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The Self-critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits

Executive Order 11,246 requires that nonexempt government contractors agree to nondiscrimination and affirmative action program provisions in contracts with governmental agencies. A large proportion of American employers must prepare affirmative action plans under this order. These plans must include statistical analyses of the sexual, racial and ethnic composition of the employer's work force and of the availability of women and minorities to fill particular jobs, an


2. The Department of Labor has exempted contracts and subcontracts not exceeding $10,000, except government bills of lading and contracts with financial institutions which are depositories for federal funds or issue savings bonds or notes. If a contractor has contracts or subcontracts within a 12-month period with an aggregate value exceeding $10,000, the exemption does not apply. 41 C.F.R. § 60-1.5(a)(1) (1984).


4. All nonconstruction contractors with 50 or more employees and a government contract of $50,000 or more must institute a formal, written affirmative action plan for each of its establishments. 41 C.F.R. §§ 60-1.40(a), -2.1(a) (1984). According to an early estimate, one-third of the labor force was covered by the Executive Order in 1966. Note, Executive Order 11246: Antidiscrimination Obligations in Government Contracts, 44 N.Y.U. L. REV. 590, 591-92 (1969). A later estimate placed the coverage at 40% of the workforce. V. PERLO, ECONOMICS OF RACISM USA 225 (1976), quoted in U.S. CONN. ON CIV. RTS., PROMISES AND PERCEPTIONS: FEDERAL EFFORTS TO ELIMINATE EMPLOYMENT DISCRIMINATION THROUGH AFFIRMATIVE ACTION 5 (1981). In 1972 more than 50% of firms employing more than 100 people were covered under the Executive Order. Goldstein & Smith, The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contractors, 29 INDUS. LAB. REL. REV. 523, 524 (1976).

5. The plan must contain a statistical analysis of the employer's work force, 41 C.F.R. § 60-2.11(a) (1984), and of the availability of minorities and women available for employment in job groups (consisting of jobs with similar content) wage rates and opportunity for advancement, 41 C.F.R. § 60-2.11(b) (1984). Extensive information must be gathered and considered in determining availability. Section 60-2.11(b)(1) provides:

In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;
analysis of the employer's utilization of the available workers,\textsuperscript{6} goals to correct deficiencies,\textsuperscript{7} and a self-critical discussion of the employer's problem areas.\textsuperscript{8}

Plaintiffs bringing federal employment discrimination suits under Title VII of the Civil Rights Act of 1964\textsuperscript{9} are often interested in either the statistics or the self-analysis of company policy contained in affirmative action plans and frequently attempt to obtain them from a defendant employer during discovery.\textsuperscript{10} These discovery requests create a conflict between the plaintiff's interest in obtaining the informa-

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\textsuperscript{6}The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

\textsuperscript{7}The availability of promotable and transferable minorities within the contractor's organization;

\textsuperscript{8}The existence of training institutions capable of training persons in the requisite skills; and

\textsuperscript{9}The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

The factors for determining availability of women are similar. 41 C.F.R. § 60-2.11(b)(2) (1984).

6. Work force levels and availability must be compared to determine where minorities and women are “underutilized.” “ ‘Underutilization’ is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability.” 41 C.F.R. § 60-2.11(b) (1984). At present, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) defines a deficiency as any difference between availability and utilization. OFCCP Federal Contract Compliance Manual §§ 2-160.1a, 2-180.2 (1979).

In regulations proposed August 25, 1981, the OFCCP proposed to redefine underutilization so that an establishment would be presumed to have reasonably utilized women and minorities if utilization were at 80% of availability. 46 Fed. Reg. 42,994 (1981) (to be codified at 41 C.F.R. § 60-2.11(b)). As of July 1, 1984, no action had been taken on the proposed changes. 41 C.F.R. Appendix — Postponed Regulations: Chapter 60-Office of Fed. Contract Compliance Programs (1984).

7. “An acceptable affirmative action program must include . . . goals and timetables to which the contractor’s good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women at all levels and in all segments of its work force where deficiencies exist.” 41 C.F.R. § 60-2.10 (1984). These goals should not be “inflexible quotas” but “targets reasonably attainable by means of applying every good faith effort.” 41 C.F.R. § 60-2.12(e) (1984).


Employers may respond to a FOIA request for an affirmative action plan with a “reverse FOIA” suit to block release, claiming that the agency abused its discretion by failing to categorize the plan under one of FOIA’s nine exemptions. See Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1979); 5 U.S.C. § 552 (1976); see also CNA Fin. Corp. v. Donovan, 28 Empl. Prac. Dec. (CCH) § 32,402 (D.D.C. 1981) (allowing the release of affirmative action plans using Chrysler criteria).

The FOIA is also less attractive to Title VII plaintiffs because there is no requirement that the plans be filed with OFCCP, although the contractor must produce them on request from OFCCP, such as during a compliance review. 41 C.F.R. § 60-1.7(a)(3), -1.40(e), -2.12(m), (n) (1984). Data files maintained by a government grantee are not “agency records” and therefore not within the scope of FOIA, even though the government has a right of access to the data. Forsham v. Harris, 445 U.S. 169 (1980). Therefore, plans that have never been submitted to
tion and the employer's interest in maintaining the confidentiality of the plans. Courts have differed widely in their approach to this conflict and have split on the question of whether plans should be discoverable.11

This Note argues that plaintiffs should have access to affirmative action plans in discovery. Part I describes the "self-critical analysis" or "self-evaluative" privilege that employers have advanced to block discovery of such plans. Part II examines the conflicting interests of society, employers and employees in allowing or denying discovery. Part III evaluates the application of a self-critical analysis privilege in light of these conflicting interests and concludes that the privilege should not be applied to affirmative action plans.

I. THE SELF-CRITICAL ANALYSIS PRIVILEGE

Affirmative action plans play an important role in both of the major federal programs aimed at eliminating employment discrimination. The plans are a cornerstone of the Executive Order program, which uses the government's contracting power to set standards for employers.12 In addition, the plans aid the enforcement of Title VII's statutory prohibition against employment discrimination based on "race, color, religion, sex, or national origin."13 Private suits by employees are one of the many administrative and judicial enforcement mechanisms that Title VII provides,14 and employers have frequently faced extensive discovery requests for affirmative action materials in such suits. Although employers have occasionally invoked the work product doctrine,15 employee privacy,16 trade secrets,17 the attorney-client

OFCCP probably cannot be disclosed under FOIA. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 930-31 n.221 (2d ed. 1983).

