commission’s Procedures Regulations provide that persons charged with employment discrimination, such as yourself, may submit a statement of position or evidence with respect to the allegations contained in this charge.

The Commission’s Recordkeeping and Reporting Requirements are set forth in 29 CFR Part 1602. See particularly §1602.14(b) which contains the terms “personal records relevant to the charge.” For example, these records may include personnel or employment records relating to the aggrieved person and all other aggrieved employees holding positions similar to that held or sought by the aggrieved person, as well as records relating to the charge.

$1602.14 Preservation of Records made or kept.

(a) A charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under Title VII, the respondent employer shall preserve all personal records relevant to the charge or the action. The term “personal records relevant to the charge,” for example, includes personnel or employment records relating to the aggrieved person and all other aggrieved employees holding positions similar to that held or sought by the aggrieved person as well as records relating to the charge. The records must be kept for a period of three years from the time the filing or the action is dismissed or the case is closed.

NOTICE REGARDING REPRESENTATION BY ATTORNEYS

Notice is hereby given that unless your lawyer appears at the hearing on this charge, it will be necessary for you to present for examination the testimony of any witnesses appearing for the Commission.

NOTICE REGARDING REPRESENTATION BY ATTORNEYS

Although it is not necessary that you be represented by an attorney while we handle this charge, you have a right, and may wish to retain an attorney to represent you. If you are represented by an attorney we request that you provide the Commission with your attorney’s name, address, and telephone number, and that you ask your attorney to write to the Commission continuing such representation.
the returned correspondence in a file and waited to be contacted. No such contact was made.

Vernon did, however, carry out his commitments. First, a new Human Resources Department was established, with his son as its director. Second, the placement of the Equal Opportunity Employer (EOE) was inserted on each job advertisement. Finally, West Point established working relationships with a variety of organizations including
EXHIBIT 7: 1990 U.S. CENSUS JOB CLASSIFICATIONS DETAILED BY RACE AND SEX FOR SUMMIT COUNTY, OHIO

<table>
<thead>
<tr>
<th></th>
<th>OVERALL TOTALS</th>
<th>MALES</th>
<th>FEMALES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>TOTAL</td>
<td>WHITE</td>
<td>BLACK</td>
</tr>
<tr>
<td>Cooks</td>
<td>4583</td>
<td>2145</td>
<td>1779</td>
</tr>
<tr>
<td>Cashiers</td>
<td>6224</td>
<td>1092</td>
<td>946</td>
</tr>
<tr>
<td>Misc. Food Prep. Occupations</td>
<td>1856</td>
<td>930</td>
<td>643</td>
</tr>
<tr>
<td>Office</td>
<td>761</td>
<td>244</td>
<td>216</td>
</tr>
<tr>
<td>Sales Workers</td>
<td>4148</td>
<td>1348</td>
<td>1261</td>
</tr>
</tbody>
</table>

the NAACP, Akron Public Schools, and the U.S. Department of Labor Bureau of Apprenticeship and Training. Nothing happened for the next three years.

COMMISSIONER’S CHARGE

On March 29, 1994, Vernon received a letter from the EEOC stating that the federal government had “probable cause” to believe that two dozen minority job applicants were unlawfully turned away without being fairly considered for employment. The commissioner’s charge from the EEOC (see Exhibits 3-5) stated that West Point Market failed to and/or refused to hire African-Americans for all positions because of their race. The EEOC stated that their charges were based on information from witnesses, the company’s reputation in the business community, and a comparison of the company’s workforce profile to availability estimates in the relevant labor market areas.

The EEOC stated that this did not constitute a finding of a violation, and the commission planned to investigate the matter with “minimal interference” to West Point Market’s operations. The letter also asked Vernon to provide specific information within two weeks. The charges against West Point Market were called a “pattern of practice,” meaning that the EEOC had used complex statistical analysis to compare thousands of hiring decisions. A defense of his pattern of practice would require its own statistical analysis.

Vernon had suspicions of who might have triggered the commission’s charges. Because no employees had complained and no private parties had filed charges, his suspicions remained unconfirmable. The deputy director of the EEOC’s Cleveland office, Walter Champ, said that his office had been following Vernon’s actions for years. Champ pointed out that the commissioner in Washington would not have signed the complaint if the case did not appear to be strong.

