COPING WITH EQUAL EMPLOYMENT

For a Contractor Involved in an EEO Lawsuit, Proper Response Can be Vital

By H. Kent Munson

The purpose of this article is to inform you, the construction contractor, of what to expect if you find yourself involved in an Equal Employment Opportunity (EEO) lawsuit. Today all across the nation many cases are being prosecuted against construction contractors.

However, a case does not find its way to court without your knowing about it. An astute businessman in any business should give prompt, thorough and conscientious attention to the preliminaries, such as the investigative and conciliatory phases of an EEO charge.

Notwithstanding your careful attention to these phases of an EEO charge, court action is sometimes required to satisfactorily resolve the issues. Sometimes you must take the bull by the horns to achieve a just result.

There are two types of charges in an EEO suit: (1) individual discrimination charges: and, (2) pattern and practice of discrimination.

The first may take the form of a minority employee complaining that he was discharged due to race, while the employer contends he was laid-off for failure to follow instructions or perform his duties.

The pattern and practice of discrimination charge may include such things as allegations that the number, of minorities in the work force is not equal to the ratio of minorities in the area's population, or that the hiring practices of the employer discourage or prevent minorities from entering or continuing in the work force.

Normally, if a discrimination charge is brought to the courts, either by an individual or the Equal Employment Opportunity Commission (EEOC), an employer must defend against both an individual and a pattern and practice charge of discrimination.

Tough Decisions

From the outset, a contractor has to make some tough policy decisions about his relationship with the unions. Normally, you have a situation where the defendant contractor has a union shop collective bargaining agreement. He therefore can hire only union members, and the unions typically involved have few minority members. Consequently, contractors cannot increase their minority participation.

Unions, realizing their precarious position, fear they too will become involved when you are engaged in an EEO charge. (However, unless some individual brings a charge against the union, no affirmative relief can be obtained against them.) The contractor as a results bears the brunt of the EEO attack.

Although serious repercussions are likely to result, if necessary, a contractor can bring the union into the suit through a cross claim or third party action. The theory is that if the contractor doesn't have enough minorities in its work force, it is the result of the union's failure to allow minority participation, and therefore if the contractor is held liable, the union should indemnify the contractor for any loss. Such a ploy, of course, cannot be made without serious consideration by the contractor of his continuing relationship with the union even after the lawsuit has long since concluded.

The lack of minorities in your unions might well be your only explanation to a charge that your company has fewer minorities than in the general population. In a recent case in St. Louis, the EEOC sued a sub-contractor, alleging both individual racial discrimination and a pattern and practice charge. We took the position that we realized that the ratio of minorities in the work force was small, but due to the union situation it was impossible to have more.

We had a situation where in the entire metropolitan area there were approximately six qualified union minority plasterers, four minority plaster tenders, seven or eight minority tapers, and very few minority dry-wall hangers. Furthermore, we indicated that we had always been willing to hire every qualified minority that came to us but since our workers had to be union members and since the minority membership in the unions was negligible our hands were tied.

This approach focused the EEOC upon the real problem in increasing minority participation in the construction trades-that is, the reluctance of unions to train or enroll minorities when much of the predominantly white membership is unemployed or during a period when work for certain trades such as plasterers and lathers is steadily declining.

Continued on page 14

Continued from page 12

After long and hard negotiations, the EEOC recognized that if minority participation is to be increased, the contractor cannot accomplish it alone. The consent decree resolving that controversy recognized the union situation and the lack of minorities therein.

Difficult Burden

In defending against charges of individual or pattern or practice discrimination the construction contractor bears a particularly difficult burden. The construction industry is very different from a factory, a power plant or a hospital. There are no seniority lists, no stable work force, no central place of operation, no objective standards to measure work performance, no bidding for jobs on lay-offs. You have, unlike other industries, word-of-mouth-hiring, infrequent formal job applications, frequent job site changes, great work force fluctuation and lay-offs without explanation.

All of this is elementary to you, but to a young Ivy-league EEOC lawyer it spells discrimination. Therefore, you have the task of educating your trial lawyer by giving him a thorough understanding of your entire business. Then you must educate the EEOC and the judge.

Every successful party to a lawsuit quickly learns that the biggest mistake a party or witness can make is to assume that others know as much about his business as he does. Only after everyone has a thorough understanding of the industry and its peculiarities can you then explain why particular individuals were in fact not the targets of discrimination.

What relief will the EEOC ask for if you are hit with an EEO charge? The probable answer is: back pay for minorities who have worked for you but were discharged or laid-off and possible for those who have at sometime requested employment; reinstatement of all of the same people; hiring quotas or goals: extensive record keeping requirements on all employees; minority recruiting requirements; and other requests which may or may not be feasible or even possible.

Back Pay Question

What the EEOC requests and what a court will award are generally two different matters. The statutes appear to read that back pay can be awarded only if the discrimination is intentional.

Many courts and lawyers have taken a stand against one dime of back pay unless there is a situation of blatant and deliberate discrimination. However, that may be changing with a recent holding of the United States Supreme Court which, in essence, held that where the effect of the conduct is discriminatory, back pay can be awarded. What change this recent decision will make on the practice of the trial courts is not yet known.

Any back pay award must, of course, take into consideration all earnings of an individual since his discharge.

Frequently, the EEOC will attempt to impose a hiring quota such as a requirement that one minority be hired for every white. Several courts have approved consent decrees with such a quota, and there are some cases that have imposed such a quota without the employer's consent.

There is no question that the courts can set certain goals to be reached over a period of time. Record keeping is always a part of the relief requested by the EEOC. The trick is to keep it as simple and light as possible.

The courts clearly have the power to nullify certain portions of collective bargaining agreements if they are repugnant to the purposes of the law and if it is necessary and appropriate under the circumstances.

Despite your feeling of helplessness when the tremendous resources of the EEOC are brought to bear against you in a discrimination charge, most of the EEOC affirmative relief requests are

negotiable. Generally, total capitulation is neither necessary nor desirable. It is true that the costs of defending an EEO suit are substantial.

But the EEOC is a government agency. As such, it is run by bureaucrats. These people are human and some times reasonable. They will give in on many points if pushed hard, even though they come on like gangbusters in the beginning.

Furthermore, if the EEOC should demand something which is out of line and detrimental to the industry if a precedent is set, you not only do yourself a disservice but the entire industry as well as the minorities themselves in some cases in the event you capitulate.

In conclusion, for years you have had certain legal problems in the normal course of your business. You have undoubtedly had to resort to legal action at one time or another to resolve problems arising from your contracts with owners or other contractors. You have had unemployment insurance disputes. You have learned to expect a certain number of labor-management disputes.

Now, with the advent of the EEO laws, you have another dimension of labor relations to consider. It is here to stay and affects every business decision you make. It must become a permanent part of your business planning if you intend to remain in business tomorrow.

[The author, H. Kent Munson, a graduate of Brigham Young University and Duke University Law School, is associated with the law firm of Stein and Seigel, St. Louis, Mo., which is engaged in civil litigation and labor law.]