A second alternative to discovery is obtaining the plans from the Equal Employment Opportunity Commission (EEOC). Title VII plaintiffs who file grievances with the EEOC may obtain the information contained in EEOC investigatory files. EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981). However, the investigatory files rarely contain affirmative action plans, although disclosure of the plans between agencies has been upheld. Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979); Reynolds Metal Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977), cert. denied, 433 U.S. 995 (1978).

11. See notes 32-34 infra and accompanying text.
12. See notes 1-8 supra and accompanying text.
14. A person claiming to be a victim of discrimination must file a charge with the EEOC. The EEOC investigates the charge, and will dismiss it if it finds no reasonable cause to believe the charge is true. If reasonable cause is found, the EEOC must try to eliminate the discriminatory practice by "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1976). If these informal methods fail, the EEOC may bring a civil action against the employer. 42 U.S.C. § 2000e-5(f)(1). An employee may request a right-to-sue letter, 29 C.F.R. § 1601.28(a)(1) (1984), and then file a private action if the EEOC either dismisses the charge or does not file suit within 180 days after the charge was filed with it. 42 U.S.C. § 2000e-5(f)(1).
The self-critical analysis privilege was originally invoked to protect a hospital committee's investigatory report in Bredice v. Doctors Hospital,21 a medical malpractice case. The court denied discovery on the material have occasionally been protected as work product. E.g., Jacobs v. Sea-Land Serv., 23 Empl. Prac. Dec. (CCH) ¶ 30,907 (N.D. Cal. 1980) (formal responses to EEOC charges protected); Rodgers v. United States Steel Corp., 12 Fair Emp. Prac. Cas. (BNA) 100 (W.D. Pa. 1975) (plan protected; “To hold that validation studies prepared after the passage of Title VII were not prepared in anticipation of litigation . . . would be to strain the limits of credulity.”); Banks v. Lockheed-Georgia Co., 4 Fair Empl. Prac. Cas. (BNA) 117, 118 (N.D. Ga. 1971) (internal report used to prepare affirmative action plan could be work product where preparation team included an attorney and report contained his “mental impressions, conclusions, opinions, or legal theories”). Affirmative action plans required under the Executive Order would not normally pass the test for work product since they are prepared in the normal course of business and not in anticipation of litigation. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024 (1970).


20. The broad discovery of materials “not privileged” under Federal Rule of Civil Procedure 26(b)(1), see note 81 infra, refers both to privilege as it is understood in the rules of evidence and to the work product doctrine. United States v. Reynolds, 345 U.S. 1, 6 (1953); see also C. Wright, Federal Courts § 81 (4th ed. 1983). However, the self-critical analysis privilege has been asserted only during discovery and could be regarded as a discovery privilege analogous to the work product doctrine rather than as an evidentiary privilege. See Flanagan, Rejecting a General Privilege for Self-Critical Analyses, 51 Geo. Wash. L. Rev. 551, 575, 577 (1983).

ground that release of such reports would end candor and criticism in staff deliberations, which the court found necessary to continued improvements in patient care. This general public policy favoring confidentiality for self-criticism has been expanded and applied, although by no means uniformly, to protect documents in other contexts, including police department investigations and academic peer reviews. Corporations have asserted, so far unsuccessfully, a similar privilege to protect internal reports of corporate investigations.

The first court to recognize a self-critical analysis privilege in a Title VII case applied it to internal reports used in preparation of an affirmative action plan rather than to the plan itself. The court relied on an analogy to Bredice and concluded that discovery of the reports would "discourage frank self-criticism and evaluation in the development of affirmative action programs."

The courts have since extended this privilege from background reports to the finalized plans required by Executive Order 11,246, reasoning that the privilege stems from the public policy which recognizes that voluntary compli-
... is essential for implementation of the policy of equal opportunity in employment. ... If subjective materials constituting "self-critical analysis" are subject to disclosure during discovery, this disclosure would tend to have a "chilling effect" on an employer's voluntary compliance.

Courts have divided on the issue of whether affirmative action plans should be discoverable. Despite the general breadth of modern discovery and its particularly liberal application in Title VII suits, some courts have recognized the self-critical analysis privilege and have denied discovery of plans entirely. Others have allowed complete discovery or allowed discovery of factual portions of plans.


30. See notes 87-88 infra and accompanying text.

31. See notes 89-95 infra and accompanying text.


The techniques courts have used have varied as widely as their results. Some have approved or disapproved a blanket privilege for all affirmative action plans.\(^{35}\) Other courts have balanced the conflicting interests of the plaintiff and defendant in the individual case, often subjecting the disputed material to *in camera* inspection.\(^{36}\) Still others have summarily held plans discoverable without discussing a self-critical analysis privilege at all.\(^{37}\)

II. CONFLICTING INTERESTS IN THE DISCOVERY OF AFFIRMATIVE ACTION PLANS

The decision to grant or deny discovery of affirmative action plans implicates conflicting interests between the plaintiff and defendant in a particular Title VII suit and between the different approaches adopted by the Executive Order and Title VII to eliminate employment discrimination. This Part first examines the interests that support the use of the self-critical analysis privilege to prevent discovery of affirmative action plans. It then discusses the strong countervailing interests that are advanced by allowing discovery, concluding that those latter interests weigh against the recognition of a privilege.

A. Interests That Weigh Against Permitting the Discovery of Affirmative Action Plans

1. Effectiveness of Affirmative Action Plans

Society has a great interest in effective affirmative action plans. They constitute a major mechanism for meeting the goal of Executive Order 11,246: "the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex or national origin, employed or seeking employment with Government contractors. . . ."\(^{38}\) While the Executive Order has no statutory basis, and its effect has been controversial,\(^{39}\) it has the force of law\(^{40}\) and has
received support from Congress and from civil rights groups.

Employers argue that confidentiality is needed to encourage voluntary compliance with the Executive Order. This emphasis on voluntary compliance is based on the common-sense idea that self-criticism is always more valuable when done voluntarily than when done out of obligation. Government contractors may produce plans under threat of sanctions which satisfy the letter of the regulations, but steps toward meeting nondiscrimination goals are more likely to be effective when employers are not worried about disclosure of unmet, more ambitious objectives. Employers argue that confidentiality is necessary for a “good faith” effort in drawing up plans because otherwise plans

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42. In late 1976 the Department of Labor proposed revised rules which would have substantially modified the requirements for affirmative action programs. Civil rights groups opposed the changes and they were not enacted. See Galloway, supra note 39, at 560 n.11.