Vernon turned for advice to his regular law firm. At an hourly rate of $225, the firm assigned a new attorney who was inexperienced in employment law. The attorney agreed that the charges were outrageous and that Vernon should not be forced to spend thousands of dollars to defend himself. The attorney recommended that Vernon ignore the charges. Vernon decided not to respond to the charges or to request any additional information.

There the matter rested for the next nine months.
WEST POINT'S WORKFORCE

From July 1, 1991 through March 24, 1994, West Point Market ran approximately 32 classified advertisements in the Akron Beacon Journal, the West Side Leader, Bakery Marketing and Production, the Canton Repository and the Cleveland Plain Dealer for 240 openings. West Point Market received 1287 applications during this period; 1043 (81 percent) of the applicants were white and 244 (19 percent) were African-American. West Point hired 26 cooks, 13 cashiers, six food preparation specialists, five office personnel and 169 sales associates. Twenty-four African-Americans were hired during the allegation period: one cashier, four cooks, and 19 sales associates.

THE COMMISSIONER’S DECISION

On January 16, 1995, Commissioner Barry Hoberman issued the following decision: “We believe that West Point Market discriminated against African-Americans in recruiting and hiring.” The decision specifically stated that West Point Market engaged in recruitment practices that discriminated against African-Americans; failed to hire African-Americans into entry-level positions; and failed to maintain proper records on its employment process in accordance with EEOC regulations.

To settle the charge, the EEOC demanded that West Point Market place a full-page classified advertisement aimed exclusively at African-Americans; achieve a 33 percent African-American workforce within five years; pay nearly $100,000 to 24 African-American applicants who the EEOC believed had been victims of discrimination during West Point’s hiring process; hire African-American applicants to the exclusion of others; and report to the EEOC on its job applicants, including their race, for the next five years.

The letter stated that the EEOC was interested in providing justice to potential victims of discrimination. For an overview of the EEOC and how it proves discrimination see Appendices 1 and 2.

VERNON’S NEW DEFENSE TEAM

At this point Vernon decided that his attorney had erred badly in recommending that he ignore the EEOC’s demands. Concluding that he needed someone with experience in employment law, Vernon dropped his law firm and hired a specialist, Neil Klingshirin, to advise him. The new attorney summarized the EEOC’s charges, then told Vernon, “We need to determine the best strategy to provide a clear and specific job-based explanation for your actions.” Klingshirin analyzed the case against WPM:

The EEOC used applicant stock statistics (Labor Market Comparison Approach) to determine that discrimination occurred at your store. They want you to have a 33 percent African-American workforce in place within five years, however they never stated where the percentage came from. This is not the SMSA for Akron, however my research indicates that this is the approximate percentage of African-Americans that are employed by the Akron fire and police departments. It appears that the EEOC is using the percentage of African-Americans in the city of Akron as their relevant labor market. And since you have less than 10 percent African-Americans on your workforce, they are assuming that you are discriminating against African-Americans.

Even so, thought Klingshirin, “there is good news.” The definition of the labor market used in statistical comparisons frequently was the subject of intense argument during court cases. The proportion of a given demographic group in the labor market
could change radically depending on the combination of geography and skill level that was chosen. Furthermore, the law did not specify how large a difference in percentages was tolerated before a court would conclude that an employer had discriminated. He told Vernon that several court cases “could help our case.”

Klingshirin proposed the following course of action:

The EEOC assumed that Akron’s African-American workforce had the appropriate qualifications for your entry-level job openings. On the contrary, we need to prove that you need people with specific job qualifications. We need to perform our own formal utilization analysis and examine the percentage of available workers in each job category (cooks, cashiers, misc. food preparation, and office and sales). I have done some research on your applicant pool and noticed that 20 percent of your applications came from outside the city of Akron. Therefore, I recommend that we use the numbers for Summit County. This includes the city of Akron and the surrounding communities. I have already retrieved the numbers for Summit County.” (see Exhibit 7).

Vernon and his new lawyer created a three-stage defensive strategy. First, they would defend their hiring records with statistical information that the EEOC would understand. Second, they would try to respond positively to the settlement demands. Third, they would build support from friends—including the African-American community—to place political pressure on the EEOC to resolve the crisis.

