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AFFIRMATIVE ACTION: THE LAW

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ABSTRACT

This is a review article on the complex and often misunderstood topic of affirmative action. This article reviews the origin of affirmative action, the nature of the plans, and the surrounding legal network. A subsequent article will address contemporary problems and issues.

Affirmative action has been with us for nearly 40 years. Interestingly, it was initially intended to be a temporary measure to redress past discriminatory practices [1]. However, like many government programs, it seems to have become a permanent fixture of public policy. But periodically, the nation revisits and debates the value of this divisive issue.

This is just such a period, as affirmative action is once again near the foreground of the nation's conscience, at least partially due to the recent Supreme Court decisions dealing with the University of Michigan's controversial affirmative action plans (AAPs). In June 2003, the Supreme Court upheld the Michigan Law School's AAP and struck down its undergraduate AAP [2, 3]. The public interest and furore created by these decisions provides an opportunity to reexamine the legal principles that directly affect at least 190,000 establishments employing more than 22,000,000 workers [4].

This reexamination is of particular importance, since there is a great deal of misunderstanding and confusion as to the definition and practice of affirmative action. Many wrongly believe that affirmative action involves only hiring quotas

and the employment of unqualified workers [5]. Moreover, there are many confusing legal mechanisms that require or provide for affirmative action. This article reviews the legal history of affirmative action, based mostly on Supreme Court opinions, and clarifies the types of affirmative action.

LEGISLATIVE AND CASE HISTORY

Affirmative action has been generally defined as "those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity [6]." In general, affirmative action involves recruitment of underrepresented groups, changing management attitudes, removing discriminatory obstacles, and preferential treatment. Within this realm a wide variety of actions are permitted. These actions can generally be categorized as recruitment, selection, training and development, or organizational climate [7].

Recruitment of protected classes may include using a variety of sources to advertise positions, developing outreach with minority organizations, and using internships, scholarships, summer jobs, and the like to recruit minorities and females. Examples of affirmative action selection practices include the use of validated tests and trained and multiple interviewers, as well as limiting reliance on highly subjective criteria [7]. The courts have even upheld "banding" test scores (based on the concept of confidence intervals), that is, treating all scores as the same score within the band (minorities tend to have lower test scores) [8, 9].

Training and development affirmative action encompasses redesign of jobs to better prepare employees for promotion and to increase their accessibility to jobs via use of nontraditional skill sets. Provision of extensive skills and developmental training, along with mentoring, are also acceptable practices. Appropriate affirmative action may take the form of actively enforcing anti-discrimination and harassment policies, diversity training for managers and employees, and company literature that is inclusive of protected classes [7].

Executive Order 11246

Affirmative action as a major instrument of government policy in employment first appeared in Executive Order 11246, signed by President Lyndon B. Johnson in 1964, directing the executive branch to conduct business only with contractors that implemented affirmative action [10]. Today, under Revised Order No. 4, federal contractors that are required to produce a written plan must have at least 50 employees and federal contracts totaling at least $50,000 [11]. However, it is not necessary for a single contract be in excess of $50,000 to meet this threshold; rather, the combined value of the various federal contracts in a year need only exceed $50,000 [12].

Under Executive Order 11246, federal contractors are expected to recruit underrepresented groups, remove discriminatory obstacles, and monitor utilization rates for protected groups. If an underutilization of a protected group is identified, goals and timetables are then set to remediate the underutilization. Goals do not have to be met, and quotas are specifically prohibited. Nor is there any requirement that a firm must hire an unqualified individual [11].

Contractors failing to meet the requirements of Executive Order 11246, or at least attempting a good-faith effort to achieve them, may be disbarred as government contractors. However, to prevent disbarment, contractors may negotiate a consent decree (an agreement between the employer and the complaining party, in this case the federal government, to create make-whole remedies and correct identified problems through some type of AAP that is approved by the courts).

Statutory Requirements

Congress first provided statutory recognition to affirmative action with the passage of the Civil Rights Act Title VII, Section 706 (g), which empowers the courts to:

> enjoin the respondent from engaging in unlawful employment practices, and order such affirmative action as may be appropriate, which may include, but not limited to, reinstatement of hiring of employees, with or without back pay or any other remedy as the court deems appropriate [13].

Congress subsequently passed the Vocational Rehabilitation Act of 1973 (protection based on disability status) and the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (protection for Vietnam-era veterans). While these later acts obligated federal contractors to construct formal AAPs, they did not require any quotas, goals, or timetables. Since 1964, various states and local municipalities have also enacted legislation that set aside public money for minority-owned businesses. Further, the Supreme Court in its landmark *Steelworkers v. Weber* decision in 1979 upheld the constitutionality of certain AAPs propagated by employers [14].