43. See Planagan, supra note 20, at 565.

44. See note 7 supra.
will be written conservatively with one eye on potential disclosure.\(^{45}\)

While confidentiality might enhance the quality of self-criticism, confidentiality alone cannot ensure that a plan will be effective in meeting Executive Order goals. Disincentives more powerful than the prospect of discovery often discourage employers from preparing an aggressive affirmative action plan. Affirmative action programs represent an effort to advance government goals by incorporating those goals into organizational planning. To the extent that the government goal of eradicating employment discrimination requires changes in an employer's existing procedures, there is bound to be pressure to prepare a conservative plan.\(^{46}\) Also, in a typical institution, the responsibility for preparing affirmative action plans lies with a personnel department that may have little influence on management decisions.\(^{47}\) There are usually few institutional rewards for achievement in the area of affirmative action and few sanctions for lack of achievement.\(^{48}\) Affirmative action officers are typically caught between conflicting loyalties to minority and women employees whose interests they are attempting to advance, and to the managers of the organization who may not share a commitment to affirmative action.\(^{49}\) Confidentiality may increase the quality of plans in spite of such powerful disincentives, but it is misleading to concentrate entirely on the importance of confidentiality to the exclusion of all the other factors that determine the effectiveness of affirmative action programs. Since confidentiality by itself is not sufficient to bring about rigorous self-criticism, it should not be sufficient to deny access to plans in the face of strong countervailing interests.

Another reason for stressing voluntarism in the preparation of af-

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45. See notes 135-36 infra and accompanying text.
46. See Flanagan, supra note 20, at 564.
48. Id.
49. See CONSULTATIONS, supra note 47, at 107 (statement of Mark Chesler). Commissioner Ruckelshaus has characterized the effects of such conflicting loyalties on affirmative action programs:

"My experience with those in corporations who have responsibility for affirmative action programs is that they are pretty much trying to keep their heads down; they are trying very hard to have a plan that will keep their company out of court, unembarrassed, and not blotch their own career path, but anything that might jeopardize that is considered pretty high-risk stuff."

Id. at 94.

Even with full support from management, there are limits to what can be achieved with the analysis mandated for affirmative action plans. Utilization analysis compares the proportion of minority and women members in a job group to the proportion in the available labor pool, see notes 5-6 supra, but this "industrial model" does not work well for highly skilled jobs where qualifications are difficult to quantify and the availability of qualified individuals is hard to document. See Note, supra note 39, at 807 n.20. In addition, the wrong assumption as to the labor pool from which employees will be drawn can completely alter the result of the calculations. See, e.g., Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).
firmative action plans is the impossibility of policing all government contractors for compliance. The Office of Federal Contract Compliance Programs (OFCCP), which administers the Executive Order, has powerful sanctions at its disposal, but enforcement has been limited by lack of staff and, before 1978, by a policy of decentralization in which each individual contracting government agency was responsible for contract compliance. OFCCP has concentrated its enforcement efforts on compliance reviews in certain target industries and on preaward audits of major prospective contractors, and has brought few enforcement proceedings. In one observer's view, the "rapid development in law and regulation outpaced the mechanisms that enforce them."

But the public is not entirely dependent on voluntary compliance to fulfill the requirements of the Executive Order program; existing enforcement power provides some incentive to comply. If OFCCP enforcement proves inadequate, one possibility for improvement would be to consolidate OFCCP functions with those of the Equal Employment Opportunity Commission (EEOC), which administers Title VII. Commentators have also argued that enforcement could be improved by allowing private suits, either under a private right of action added to the Executive Order or on a third-party beneficiary theory. In short, existing enforcement problems do not warrant dependence on confidentiality as a way to produce voluntary compliance. Indeed,

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51. See Jones, supra note 41, at 79.


53. 41 C.F.R. § 60-1.20 (1984). The reviews may involve an analysis of the contractor's employment practices, the adequacy of its affirmative action program and its compliance with the program. 41 C.F.R. § 60-1.20(a) (1984). Violations may include submission of an inadequate affirmative action plan or failure to submit a plan. 41 C.F.R. § 60-1.26(a)(1) (1984). When deficiencies or violations are found, the agency must try to encourage compliance through conciliation and persuasion. 41 C.F.R. § 60-1.20(b) (1984). When these procedures fail, administrative proceedings normally follow. 41 C.F.R. § 60-1.26(a)(2) (1984).


56. See Consultations, supra note 47, at 74 (statement of Eleanor Holmes-Norton); Jones, supra note 41, at 120-22.

57. Galloway, supra note 39, at 572-93; Jones, supra note 41, at 112-17. Courts have thus far refused to recognize a private right of action under Executive Order No. 11,246.
it is possible that the prospect of discovery — while it might thwart complete candor in the preparation of affirmative action plans — actually encourages otherwise uncooperative employers to put together a plan in a manner that is at least facially adequate.

2. Fairness

Employers who regard preparation of rigorous affirmative action plans as advancing their own interests will continue to do so even under a threat of disclosure. However, courts have suggested that a second reason for granting a selfcritical analysis privilege to affirmative action plans is to "assure fairness to persons who have been required by law to engage in self-evaluation." 58

Some commentators have assumed that the adverse effects of plan disclosure would fall most heavily on employers with the greatest commitment to affirmative action because they will set high goals that may be difficult to achieve. 59 However, an employer's current good faith efforts in drawing up a plan should not be used to deny relief to individuals who have been the victims of past discrimination. More importantly, it is likely that the burdens of disclosure will fall most heavily on those employers who have a poor employment record for minorities and women.

