Department of Justice

STATEMENT OF

ASHEESH AGARWAL
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"EMPLOYMENT LITIGATION SECTION, CIVIL RIGHTS DIVISION, OVERSIGHT"

PRESENTED

SEPTEMBER 25, 2007

STATEMENT OF
ASHEESH AGARWAL
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
"EMPLOYMENT LITIGATION SECTION, CIVIL RIGHTS DIVISION, OVERSIGHT"

SEPTEMBER 25, 2007

Thank you. Mr. Chairman, Ranking Member Franks, Members of the Subcommittee, it is a pleasure to appear before you to represent President Bush, Acting Attorney General Keisler, and the dedicated professionals of the Employment Litigation Section of the Civil Rights Division.

I am honored to serve the people of the United States as a Deputy Assistant Attorney General for the Civil Rights Division. I am pleased to report that the Civil Rights Division remains diligent in combating employment discrimination, one of the Division's most long-standing obligations.

Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (EEOC). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive.

We have filed or authorized three pattern or practice cases thus far in Fiscal Year 2007. One of these cases highlights our efforts in enforcing Title VII. In *United States v. City of New York*, filed against the nation's largest fire department on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against African-American and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York in violation of Title VII. Specifically, the complaint alleges that the City's use of two written examinations as pass/fail screening devices and the City's rank-order processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have

resulted in a disparate impact against African-American and Hispanic applicants and are not job-related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination. In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the City will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the *City of Chesapeake* litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

In *United States v. Southern Illinois University*, the Division challenged under Title VII three paid graduate fellowship programs that were open only to students who were either of a specified race or national origin, or who were female. While denying that it violated Title VII, the University admitted that it limited eligibility for and participation in the paid fellowship programs on the basis of race and sex. The case was resolved by a consent decree approved by the court on February 9, 2006.

In Fiscal Year 2006, the Division obtained settlement agreements or consent decrees in six cases alleging a pattern or practice of discrimination. One example is a pattern or practice case the Division brought against the State of Ohio and the Ohio Environmental Protection Agency. We reached a consent decree on September 5, 2006, that accommodated employees with religious objections to supporting the public employees' union. The consent decree permits objecting employees to direct their union fees to charity.

The Division also actively enforces Section 706 of Title VII. In addition to *United States v. City of New York*, which was filed under Section 706 as well as Section 707 of Title VII, thus far in Fiscal Year 2007 the Division has filed nine other lawsuits under Section 706. The two most recent lawsuits filed under Section 706 are *United States v. Robertson Fire Protection District*, filed on July 17, 2007, and *United States v. Spartanburg County South Carolina*, filed on August 13, 2007. In *Robertson Fire*, we alleged discrimination on the basis of race and retaliation against two African-American former employees of the Fire Protection District. In

Spartanburg, we alleged discrimination on the basis of sex against a former female employee.

The Division also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA). USERRA prohibits employment discrimination on the basis of military status. USERRA also protects the civilian employment rights of reservists and other uniformed servicemembers who are called to active duty. This important statute enables those who serve our country to return to their civilian positions with the same seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases.

In Fiscal Year 2007 thus far, we have filed five USERRA complaints in district court and resolved five cases. Additionally, the United States Attorney's offices have resolved three cases this fiscal year. One case resolved in the current fiscal year is *McKeage v. Town of Stewartstown, N.H*. In that case, the town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its "outrageous and illegal" conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of $25,000 in back wages.

During Fiscal Year 2006, we filed the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines (AA) violated USERRA by denying three pilots and a putative class of other pilots employment benefits during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the employment benefits of its pilots who had taken military leave, while not reducing the same benefits of its pilots who had taken similar types of non-military leave. Other examples of USERRA suits include *Richard White v. S.O.G. Specialty Knives*, in which a reservist's employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. We recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), and the Servicemembers' Civil Relief

Act (SCRA).

The Civil Rights Division has vigorously enforced, and will continue to vigorously enforce, the provisions of Title VII and USERRA.