Private Sector AAPs

In *Steelworkers v. Weber,* which dealt with private sector AAPs, a collective bargaining agreement voluntarily set aside 50% of the corporation's craft-trainee positions for Blacks [14]. This plan was in response to a finding that its craft workforce was only 2% Black, but in contrast there were 39% Blacks in the relevant labor force.

The Court noted that since the AAP was in the private sector, it was not directly subject to the Equal Protection Clause of the Fourteenth Amendment, as are establishments in the public sector. It also addressed the issue of whether AAPs are

a form of illegal discrimination under Title VII, particularly since Title VII does not specifically allow AAPs. However, the Supreme Court pointed out, that "it is a familiar rule, that a thing may be within the letter of a statute and yet not within the statute" [14, at 199]. Based on a review of the *Congressional Record,* the Supreme Court concluded that Congress's primary concern in passing the Civil Rights Act was to address "the plight of the Negro in our economy" [15, p. 6548]. It went on to the say, "this plan was voluntarily adopted by private parties to eliminate traditional patterns of racial segregation" [14, at 200].

To that end, the Supreme Court upheld voluntary AAPs, even those that voluntarily impose quotas in the private sector, subject to the following provisions [16, p. 2004]:

- The AAP must be in connection with a formal plan.
- There must be data showing that the AAP is justified as a remedial measure. This usually means that a utilization analysis is conducted and demonstrates that a protected class is represented in an organization at a rate substantially lower (not above) than its relevant labor force in job classifications traditionally closed to minorities and women. In *Jurgens v. Thomas,* one establishment developed a plan to increase its utilization of Hispanics in all job classifications regardless of whether they had been traditionally closed to minorities and females, and its utilization rate of Hispanics was already 12.9%. However, because the relevant labor force contained only 6.8% Hispanics, there was no underutilization, and the plan included job classifications not traditionally closed to women and minorities. The court declared the AAP to be illegal [17].
- The plan must be voluntary.
- The plan must be temporary. This means the plan was not designed to maintain a racial balance but simply to correct a manifest imbalance. Once this imbalance is eliminated, preferential selection will be ended [14].
- The plan must not unnecessarily trammel the interests of whites. Within the context of a voluntary plan (this excludes public sector AAPs), this means that white workers are not discharged and replaced with minority workers, nor are whites discharged for inappropriate conduct while Blacks are not terminated for similar offenses [14, 18].
- The plan cannot create "an absolute bar to advancement for white employees" [14, at 197]. The Supreme Court has not approved plans that have set greater than a 50% hiring rate for qualified protected classes. Targets may be set at a rate higher (50% or lower) than their availability in the relevant labor force to speed the achievement of racial balance [14].

Other than the use of quotas, these principles also apply to AAPs that employ the use of goals in both private and public sectors subject to the additional principles to be discussed.

Voluntary Plans

Any plan not imposed by the courts is considered a voluntary plan. This includes plans under Executive Order 11246 (firms for the most part do not have to do business with the government), consent decrees (approved by the courts) and any other AAP drafted by an organization of its own volition.

In the private sector, firms may set fixed targets or quotas as they did in *Steelworkers v. Weber* (as long as they are not a government contractor), subject to the guidelines discussed above, or they may merely set goals and timetables as those mandated under Executive Order 11246. These goals and timetables do not have to be realized but do demand a "good-faith effort" to attain them.

Involuntary Plans

There are also involuntary plans that are dictated by the courts. In addition to other remedies the courts may impose to eradicate past discrimination, organizations are often compelled to use temporary quotas for egregious conduct that recklessly disregards the law.

The Sheet Metal Worker's Union was required to set a 29% nonwhite membership goal to be achieved by a specified date (in effect a quota), based on a similar percentage of nonwhites in the relevant labor pool, when a district court found that it had breached Title VII "by systematically discriminating against nonwhite workers in recruitment, selection, training, admission, and then deliberately attempting to prevent and delay instituting affirmative action" [19, at 424]. The Supreme Court, in upholding this drastic measure, stated that "Federal District Courts have broad discretion to award appropriate equitable relief to remedy unlawful discrimination . . . in cases involving particularly egregious conduct, a federal district court may fairly conclude that an injunction alone is insufficient to remedy a proven violation of Title VII . . ." [19, at 424] [and] may order "affirmative race-conscious relief as a remedy for past discrimination" [19, at 423). Quotas may be imposed in the public sector as well.