Employers have argued that information in affirmative action plans may hurt their competitive position by revealing their efficient use of labor, putting them at a disadvantage in competitive bidding, facilitating undesirable technology transfer and enabling employee raiding. In addition, revelations of anticipated layoffs and applicant flow data may damage employee morale and discourage qualified minority and female applicants. 60 Another concern is that the plaintiff may be engaged in a fishing expedition for charges and the discussion


59. See, e.g., Flanagan, supra note 20, at 566. While an employer does have flexibility in setting goals and timetables consistent with a "good faith effort," deficiencies are measured not against the goals, but against full utilization of minorities and women. See notes 6-7 supra.

of deficiencies in the plan may subject the employer to further suits. A final fairness argument is that release of a plan is unnecessary if the information needed by the plaintiff is available from other sources. 61

Such concerns for fairness can be satisfied without completely denying discovery of affirmative action plans. Courts have broad discretion to limit discovery to "relevant" material. 62 They can also control the use of discovered materials by conditioning release with a protective order. 63

3. Comparison to Other Applications of a Self-critical Analysis Privilege

Employers originally invoked the self-critical analysis privilege in employment discrimination suits on the theory that the interests protected are analogous to those protected by the privilege in other contexts. 64 The soundness of the privilege is disputed in all of its applications, 65 but even if the privilege were regarded as legitimate in other areas, its use in employment discrimination suits would represent an unwarranted expansion into a fundamentally different context. One difference is that documents most often entitled to the privilege, such as medical malpractice and police investigatory reports, typically focus on a single event, while affirmative action programs are part of a continuous process with yearly updates mandated by a federal agency. 66 As such, affirmative action programs are more routine and institutionalized and do not depend on the protections and incentives arguably necessary to encourage more ad hoc self-investigations.

The purposes and uses of affirmative action plans also differ from those of investigatory reports. The latter typically serve internal purposes and are destined solely for internal use. In contrast, affirmative action plans are prepared to comply with federal regulations and with the knowledge that they must be submitted to OFCCP on request. 67

61. However, only factual data, not employer self-criticism, is likely to be duplicated elsewhere. Even in cases where the court has noted that the factual information was available elsewhere, e.g., Stevenson v. General Elec. Co., No. 80-3644, slip op. (6th Cir. Aug. 16, 1982) (available on LEXIS, Labor library, Courts file); Wehr v. Burroughs Corp., 20 Fair Empl. Prac. Cas. (BNA) 526, 527 (E.D. Pa. 1977); Sanday v. Carnegie-Mellon Univ., 11 Empl. Prac. Dec. (CCH) \$ 10,659 (W.D. Pa. 1975), these alternative sources of raw data may be irrelevant if the plaintiff cannot afford to perform the statistical analyses himself. See notes 105-06 infra and accompanying text.

62. See notes 90, 92, 93-95 infra and accompanying text.

63. See notes 138-58 infra and accompanying text.


65. See notes 21-26 supra and accompanying text.


67. This purpose was stressed in Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979), where the employer asserted a self-critical analysis privilege against FOIA disclosure of its plans. The court found the employer had notice of their purpose and denied the privilege. [U]nlike the situation in Bredice, the [affirmative action] reports . . . are not made solely for
Once the plans are in OFCCP files, they are available to the EEOC\textsuperscript{68} or they may be released in response to a FOIA request.\textsuperscript{69} Because the plans are prepared for an outside purpose and with clear notice that they may not remain solely in the employer’s control, there is less reason to protect confidentiality than in the case of purely internal proceedings.

Another important distinction is that self-criticism is \textit{required} by government regulation and sanctions are available to enforce the requirements.\textsuperscript{70} In contrast, no such measures are brought to bear on the other, more “voluntary” reports protected by the privilege. OFCCP regulations and sanctions provide an incentive for self-criticism in affirmative action plans that lessens the need for confidentiality to encourage effective evaluation and weakens the argument for extending the privilege to this context.

A final reason for distinguishing the application of the privilege to affirmative action plans from its application in the paradigm cases is that determining exactly what is “self-evaluative” is less straightforward here than in other contexts. An entire medical committee report is “self-evaluative,” but an affirmative action plan is a blend of statistics and prose, often with no clear lines between self-evaluation and fact.\textsuperscript{71} For example, much of a plan may be numerical, but this does not ensure that the content is purely factual. Certainly a plan’s comparison of utilization and availability of employees, while it may be presented in numerical terms,\textsuperscript{72} forms the basis of “self-evaluation.”

Courts that have recognized a self-critical analysis privilege have dealt with this ambiguity between fact and self-evaluation in various ways. Some courts have allowed the employer to remove the self-criticism without court inspection.\textsuperscript{73} This is an unsatisfactory solution be-

\textsuperscript{68}. Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979).
\textsuperscript{69}. See note 10 supra.
\textsuperscript{70}. See note 50 supra and accompanying text. The sanctions available were emphasized in a FOIA suit that rejected the argument that plans need to be protected from disclosure as a matter of public policy. The court noted that the employer was subject to a statutory duty to file the information and that failure to file “would be an act of bad faith and expose the contractor to penalties.” Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 296 (C.D. Cal. 1974), vacated and remanded, 20 Fair Empl. Prac. Cas. (BNA) 1422 (9th Cir. 1979).
\textsuperscript{71}. See notes 5-8 supra and accompanying text.
\textsuperscript{72}. See note 6 supra.
cause of the potential for employer abuse, as illustrated by an employer's claim that pure statistics on numbers of applicants constitute self-criticism. Given the lack of cooperation between adversaries in many proceedings, other courts have concluded that the exercise of the privilege requires monitoring. These courts have examined the plans in camera and have removed damaging material themselves. This procedure is often a substantial drain on court resources and some courts have refused to recognize the privilege based in part on concerns about the burden of separating fact from self-criticism and the efficient use of court time. Despite an oft quoted conclusion by one court that "only subjective, evaluative materials have been protected; objective data contained in those same reports in no case have been protected," some courts have extended the privilege to cover the entire plan. This approach eliminates the need to distinguish fact and self-criticism, but goes beyond the scope of the privilege to restrict discovery of materials not a part of the self-criticism. It also places an unjustified burden on the plaintiff where factual information in the plan is unavailable from other sources.

B. Interests That Weigh in Favor of Permitting the Discovery of Affirmative Action Plans

1. The Mandates of Title VII of the Civil Rights Act

The public has a strong interest in achieving Title VII's goal of eliminating employment discrimination. A private plaintiff's interest in remedying a specific violation overlaps with this public interest be-

79. See note 32 supra.
80. See note 61 supra and accompanying text.
81. Under Title VII,

cause the private right of action is an extremely important part of Title VII enforcement. Although the EEOC was granted direct enforcement power in 1972, Congress retained the private right of action, primarily to ensure individuals an opportunity to press their cases.\textsuperscript{82} However, the Supreme Court has recognized a broader, public role for private suits, noting that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII . . . . In such cases, the private litigant not only redresses his own injury but vindicates the important congressional policy against discriminatory employment practices."\textsuperscript{83} The Court has stated that the private plaintiff should be considered a "private attorney general" whose role in enforcing the Title VII ban on discrimination is parallel to that of the EEOC.\textsuperscript{84} Private suits have greatly increased the number of legal actions brought and have thus stimulated the rapid development of Title VII.\textsuperscript{85} Indeed, although the EEOC often played a critical role in supplying money or expertise, almost all the major Title VII cases that shaped and advanced the law have been brought by individuals, not by the government.\textsuperscript{86}

Liberal discovery is one means of encouraging private suits. While discovery under the Federal Rules of Civil Procedure is broad in scope\textsuperscript{87} and has been liberally interpreted,\textsuperscript{88} the rules have been applied even more broadly in Title VII suits.\textsuperscript{89} If the material sought is

\textsuperscript{82} The retention of the private right of action . . . is intended to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint. . . . It is hoped that recourse to the private lawsuit will be the exception and not the rule. . . . However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.