To combat these charges, Vernon hired Dr. Gerald Barrett, a University of Akron professor with a Ph.D. in industrial/organizational psychology and a law degree. Dr. Barrett performed a utilization analysis to examine the percentage of available African-American workers in Summit County, which included the city of Akron, for each job category: cooks, cashiers, misc. food preparation, office and sales.

Stage two of the defense strategy was to respond positively to the settlement demands. Vernon agreed in principle that a greater effort could be made to attract a more diverse workforce. He hired a new Director of Human Resources, Terrie Freiman, who increased West Point’s networking with the African-American community. Although she did not have a college degree, she did have experience in Human Resources Management. Relationships were built with the Arlington St. Baptist-Urban League, the local chapter of the NAACP, the Summit County Department of Human Service, and the city’s African-American activities programs such as “Hands Across the Bridge,” a celebration of Akron’s diversity.

Vernon proposed alternatives to the cash payments for back pay and damages to the victims of discrimination identified by the EEOC. He proposed that West Point Market invite new applications from the 24 African-Americans who had not been hired. Any of them who were hired and remained with West Point for one year then would receive free tuition to a local college while continuing to work at West Point Market.

1. Several court cases that have examined this subject include the International Brotherhood of Teamsters v. United States, 431 U.S. 324, 229 n. 20 (1977); Hazelwood School District v. United States, 433 U.S. 299, 307 (1977); and Castenda v. Partida, 430 U.S. 482, 497 n. 17 (1977). In International Brotherhood of Teamsters vs. United States, the Supreme Court supported the use of statistical analysis using data from the community from which the employees are hired as an acceptable way of determining an imbalance. This imbalance could be used as a sign of possible discrimination. However, they pointed out that data for the general population might not accurately reflect the pool of qualified job applicants. In Hazelwood School District v. United States, the Supreme Court reiterated that statistics can be an important source of proof that employment discrimination exists. They expressed the view that given enough time and no discrimination, the ethnic and racial composition of the work force will be more or less representative of the community. The decision also pointed out that the populations used for comparison must be relevant labor markets.
The final stage of Vernon’s strategy was to build support from friends. He aimed to create political pressure on the EEOC to resolve the crisis. Vernon put all his marketing skills into the campaign. He mailed background information to U.S. senators and the local U.S. representative and solicited their letters of support. He also wrote to the Office of Advocacy in the Small Business Administration. Vernon also began a “grass roots” movement at home. The president of the state grocers association regularly updated state legislators on West Point’s situation.

West Point Market was also a member of several national organizations including the Society of Human Resource Management (SHRM) and the Food Marketing Institute. Their lobbyists supported Vernon and introduced him to key people in Washington. Prominent African-American leaders in Akron circulated petitions of support. The Akron chapter of the NAACP, now under new leadership, wrote to the EEOC’s Cleveland office in support of West Point. According to the chapter, “We have never seen or heard of any unfair practices at West Point. We will stand by them all the way.”

The chairman of the EEOC in Washington D.C. also received many letters. One was from Ohio’s governor, George Voinovich:

Recently a situation was brought to my attention that is very confusing to me. There is a small, family-owned retail business in Akron called the West Point Market. They have enjoyed a stellar reputation as being a good citizen in the Akron area. The Akron NAACP has confirmed this company’s high level of support in providing jobs to African-Americans and in financially supporting NAACP programs over the years. I do not understand why or how a charge can be levied when there has been no specific complaint filed. I find this incredulous; it is incomprehensible to me how
this could be happening. Furthermore, there has never been one race-discrimination complaint filed against West Point with the Ohio Civil Rights Commission, the state agency that often works with the EEOC in investigation complaints.

As word spread throughout Akron about the EEOC’s charges, support for West Point grew. Loyal customers started a $6,000 defense fund, and the local newspaper backed the company.

THE REVERSAL

On April 25, 1995 it appeared that Vernon’s three-stage strategy had succeeded. The EEOC announced that it was willing to drop its demand for a workforce comprising 33 percent African-Americans and to explore creative alternatives to back pay for the affected class members. During the initial stages of negotiations, the Small Business News, an Akron-Cleveland publication, ran an explosive article on the event. The reporter already had interviewed the civil rights attorney when he approached Vernon. “By the time he interviewed me,” Vernon reflected, “no comment” was not an option.”

