

## Special Bulletin to Broadcasters

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## The Impact of the *Lutheran Church* Case: An Update

As we reported in **Special Bulletin to Broadcasters**, SB No. 98-4 (April 14, 1998) and **Special Bulletin to Broadcasters**, SB No. 98-5 (April 24, 1998), the U.S. Court of Appeals for the District of Columbia Circuit has thrown out the FCC's broadcast affirmative action requirements, and has cast serious doubt on the Commission's non-discrimination regulations, in its decision in *Lutheran Church-Missouri Synod v. FCC*, D.C. Cir. No. 97-1116 (April 14, 1998).

*The FCC has since asked all eleven judges on the District of Columbia Circuit to hear the case. (The decision was made by a three-judge panel of the Court.) The full Court denied rehearing en banc, and the FCC has not filed for a stay. The Court's mandate issued on September 23, 1998, thereby making the decision effective on that date.*

In recognition of the Court's mandate, the FCC has suspended the requirement that broadcasters file Annual Employment Reports (Form 395-B) and Model EEO Program Reports (Forms 396 and 396-A). The Commission has 90 days from the date the Court of Appeals denied rehearing (until December 15, 1998) to ask the Supreme Court to review the decision. Because of the importance and political sensitivity of the case, the Commission will surely need to consult and coordinate with the Department of Justice before it can take that step. Some observers believe that the Department of Justice may not want to take the case further because (a) the record is not favorable for making the case into a test case; and (b) affirmance by

the Supreme Court could damage affirmative action programs conducted by other federal agencies.

The firm successfully represented the Lutheran Church in its appeal. In light of the major impact that the Court's decision will have on the FCC's enforcement of its EEO rule, we offer the following "questions and answers" to assist broadcasters in understanding the current state of the law and their obligations under the FCC's rules and regulations.

### **Q. What did the Court hold in the *Lutheran Church* case?**

A. The Court held unconstitutional under the Equal Protection Clause of the Fifth Amendment the FCC's broadcast rule requiring affirmative action in the hiring of minorities. (The rule is 47 C.F.R. §§ 73.2080 (b) and (c)). This rule required broadcasters to contact minority and female targeted organizations whenever there are job openings and to keep detailed records of their minority and female hiring activities. The Court left standing the FCC's broadcast rule requiring non-discrimination in hiring, 47 C.F.R. § 73.2080 (a), but remanded the case to the Commission and instructed the agency to determine whether it had authority to enforce that rule.

### **Q. What was the Court's reasoning?**

A. The Court found that the FCC's affirmative action rule "pressure(s) stations to maintain a workforce that mirrors the racial breakdown of their 'metropolitan statistical area,'" and that the Commission's current and past practices in enforcing the rule "harden the suggestion" that stations' workforces must approach proportional representation of minorities. Accordingly, under the Supreme Court's ruling in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), these race-based affirmative action regulations could survive only if they were narrowly tailored to serve a compelling governmental interest. The Court held, however, that the only governmental interest advanced by the FCC to justify its rule -- programming "diversity" -- was "too abstract to be meaningful," much less compelling. The Court could find no rational connection between recruiting for every employment position and the programming broadcast by stations. Indeed, the Court stated that the FCC's goal of "intra-station diversity" (*i.e.*, racial diversity of the staff of each station) was incoherent: the FCC's "purported goal of making a single station all things to all people makes no sense. It clashes with the reality of the radio market, where each station targets a particular segment: one pop, one country, one news radio, and so on."

**Q. What effect does the decision have on the obligation of broadcasters to file various EEO-related reports with the FCC?**

A. On September 29, 1998, the FCC issued a *News Release* announcing that it had adopted an *Order* effective September 29, 1998 suspending the requirement for the filing of Annual Employment Reports (FCC Form 395-B) for broadcast stations. Those reports were due to be filed at the FCC on September 30, 1998. The FCC simultaneously suspended the requirements for filing other EEO forms for broadcast applications, including those which accompany license renewal applications (FCC Form 396) and applications for assignments and transfers of stations, and for new stations (FCC Form 396-A). The Commission stated that EEO filings for nonbroadcast services remain in effect, as the *Lutheran Church* case dealt only with broadcast services.