\textsuperscript{85} See CONSULTATIONS, supra note 47, at 72 (statement of Eleanor Holmes-Norton).

\textsuperscript{86} See id. at 73; Belton, A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964, 31 Vand. L. Rev. 905, 924-52 (1978).

\textsuperscript{87} Federal Rule of Civil Procedure 26(b)(1) provides:

\textit{(b) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.}


\textsuperscript{89} See, e.g., Burns v. Thiokol Chem. Corp., 483 F.2d 300, 305 (5th Cir. 1973); Milner v. National School of Health Tech., 73 F.R.D. 628, 632 (E.D. Pa. 1977). Courts frequently impose limits that restrict discovery with reference to the effective date of Title VII. See, e.g., Georgia
not privileged, discovery can be denied when the material is not relevant to the suit or when production of the information would be burdensome. However, courts have wide discretion over the boundaries of relevance and burden. They have exercised this discretion to permit discovery in Title VII suits both when the material sought did not pertain directly to the plaintiff’s claim, but might indicate broader discrimination, and when discovery required the employer to expend large amounts of time or money. Courts have frequently permitted classwide discovery before the determination of class certification or


have allowed inquiry which might tend to establish a pattern of discrimination, even in individual cases.\textsuperscript{95}

Courts have granted this particularly broad discovery as a means of enhancing the effectiveness of private suits. The private attorney general role of the plaintiff increases the importance of disclosure\textsuperscript{96} and has been cited to justify permitting discovery with a breadth comparable to that of an EEOC investigation.\textsuperscript{97} Broad discovery also serves the individual interests of a private plaintiff. An employee is at a disadvantage in documenting employment discrimination and plaintiffs often have difficulty in carrying their burden of proof in Title VII cases.\textsuperscript{98} Permitting broad discovery represents an attempt to aid plaintiffs by improving their access to adequate documentation. Moreover, a victim of employment discrimination will often have financial difficulty bringing a claim\textsuperscript{99} and courts have recognized the need for broad discovery when the financial capabilities of a Title VII plaintiff are limited compared to those of a defendant.\textsuperscript{100} Finally, the prospect that substantial information may be obtained through discovery may assist a plaintiff in obtaining counsel on a contingent-fee basis.\textsuperscript{101}


\textsuperscript{96} Wood v. Breier, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972).

\textsuperscript{97} Burns v. Thiokol Chem. Corp., 483 F.2d 300, 305 (5th Cir. 1973) ("Any information relevant — in a discovery sense — to an EEOC investigation is likewise relevant to the private attorney-general, either in his individual role or in his capacity as the claimed representative of a class."); see also EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 602-03 (1981) (private attorney general role cited in holding that charging party may view EEOC investigatory file on his case).

Some commentators have expressed concern that disclosures to private plaintiffs may impede EEOC conciliation and negotiation. See, Comment, Access to EEOC Files Concerning Private Employers, 46 U. CHI. L. REV. 477, 479-80 (1979). Because the employer may be motivated to negotiate in order to avoid litigation, its incentive to settle may decrease if it continues to face private suits. Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975) ("We recognize . . . that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance . . . . "). However, the practical effect disclosing affirmative action plans has on conciliation is not clear. Katz, Investigation and Conciliation of Employment Discrimination Charges Under Title VII: Employers' Rights in an Adversary Process, 28 HASTINGS L.J. 877 (1977). The Supreme Court has recently rejected this concern and endorsed disclosure of EEOC investigative materials to private plaintiffs. The Court suggested that disclosure could improve the Commission's ability to solve disputes informally. Associated Dry Goods Corp., 449 U.S. at 601 ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own.") (citation omitted).

\textsuperscript{98} See, e.g., Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir.), cert. denied, 429 U.S. 870 (1976).

\textsuperscript{99} See Comment, supra note 97, at 487.


\textsuperscript{101} See Comment, supra note 97, at 487.
2. Usefulness of Affirmative Action Plans as Evidentiary Tools

Permitting broad discovery in general, and discovery of affirmative action plans in particular, is one way to encourage effective private suits. The plans provide both statistical and nonstatistical information which can aid a plaintiff in meeting the burden of proof in Title VII cases.

Statistics are crucial in cases brought under the adverse impact theory of discrimination, where the plaintiff must establish a prima facie case that the employer's practices have a substantially disproportionate discriminatory effect on a protected class. While statistics are not as important in individual disparate treatment cases, plaintiffs often rely on statistics for proof in class actions.

The costs of bringing suit have increased because the courts have substantially refined the quality of statistical proof needed to establish a Title VII case. However, these costs may be reduced by permitting discovery of affirmative action plans which provide extensive documentation and comparison of the employer's work force and the available labor force. While this data will probably be presented in a light most favorable to the employer and most plaintiffs would prefer to calculate their own statistics from original sources such as personnel records, the plans can be useful to a plaintiff with limited finan-

102. The inquiry in disparate impact cases focuses on whether a selection device (such as a test) or other criterion for employment or promotion disqualifies a disproportionate number of members of the protected class. If the employee can show such impact, he or she has established a prima facie case and the employer must demonstrate that the test is job-related or otherwise a business necessity to escape liability. See Griggs v. Duke Power Co., 431 U.S. 424 (1971). Proof of a discriminatory motive is not required. See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. at 432. Plaintiffs commonly introduce pass/fail comparisons for a test or population/work force comparisons for other criteria to establish a prima facie case. See, e.g., Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

103. "Disparate treatment" is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted). See generally B. SCHLEI & P. GROSSMAN, supra note 10, at 13-22. The Supreme Court has established a tripartite procedure for analyzing disparate treatment cases: (1) the plaintiff must establish a prima facie case, (2) the defendant must offer a nondiscriminatory reason for its actions, and (3) the plaintiff must establish that this supposedly legitimate reason was a pretext to mask an illegal motive. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). The case most often hinges on the plaintiff's ability to show that the reason for the different treatment offered by the employer was a pretext. Comparative evidence showing that persons in a different protected group were treated more favorably in a comparable factual situation is normally dispositive. See B. SCHLEI & P. GROSSMAN, supra note 10, at 1317-20.