The article was largely sympathetic to West Point, portraying the company as a victim who was confident of winning its case, and the EEOC as a tool of organized labor. The article alleged that the United Food & Commercial Workers Union had initiated the complaint. (A forerunner to this union had been ousted by West Point’s employees in a 1957 decertification note case that was so notable that the Wall Street Journal had covered the story.) The union’s chief organizer, Lou Maholic, was asked if his union had played any role in the complaint. He replied, “I may have given the (EEOC’s) phone number to some people who called to complain.” (See end of text for article availability).

Four months later, the EEOC’s Cleveland office notified Vemon that it would no longer honor its proposed terms nor the previously accepted portions of the settlement, and that it wanted to triple to $210,000 the back pay due from West Point. The EEOC gave no reason for its latest action. At the same time, Congress amended the Equal Access to Justice Act (EAJA) to include a special provision for small businesses. The EAJA allows defendants to recover legal fees (up to $125 per hour) and other expenses (e.g., expert witnesses, reasonable cost of any study, analysis, or a project that is found necessary for the preparation of the party’s case). This would allow West Point Market to recover their legal fees if the court decided that the EEOC had demanded a settlement that was “unreasonable” when compared to the trial court’s ultimate award.

THE DECISION

Russell Vemon thought that his decision might make or break his company. He saw three options available to West Point Market.

- Bring his case to court, filing under the Equal Access to Justice Act to recover West Point’s legal fees of $100,000. A loss would mean paying West Point’s legal fees as well as the EEOC’s proposed penalties, for a total of $310,000.
- Settle out of court, paying the $210,000 sought by the EEOC. Combined with the $67,000 already spent on West Point’s legal defense, this would bring the total loss to $277,000. Could Vernon afford to do this?
- Reconcile with the EEOC out of court. If Vernon chose this option, West Point could not recover any of the money already spent on its defense.

Vemon also had to consider that a victory in court would afford an opportunity to
clear his reputation. If he settled out of court or reconciled, he might be perceived as a racist. This could be detrimental to the store’s future.

Placing a bag of Chocolate Raspberry Suicides into a customer’s shopping bag, Russell Vernon pondered all that he had learned over the past few months about discrimination cases. He was sure that this decision would be among the most important he had ever made.

REFERENCES


APPENDIX 1: The EEOC in 1996

The Equal Employment Opportunity Commission is the federal agency that enforces the Age Discrimination Employment Act of 1967, Title VII of the Civil Rights Act of 1964 (as amended), the Equal Pay Act of 1963, the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991. These acts prohibit employment discrimination based on race, sex, religion, national origin, age, or handicap status. The agency’s job is to receive complaints, gather information, and take the appropriate action.

The process begins when a complaint is filed. Approximately 80 percent of the charges are considered local because they are filed by employees who believe that they have been discriminated against. They contact a local EEOC and may file a charge within 180 days of the allegedly discriminatory act.

The remaining 20 percent of the charges (Commissioner’s Charges) are not considered to be local charges because they are not initiated by an employee. Rather, they are filed by one of the agency’s five commissioners who oversee the EEOC’s activities in Washington, DC. Typically, this charge is used against giant corporations who operate in many locations across the country. It is rare that a small business such as West Point
Market should face a commissioner’s charge, but it is in fact what happened. When a commissioner initiates a charge, the EEOC contacts the employer directly with the charge that stated the allegation. The EEOC is not required by law to identify the names of the people who requested the investigation.

Once an allegation has been made, the EEOC will send a copy of the charge to the employer. If there is probable cause to investigate, the EEOC will ask the employer to provide certain types of information. The EEOC then performs an investigation.

If the EEOC finds reasonable cause to believe that discrimination has occurred, it must seek to conciliate the charge to reach a voluntary resolution between the charging party and the respondent. If the conciliation is not successful, then the EEOC or the charging party may litigate the case. The EEOC’s complaint procedure is shown in Exhibit 6.