FCC Chairman William Kennard released a statement appended to the September 29, 1998 *News Release* promising to work on new EEO rules which could be adopted "soon." His statement indicated that a proposal for new rules would be issued before the end of the year, with new rules adopted "as early as possible in 1999." In addition, Kennard urged broadcasters to voluntarily file EEO data with the FCC.

Commissioner Harold Furchgott-Roth also released a statement along with the *News Release*, taking issue with the statement of Chairman Kennard. Commissioner Furchgott-Roth indicated his concern that the Chairman's statement encouraging broadcasters to voluntarily file EEO information could have a coercive effect on broadcasters, urging them to do something which the Court had determined was a violation of their constitutional rights. In addition, Commissioner Furchgott-Roth voiced his concern with the Chairman's promise to reinstitute new rules, as Furchgott-Roth said that, at most, the Commission could promise only to consider whether to adopt new rules, and "many constitutional issues . . . potentially remain."

**Q. What effect does the decision have on pending applications for renewals, assignments and transfers of controls which have been petitioned against on EEO grounds?**

A. For the reasons given above, the decision legally bars the FCC from taking any action to enforce its broadcast affirmative action rule. The Rainbow Coalition has announced that it will continue to file petitions to deny license renewals as it has in the past. We are told that the Commission is considering what to do with applications that are subject to petitions to deny on EEO grounds. The Commission's staff is reviewing all pending renewals that are subject to EEO-related petitions to deny in order to determine whether the petition raises only affirmative action compliance issues or also discrimination, misrepresentation or other issues. We would expect the FCC to make some sort of announcement about these issues very soon, but the Commission has made no commitment to do so.

**Q. Should a broadcaster make any changes in its current EEO practices in view of the decision?**

A. The National Association of Broadcasters has urged broadcasters to continue their efforts to recruit a diverse work force, and many group broadcasters have pledged to maintain their support of equal employment opportunity principles. Nondiscrimination and equal employment opportunity for persons of all races, colors and creeds remain the law of the land and constitutes good business practice. However, broadcasters must carefully evaluate whether specific parts of their current affirmative action programs must be modified after the *Lutheran Church* decision. Broadcasters should discuss with this firm or a local employment lawyer the most prudent course to follow and should be aware of the following issues, among others:

- Does a broadcaster's data collection practice of, for example, keeping track of the race of each job applicant and interviewee violate any state or local laws? Many state laws place restrictions on what employment data an employer can obtain and maintain and on how that data can be used. The two most common exceptions are: (1) records made to conform with requirements of an agency of the federal government in connection with administration of a program which serves to promote the elimination of discrimination; or (2) records that are part of a bona fide systematic program to analyze whether an employer's employment procedures have an adverse effect upon minorities or women. A number of years ago, the FCC itself acknowledged that if actual conflicts arise between its EEO requirements and local laws, it would take that circumstance "into account in evaluating the licensee's overall efforts." *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 4 FCC Rcd 1715 (1989). Now that the affirmative action requirements of the Commission no longer exist, and the filing requirements of EEO-related reports have been suspended, a broadcaster will no longer be able to argue that FCC regulations requiring data collection should "preempt" (*i.e.*, trump or make inapplicable) such state and local laws.
- Could a broadcaster's voluntary practices in this area increase the risk that a frustrated nonminority job applicant would be able to prevail in a Title VII suit claiming "reverse discrimination"? That risk is very difficult to assess at this time, given that the *Lutheran Church* decision is so new. A frustrated applicant could seek to use "race conscious" steps taken by those who do the hiring at a station as evidence that all employment decisions at a station, including hiring itself, are based on race. Stations should be aware, however, that such arguments by a frustrated applicant are by no means conclusive. Moreover, stations may be able to negate such arguments through certain organizational structures (for example, by separating the staff which does the actual hiring from the staff that undertakes outreach efforts and maintains racial statistics). In any event, stations should be aware of these issues and discuss them with the firm or a local employment lawyer since

stations will no longer be able to cite the FCC's affirmative action requirements as a defense to such claims.