105. See CONSULTATIONS, supra note 47, at 73 (statement of Eleanor Holmes-Norton). Even the smallest class action will cost a minimum of $15,000 for statistical work alone. Id.

106. See note 5 supra.

107. Statistics contained in affirmative action plans are broken down by job groups, which may mask disparities that would appear in an analysis of individual jobs. For example, if a job
cial resources who would be unable to perform a sophisticated statistical analysis.

Although statistical evidence dominates adverse impact cases and class disparate treatment cases, plaintiffs often introduce nonstatistical evidence in support of the statistical claim. Such evidence is particularly important to the plaintiff when the employer has used statistics to reach a conflicting conclusion or when the statistical sample or disparities between groups are small, thus weakening the force of the statistical conclusions.\(^{108}\) Part of the value of self-criticism is that any conclusions that do support a plaintiff's case carry the authority of the employer.\(^{109}\) Such conclusions may also be useful to impeach the employer's witnesses.

In addition to the information contained in a plan, the quality of affirmative action efforts and the effectiveness of the plan itself are important forms of nonstatistical proof. Such proof is important in establishing\(^{110}\) or rebutting\(^{111}\) a prima facie case of employment

which is largely filled by minorities is combined in a job group with a job dominated by white males, the disproportionate representation will balance out for the job group as a whole.

108. See, e.g., Taylor v. Teletype Corp., 648 F.2d 1129, 1135 & n.13 (8th Cir. 1981) (where statistics are significant, but not of a magnitude that "clearly demonstrates intentional discrimination," nonstatistical evidence may be used to support prima facie case in disparate treatment class action), cert. denied, 454 U.S. 969 (1981).

109. See Flanagan, supra note 20, at 558-59.


Courts have also viewed evidence of affirmative recruitment and promotion policies as indicating a lack of intent to discriminate under the greater intent requirements of a § 1981 disparate impact case. See Washington v. Davis, 426 U.S. 229 (1976); Vanguard Justice Soc'y., Inc. v. Hughes, 471 F. Supp. 670 (D. Md. 1979); Dickerson v. United States Steel Corp., 472 F. Supp.
discrimination. Moreover, the plan itself is especially crucial non-statistical evidence in a reverse discrimination suit. Since the Supreme Court upheld a voluntary affirmative action plan against a claim of reverse discrimination in *United Steelworkers of America v. Weber*, much of the subsequent litigation has focused on the content of the employer’s plan.

Thus, both the statistical and nonstatistical portions of a plan may be helpful in establishing a plaintiff’s case, either by demonstrating a prima facie case of discrimination or by showing that the employer’s “legitimate” reason for using a procedure with disparate impact is merely a pretext for intentional discrimination. In addition, permitting discovery of the plan may be necessary to a plaintiff’s preparation for trial if it will form a part of the employer’s defense.

The nature and strength of the conflicting interests of Title VII plaintiffs and defendants are important considerations in determining whether or not to permit discovery of affirmative action plans. Plaintiffs in a Title VII suit share the need of all litigants for sufficient information to ensure a full, fair consideration of the issues. These concerns are especially strong in the Title VII context, where the employer can draw on vastly superior resources and data. Employers, on the other hand, have legitimate concerns in protecting information in the plans from competitors. The public has interests in encouraging both affirmative action and enforcement of Title VII. These competing interests all deserve consideration; the pattern of discovery selected must reflect not only the importance of those interests, but also the full range of methods available to accommodate them.

### III. ALTERNATIVE APPROACHES TO THE DISCOVERY OF AFFIRMATIVE ACTION PLANS

Courts can take several approaches to the discovery of affirmative action plans. Recognition of an absolute privilege would provide

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114. See notes 98-101 supra and accompanying text.

115. See note 60 supra and accompanying text.

116. An “absolute” or “fixed” evidentiary privilege is one that, once recognized, is inviolate
the most secure protection from discovery but would balance the competing interests entirely in favor of confidentiality and the employer. At the other end of the spectrum, plans could be uniformly released without any protections, thus achieving the same results as when the plans are obtained through FOIA. This would balance the interests entirely in favor of the private plaintiff's interest in enforcing Title VII. Plans could also be protected with a qualified privilege,117 which would require a balancing of the relevant interests in each individual case.118 This Note argues that courts can best accommodate the conflicting interests implicated in discovery of affirmative action plans by permitting the discovery of such plans under a protective order.

A. An Absolute Self-critical Analysis Privilege for Affirmative Action Plans

Despite a general judicial trend toward restricting privileges,119 except when waived. Examples include the attorney-client, physician-patient, marital and priest-penitent privileges. The traditional justification for such privileges, which unlike the majority of evidentiary rules do not aid in the search for truth by safeguarding the quality of evidence, is that public policy requires the safeguarding of communications necessary to certain relationships. See McCormick on Evidence § 72, at 171 (E. Cleary 3d ed. 1984). "[T]he achievement of [these] utilitarian objectives requires privileges which are essentially absolute in character." Id. § 77, at 186.

117. A "qualified," "limited" or "conditional" privilege may be overcome by public interests that require disclosure or by a showing of sufficient hardship on the part of the party seeking to introduce the evidence. The most commonly accepted qualified privileges are used to protect grand jury transcripts, trade secrets and executive or official government information. See Case Comment, Civil Procedure: Self-Evaluative Reports — A Qualified Privilege in Discovery?, 57 Minn. L. Rev. 807, 812 & n.20 (1973). A privilege for informers has also been described as a limited privilege. See M. Larkin, Federal Testimonial Privileges § 7.05, at 7-14 (1982).

118. See notes 131-36 infra and accompanying text. See generally Note, supra note 10.

119. Federal courts have narrowly interpreted existing evidentiary privileges and have been hostile to the development of new ones. See, e.g., Trammel v. United States, 445 U.S. 40 (1980) (limiting the marital communications privilege); Herbert v. Lando, 441 U.S. 153 (1979) (refusing to recognize an editorial privilege); Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 389 n.2 (N.D. Cal. 1976) (federal court may not create a new federal evidentiary privilege unless the privilege "rises to the constitutional level"). The Supreme Court has recently warned against the expansion of privilege, reasserting that "these exceptions to the demand for every man's evidence are not lightly created nor expansively constructed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974) (footnote omitted).