From the fiscal year 1991 to fiscal year 1994 the number of discrimination charges increased dramatically. This was due to the passage of the 1990 Americans with Disabilities Act (ADA) and the 1991 Civil Rights Act, which increased the allowable damage awards and was followed by a surge in allegations of sexual harassment. Annual charge receipts increased from 62,135 in fiscal year 1990 to 91,189 in fiscal year 1994. In the same period, due to budget restrictions, available investigators decreased from 762 to 732. As a result, the average caseload per investigator grew from 51.3 in 1990 to 122 in fiscal year 1994. The investigators could not keep pace with the escalating charge receipts. Furthermore, there was a projected year-end backlog of 120,000 charges by the end of 1995.

APPENDIX 2: How Does the EEOC Prove Discrimination?

To determine if discrimination in staffing has occurred within an organization, the EEOC can follow two different paths: disparate treatment or disparate impact. To prove discrimination the EEOC needs evidence and proof, particularly as these charges pertain to the staffing system itself and its specific characteristics in practice.

When an organization is accused of disparate treatment, the plaintiff claims that they intentionally discriminated against people on the basis of specific characteristics such as race or sex, for example, not hiring women with young children while hiring men without children or hiring minorities to become janitors while whites are made waiters. The effect of such decisions, even though they may be prompted by the employer’s idea of good business practice, is to subject a specific group to negative treatment because of a personal characteristic (Gatewood & Feild, 1999, page 43).

If a disparate treatment case goes to court, a sequence of events occurs. First, to prove whether or not disparate treatment exists within an organization, a plaintiff must show that the following four conditions exist:

- The person belongs to a protected class.
- The person applied for, and was qualified for, a job the employer was trying to fill.
- The person was rejected despite being qualified.
- The position remained open and the employer continued to seek applicants as qualified as the person rejected (Heneman, Judge, & Heneman, 2000).

If this is done successfully, the plaintiff is said to have established a prima facie case of discrimination. If this is not done, the case should be dismissed.

If the plaintiff is successful in proving that a prima facie case exists, the defendant must present a clear and specific job-based explanation for its actions in order to defend itself. The defendant must provide a legitimate, nondiscriminatory reason for rejecting the plaintiff. This is relatively easy to do. For example, previous defendants have suc-
cessfully argued that the qualifications of the individual were inferior to those selected. If the argument is clear and specific, the defendant meets its burden of proof. The defendant does not have to persuade the judge that it actually used this as the basis for rejecting the plaintiff. It is up to the plaintiff to prove that the employer did not use it. The argument is usually more acceptable when the defendant’s reasons include some objective data. The argument is less acceptable if the reasons are based solely on subjective judgments, especially if these are made without clear definition and procedures.

If the organization is successful in defending itself, then the plaintiff must prove that the organization’s defense is a pretext and the true reason for rejection was prejudice. Previous court cases have accepted racial slurs made by company managers, records that the company’s treatment of the plaintiff were inconsistent with other individuals of other demographic groups, and statistics showing the demographic group of the plaintiff were underrepresented in the company’s workforce. If the data are not acceptable, the plaintiff is unsuccessful in countering the defense of the organization (Gatewood & Field, 1998).

Disparate impact, also known as adverse impact, focuses on the motive or intent underlying actions. In this form, organizational selection standards are applied uniformly to all groups of applicants, but the net result of these standards is to produce differences in the selection of various groups. Two classic examples of such discrimination are the requirement of a high school diploma, which had been used extensively for entry-level positions, and of height minimums, for example 5’6”, which may have been used for police and some manual positions. The problem is that such standards disqualify a much larger percentage of groups. For instance, more whites have high schools diplomas than most minority groups. A number of frequently used and seemingly valid selection requirements has been the subject of disparate impact discrimination charges, including arrest records, type of military discharge, various educational degrees, scores on some tests and interviews, years of previous work experience, and financial history. The use of each of these has been linked to the disqualification of a high percentage of at least one demographic group of applicants (Gatewood & Field, 1998).

Statistics are used in cases of both forms of discrimination. In disparate treatment cases, statistics are mainly used to assist the plaintiff in rebutting the defendant’s explanation of the selection practice under question. In disparate impact cases, statistics are most often used by the plaintiff in demonstrating that a pattern of adverse effect has occurred. The two main types of statistics that have been used are applicant stock (relevant labor market approach) and applicant flow statistics (selection ratio approach).