- We do not see any problem with a station continuing to send job availability notices to minority-targeted sources, as long as general sources are also used. We encourage you to contact the firm or a local employment lawyer to discuss how best to proceed.

**Q. In the absence of an FCC mandated affirmative action requirement, will interested parties still have a legal basis to file EEO related petitions against renewal, sale and new station applications?**

A. Yes. The Court did not declare unconstitutional the non-discrimination prong of the EEO rule. An interested party, therefore, can allege that a licensee has unlawfully discriminated in violation of that rule. However, the Court remanded the nondiscrimination rule as needing further justification, and a licensee could use this as a defense. Moreover, allegations of discrimination are usually victim-specific. A petitioner would have to show that a particular person was discriminated against. It is possible that a petitioner may assert that the absence of a minority outreach program or a station's abandonment of its former minority outreach program, coupled with a record of no or few minority hires, is evidence of an intent to discriminate. However, concerns regarding Title VII in the absence of FCC EEO requirements make a station's decision to reexamine its affirmative action plan understandable. Moreover, the FCC's decision in the *Lutheran Church* case casts serious doubt on whether a claim of discrimination before the FCC can succeed in the absence of evidence of actual discrimination against a minority individual. *Memorandum Opinion and Order*, 12 FCC Rcd 2152, 2161-62, ¶ 17 (1997), *citing Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340, 2343 (1991).

**Q. If a broadcaster previously paid an EEO-related forfeiture, can it now obtain a refund?**

A. In our view, the voluntary payment of the forfeiture (*i.e.*, payment without protest or without appeal) made the matter legally "final," and no refund can be obtained. We appreciate the argument that if the affirmative action requirements are unconstitutional,

they were unconstitutional at the time the forfeiture was paid. Unfortunately, however, the law does not undo what it considers to be "final" actions.

**Q. If a broadcaster has recently received an EEO-related fine, what action should the broadcaster take?**

A. We believe that the best strategy may be simply not to pay the fine, although this course should be carefully considered with counsel's input. The FCC's recourse under the Communications Act is to file suit against the broadcaster in a local federal district court. If such a lawsuit is brought, the broadcaster can defend by stating that the EEO program is unconstitutional.

**Q. If a broadcaster has been operating under EEO reporting conditions, can they now disregard those conditions?**

A. For the reasons discussed above, the FCC is in a very difficult position with respect to reporting conditions. A broadcaster might attempt to argue in a letter to the FCC that it should be relieved from reporting conditions on constitutional grounds, although such a letter should be carefully crafted with counsel's input.

**Q. Did the Court also throw out the affirmative action requirements as they relate to women?**

A. No. The Court explicitly stated that the affirmative action requirements for women were not involved in the case and that the Court would therefore not address the issue. However, in our view, the Court's reasoning strongly indicates that it believes that affirmative action requirements for women are unconstitutional and would so find in an appropriate case.

**Q. What impact is the case likely to have on other services (i.e., cable, common carrier)?**

A. The Court did not address these services and the Commission explicitly stated that its order suspending EEO filings applied only to broadcasters. However, as with the issue of affirmative action for women, we believe the Court's reasoning strongly indicates that it would find that affirmative action requirements for these services are unconstitutional if presented with a case that raised the issue. The

National Cable Television Association has apparently already announced its belief that the decision should apply to cable if it is affirmed on appeal.

**Q. Is the Court's decision likely to have an impact on any other types of FCC regulations?**

A. As noted above, the Court had a great deal of difficulty understanding what the Commission meant by "program diversity" in the EEO context. The Court's reaction to the Commission's stated rationale for its affirmative action requirements will likely require the Commission to more carefully articulate its goal of program diversity in the context of any future changes in, for example, its multiple ownership rules.

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Because the *Lutheran Church* decision is so recent and its impact is only now beginning to be played out, the information in this **Special Bulletin** is preliminary and subject to change. We will, of course, keep our clients informed of any important developments. Given the uncertainties, stations should consult with counsel before taking any action in response to the *Lutheran Church* decision.

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