However, in adopting the Federal Rules of Evidence in 1975, Congress rejected a narrow enumerated list of privileges and adopted a more flexible rule. See 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 301-309 (1982). It thus indicated its "affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis . . . ."" Trammel v. United States, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891) (statement of Rep. Hungate); see also S. Rep. No. 1277, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7059 ("[O]ur action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."). Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the
some commentators have urged the recognition of an absolute privilege to protect self-critical analysis from discovery. Those commentators reason that an absolute privilege is the only way to protect confidentiality. 120 This solution is inappropriate because it does not recognize countervailing public interests in permitting discovery and at the same time would fail to provide the complete confidentiality that employers seek.

An absolute privilege would place undue weight on society's interest in encouraging affirmative action plans and in meeting the goals of Executive Order 11,246, to the detriment of the public interest in the private enforcement of Title VII. Such a one-sided balancing of the public interest is inappropriate in the face of the strong federal policies served by such suits:

[F]ederal equal opportunity laws manifest a strong policy in favor of eradicating all vestiges of employment discrimination . . . . In furtherance of this policy, plaintiffs must be permitted to obtain information sufficient to enable them to prove employment discrimination where such discrimination exists. To the extent that the defense of "self-critical analysis" conflicts with a plaintiff's ability to gather information necessary to prove his or her case, the recognition of such a defense hampers the enforcement of federal equal employment laws. 121

To a certain extent, the goal of Title VII and the Executive Order is the same: to eradicate discrimination. However, not only are the means chosen to achieve that goal different under the two programs, 122 but Title VII goes beyond the Executive Order to offer

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120. See, e.g., Murphy, supra note 26, at 496; Note, The Privilege of Self-Critical Analysis, 96 HARV. L. REV. 1083, 1097-98 (1983); see also notes 135-36 infra and accompanying text.


122. The Executive Order combats discrimination by using the federal government's bargaining power to require employers who wish to contract with the government to develop affirmative action plans. See notes 1-8 supra and accompanying text. Lucrative government contracts may be thought of as an incentive to develop affirmative action plans. Title VII, on the other hand, adopts a more coercive approach to eradicating discrimination. It prohibits employment discrimination and backs up its prohibition with an enforcement mechanism. See note 14 supra and accompanying text.
strong protection to the individual injured by discrimination.\textsuperscript{123} The rights of individuals cannot be vindicated by an affirmative action program alone, and private Title VII suits have proved to be a necessary technique for protecting those rights.\textsuperscript{124} An absolute privilege would be one-sided not only in terms of the enforcement of Title VII, but also in terms of the "clash between highly-valued interests"\textsuperscript{125} of the employer and employee. An absolute privilege hampers the employee's ability to establish a case of employment discrimination. As noted by one court, "[c]arried to its logical extreme, such a privilege would foreclose any discovery of material which might be most strongly probative of discriminatory intent."\textsuperscript{126}

Even if it were legitimate to emphasize the Executive Order at the expense of Title VII and the employers' interests at the expense of the employees', the argument for an absolute privilege overlooks existing alternative means of obtaining access to affirmative action plans. Employers often attempt to justify an absolute privilege by claiming a need to be certain that their plans will remain confidential. However, people who file requests may obtain plans through the Freedom of Information Act (FOIA) and plaintiffs have access to them if they are contained in EEOC files.\textsuperscript{127} It may even be shortsighted for employers to advocate eliminating discovery of the plans since plaintiffs might then rely more heavily on these alternative approaches, which lack the safeguards that can be afforded to employers in discovery.\textsuperscript{128}

The proposed privilege is also fundamentally different from the privileges traditionally recognized as "absolute," which function to protect and enhance a relationship.\textsuperscript{129} A privilege for self-critical  

\textsuperscript{123} E.g., Connecticut v. Teal, 457 U.S. 440, 453-54 (1982) ("Section 703(a)(2) prohibits practices that would deprive or tend to deprive 'any individual of employment opportunities.' The principle focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.") (emphasis by the Court); Los Angeles v. Manhart, 435 U.S. 702 (1978) (striking down a retirement program where premiums were set using sex-based life expectancy tables, citing Title VII's protection of the individual).

\textsuperscript{124} In 1977, the EEOC had a backlog of 130,000 cases and a reputation as the "government's worst bureaucratic mess." The backlog was cut in half and efficiency increased by 65% in the following two years. E. Norton, A Conversation with Commissioner Eleanor Holmes Norton 1-2 (1980). In spite of such improvements, the EEOC does not have the resources to pursue legal action in many cases where conciliation is unsuccessful. See EEOC, General Counsel Manual, reprinted in E.E.O.C. Compl. Man. (CCH) \# 10,024 (June 1980).


\textsuperscript{127} See note 10 supra.

\textsuperscript{128} See note 157 infra and accompanying text.

\textsuperscript{129} Wigmore's definition of the four elements necessary to establish a privilege emphasizes the need for a personal relationship between the parties:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
analysis would not enhance the same types of personal interactions protected by attorney-client, doctor-patient or husband-wife privileges. Qualified privileges also further the policy of keeping certain information private, but for reasons that must be measured against and may have to yield to other policies in an individual case. The force of the policies behind encouraging enforcement of Title VII through private suits suggests that a privilege for affirmative action plans, if approved at all, should provide qualified rather than absolute protection for affirmative action plans.

B. A Balancing Approach to Discovery of Affirmative Action Plans

Many courts have attempted to balance the interests of Title VII plaintiffs and defendants in determining whether to permit discovery of affirmative action plans. This procedure, essentially that of qualified privilege, has several disadvantages. Most courts undertaking balancing have inspected the affirmative action plans in camera, which can be a very time-consuming process and is a questionable use of precious judicial resources. In addition, in nonjury cases, the court's inspection in camera may later be an impediment to fair and impartial factfinding by that same judge.

Even more importantly, a policy which leaves the application of the privilege to be determined on a case-by-case basis works against the very policy advanced as a basis for the privilege. Contractors will be as cautious in their self-critical analysis when they cannot be sure of its confidentiality in the face of an uncertain privilege as they are when

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(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.