Applicant stock statistics require the calculation of the percentage of the targeted minorities employed in the organization versus the percentage of available minorities employed in the population. To determine if discrimination exists, the EEOC compares the relevant labor market (RLM) data with the targeted population within the organization.

Data on the RLM usually comes from the U.S. Census, chamber of commerce, industry, and other reports. The RLM has two components: the geographical location and skill level. In general, geographical units are explained in terms of the nation, state, or Standard Metropolitan Statistical Area (SMSA), which is the region surrounding a central city or town. Appropriate skill level is reported in terms of the numbers reported as holding or qualified to hold specific jobs.

The following is an example of how the EEOC would use the RLM approach:

<table>
<thead>
<tr>
<th>Number of African-American managers in the organization</th>
<th>Number of appropriately skilled African-American managers in the labor force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of managers in the organization vs. Total number of appropriately skilled managers in the labor force</td>
<td></td>
</tr>
</tbody>
</table>
This example requires the calculation of the percentages of African-Americans that are employed in the organization as managers and the available number of African-American managers available in the labor force or RLM.

The percentages are then compared to search for disparities. If the percentage of African-American managers in the organization's workforce is significantly smaller than the percentage in the comparison group then there is the possibility that racial discrimination has occurred in the selection process. This process is referred to as "utilization analysis."

The other statistical technique used by the EEOC is applicant flow statistics. Applicant flow statistics compare proportions taken at two time frames, before and after the selection has taken place.

\[
\frac{\text{Number of minority applicants selected}}{\text{Number of minority applicants}} \quad \text{vs.} \quad \frac{\text{Number of non-minority applicants selected}}{\text{Number of non-minority applicants}}
\]

If the percentage difference for the minority group is significantly smaller than the percentage for the non-minority group, evidence of discrimination is present. The courts have used two statistical tests to assist in their decisions using this method: the Four-Fifths Rule and the Standard Deviation Rule. The Four-Fifths Rule is said to indicate discrimination if the hiring of minorities is less than 80 percent of the rate of hiring for non-minorities. For example, assume that West Point Market hired 90 percent of their white applicants, but only 60 percent of their African-American applicants. Since, 60 percent is less than four-fifths of 90 percent, statistical evidence of discrimination is present. The 80 percent rule is only a guideline and provides for exceptions based on sample size considerations and practical significance of difference in selection rates.

The Standard Deviation Rule provides a rule of thumb to judge whether or not the number of African-Americans actually hired is roughly representative of their population in the applicant pool. This method requires the calculation of the standard deviation. The general rule is that the number selected should be within a range defined by the standard deviation units from the expected number selected.

To determine the standard deviation you must multiply the following and then take the square root of the final product:

\[
\sqrt{\frac{\text{Total minority applicants}}{\text{Total applicants}} \times \frac{\text{Total non-minority applicants selected}}{\text{Total applicants}} \times \frac{\text{Persons Selected}}{}}
\]

For example, assume that 200 individuals selected from an applicant pool of 500 applicants were African-American and 300 were white. Inserting these numbers into the equation would yield a standard deviation of 6.93. Two standard deviations would be approximately 14. If African-Americans were selected in the same proportion as they were represented in the applicant pool, you would expect that 80 African-Americans would have been selected \((200 \times 40\) of applicants\). In this case, the acceptable selection range would be 80 plus or minus 14, or the range from 66 to 94 African-Americans selected. According to this type of analysis, a firm that hires fewer than 66 African-Americans, or greater than two standard deviations, could be accused of racial discrimination.

Todd A. Finkle is Associate Professor of Management Fellow at the Fitzgerald Institute for Entrepreneurial Studies at The University of Akron.
Robert a. Figler is Associate Professor of Management at the University of Akron.

Kenneth A. Dunning is Professor of Management and Fellow at the Fitzgerald Institute for Entrepreneurial Studies at the University of Akron.

The authors would like to thank Mr. Russ Vernon, owner/manager of West Point Market, for his cooperative assistance.

The article references in the text, "Vernon for the defence" and the teaching notes are available through Todd Finkle at finkle@uakron.edu.