130. See Flanagan, supra note 20, at 574.


134. See O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980) (not separating responsibility for in camera inspection and trial because "contentiousness" of case indicates that separation would result in the devotion of "substantial additional judicial time"). The remedial power granted courts in § 706(g) of Title VII is "equitable" and jury trials need not be provided in Title VII suits. Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975).
no privilege is available at all. A qualified self-critical analysis privilege requiring case-by-case application has been described as having potential "as a tactical device in private litigation . . . but as a planning tool for corporate decision makers, its uncertainty overshadows its utility." Those who advocate the self-critical analysis privilege argue that it will be ineffective if confidentiality remains uncertain. Therefore, a qualified privilege will not protect employer's interests adequately, even though it still places a heavy burden on plaintiffs.

C. Alternative Means of Protecting Employer's Interests

If a self-critical analysis privilege is not recognized for affirmative action plans, there are other mechanisms that can protect the interests of society and the employer. OFCCP enforcement mechanisms and other incentives such as public pressure for effective affirmative action can support Executive Order goals. The employer's privacy interests can be protected through the broad control of courts over the relevancy and burdensomeness of discovery. Rule 26(c) of the Federal Rules of Civil Procedure facilitates this control by authorizing courts to enter a protective order limiting discovery for "good cause."

Many of the cases that have granted discovery of affirmative action
plans have done so under a protective order for the whole139 or part140 of the plan. Although Rule 26(c) expressly deals only with protective orders affecting depositions141 and trade secrets,142 protective orders covering affirmative action plans are implicitly authorized by the rule, which allows a court to order that discovery must proceed on "specified terms and conditions."143

Any person "from whom discovery is sought" may file a motion for a protective order.144 Orders are flexible and can be fashioned to fit the needs of a specific case.145 The movant has the burden of showing "good cause" for a protective order, and Rule 26 requires a balancing of one party's need for information with the other party's need for confidentiality.146

One of the limitations most frequently imposed by protective orders is a restriction on the number and categories of persons who may have access to the discovered information.147 For example, access may be limited to counsel and to counsel's staff, and then only to the extent necessary to assist in preparing the case.148 Such a restriction prevents damaging publicity and should deal adequately with an employer's concerns that the release of a plan might hurt employee morale or provide competitors with trade secrets.149 Restrictions may also be placed on the uses to which the discovering party may put the information. One common prohibition is that the receiving party may not use the information for commercial purposes.150 When release of


143. See Note, Rule 26(c) Protective Orders and the First Amendment, 80 Colum. L. Rev. 1645, 1645 n.2 (1980).


149. See note 60 supra and accompanying text.

150. See, e.g., Chemical & Indus. Corp. v. Druffel, 301 F.2d 126, 130 (6th Cir. 1962).
commercial information or trade secrets is a concern, the employer can invoke Rule 26(c)(7) and a large body of case law outside the Title VII context. When employers are concerned that the self-criticism in a plan may stimulate further lawsuits, protective orders can prohibit use of discovered materials by litigants in subsequent legal actions or require that the documents be returned immediately after their use in the trial of a particular case.

Violation of a protective order is grounds for contempt. One commentator has summarized the effectiveness of Rule 26 by stating that "the protection afforded by court protective orders is not to be underestimated." However, it may be difficult for a court to determine if ostensibly protected information is disclosed in violation of an order. Despite the difficulties in policing an order, the protective order device represents a logical compromise between the interests of employers and employees in the discovery of affirmative action plans. A court's control over discovery and over the specific protective order provides safeguards not available to an employer faced with a successful FOIA request for the plan. In addition, OFCCP regulations provide little procedural protection to contractors who may object to the plaintiff in a Title VII suit is usually an employee and not a competitor with an interest in trade secrets. Nevertheless, problems may arise when plaintiff's counsel also represents another client who is a competitor.


155. R. MILGRIM, supra note 152, § 7.06[1], at 7-78.

156. See, e.g., Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 205 (S.D.N.Y. 1977). In addition to the practical difficulties of protective orders, an aggressive order may face constitutional challenge. An order restraining extra-judicial comment by parties and lawyers may be attacked as a violation of a first amendment interest in disseminating discovered information. See In re Halkin, 598 F.2d 176, 182-83 (D.C. Cir. 1979).

However, it appears that first amendment concerns about protective orders have been laid to rest by the Supreme Court's recent decision in Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984). The Court held that a court could, under a state version of Rule 26, prohibit a newspaper from publishing information obtained through discovery. Because discovery is a matter of legislative grace, a litigant has only a slight first amendment interest in publicly releasing information obtained for the purpose of trying a case. In contrast, the power to issue protective orders "further a substantial governmental interest unrelated to the suppression of expression." 104 S. Ct. at 2208. Therefore, a protective order does not offend the first amendment if it is entered on a showing of good cause in the context of civil discovery and it does not restrict dissemination of information gained from other sources. 104 S. Ct. at 2209-10. For a critique of the Rhinehart decision, see Note, Access to Pretrial Documents Under the First Amendment, 84 COLUM. L. REV. 1813, 1837-44 (1984).
release of documents they have submitted. A plaintiff may feel hampered by the restrictions imposed by the protective order, however, alternative means of obtaining access to an affirmative action plan may be even less attractive. FOIA disclosure requests are often time consuming. A plaintiff would probably prefer to obtain the plan through discovery, even if it means adhering to the conditions of a protective order. Thus, both the employer’s interest in confidentiality and the employee’s and public’s interest in facilitating Title VII actions are accommodated by a doctrine that encourages the litigants to submit to court-controlled discovery.

CONCLUSION

Even with their limitations, protective orders can allay many of the fairness arguments against allowing discovery of affirmative action plans. A policy of allowing discovery under a protective order coupled with energetic enforcement of the Executive Order would provide the best balance between the competing public interests in Title VII enforcement and affirmative action as well as the competing interests of employer and Title VII plaintiff. The encouragement of private suits, as advanced in liberal discovery policies and access to affirmative action plans, is particularly important given the current cutbacks in governmental support for EEOC enforcement of Title VII and for implementation of the Executive Order.

157. It is OFCCP policy to disclose affirmative action plans (whether approved or not), final conciliation agreements and validation studies of tests used to select employees. 41 C.F.R. § 60-40.2(b)(1), (3), (4) (1984). Certain records may be withheld if OFCCP determines release would not be in the public interest and would impede the discharge of its functions. 41 C.F.R. § 60-40.3(d)(1), (2), (5), (6). There is no express provision requiring notification of a contractor that the documents it submitted have been requested through FOIA, but contractors may obtain an agency determination on whether the information they have submitted is subject to FOIA disclosure. 41 C.F.R. § 60-60.4(d).

158. See note 10 supra.