Public Sector AAPs

Involuntary Plans

In *U.S. v. Paradise,* there had been a longstanding practice by the State of Alabama of excluding Blacks from employment as state troopers [20]. Several orders, including a consent decree, had been issued by the federal district court requiring the State of Alabama to refrain from engaging in racial discrimination, to hire one Black trooper for every white trooper until there were approximately 25% in the workforce, and to develop a promotional procedure that would have little or no adverse impact on Blacks [20]. The State of Alabama made little or no attempt to comply with these directives. As a

result, the district court imposed a 50% promotional quota contingent upon there being qualified applicants available; otherwise, the court could waive this stipulation [20, 21].

Under its strict scrutiny standard—the most stringent form of judicial review—the Supreme Court upheld quotas as a remedial measure in the public sector and, as such, they are allowed by the Fourteenth Amendment. Writing for the majority in rebuking Alabama's actions, Justice Brennan found that the principles of the strict scrutiny standard had been met because the quotas were, "justified by a compelling government interest in eradicating the State's pervasive, systematic, and obstinate discriminatory exclusion of blacks . . . the enforcement order was also supported by the societal interest in compliance with federal-court judgments" that the Alabama Department of Public Safety had persistently resisted for many years [20, at 153]. The Court also found that the plan was narrowly tailored to redress the problem with respect to Blacks in a specific problematic job classification, in that it was a flexible plan that did not grant gratuitous promotions to Blacks (did not require the hiring of unqualified Blacks). Given the circumstances, the Court concluded that this was the only sensible solution (others had been considered) for ridding a state entity of systematic and pervasive discriminatory practices [20].

Voluntary Plans

Establishments in the public sector are also allowed to construct voluntary AAPs without a legal finding that the employer has committed discriminatory acts in the past [22]. However, voluntary plans that set aside openings based specifically on race or sex classifications (quotas) absent such a legal finding are illegal under Equal Protection Clause of the Fourteenth Amendment [23].

In the now-infamous *Regents v. Bakke* lawsuit, the University of California had developed a special admissions program where 16 of its 100 slots for medical school were reserved for Blacks. However, Bakke, a white male, was denied entry despite qualifications superior to all of the Blacks that were admitted to the program [23].

In the subsequent lawsuit, *McLaurin v. Oklahoma State Regents,* the Supreme Court under its strict scrutiny standard required that "when a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethic background, it must be regarded as suspect" [24, at 641-642]. "In order to justify the use of a suspect classification, a state must show that its purpose is both constitutionally permissible and substantial, and that its use of the classifications necessary . . . to accomplishment of its purpose" [23, at 291]. The Supreme Court did not find the voluntary quota system to be necessary absent a judicial, legislative, or administrative finding of constitutional or statutory violations. To justify such an extreme level of *remedial* action under the Equal Protection Clause, there would have had to have been an injured party [23].

State Set-Aside Programs

Voluntary AAPs that establish quotas in the form of setting aside public funds by the federal government, state government, or a municipality) to be awarded specifically to firms based on race to conduct state-related business are in violation of the Constitution unless the state entity can show that there has been past discrimination against the race in question [25]. Arguing that minorities have experienced "societal discrimination" is not a sufficient determination of past discrimination [25]. Moreover, alternative race-neutral devices, such as the simplification of bidding procedures, should be employed before a set-aside program becomes necessary under the Constitution [25].

Nevertheless, the Supreme Court did not ban quotas in voluntary AAPs in the public sector altogether. In 1986, the high Court upheld a consent decree involving the use of quotas after a district court found a historical pattern of racial discrimination in Cleveland's fire department [26].

An important point is that an organization's behavior must be sufficiently egregious for a consent decree involving the use of quotas to pass constitutional muster. A mere finding of a severe statistical balance is not sufficient to demonstrate an outrageous disregard of the law [26].

In *Dallas Fire Fighters v. City of Dallas,* the city did not hire its first Black firefighter until 1969, and at that time less than 2% of the firefighters were minorities or females [27]. This number improved to 38.7% Black and Latino firefighters and 1.9% women by 1988. However, the officer ranks were comprised of less than 6% Blacks and Latinos and no women. Based on this latter finding, a consent decree between the Fire Department and the Department of Justice was agreed upon to promote some women and 28 "qualified" Blacks over white males without regard to whether the person to be promoted had been a victim of past discrimination. This meant that they had to achieve scores within a certain "band" on a relevant civil service exam [27].

The district court failed to approve the consent decree, and this decision was upheld on appeal [24, 27, 28]. The federal courts noted that the Fire Department's conduct was not particularly egregious because it had taken a number of affirmative steps since 1969 to correct the underutilizations in its workforce. These steps included: elimination of an irrelevant rank, reduction of time-in-grade requirements, and even allowing some skip promotions. Additionally, the promotional system had not been appropriately validated, and there even was evidence that the department could actually identify the specific victims of promotional discrimination (therefore, it was they who should have been promoted). As a result, the consent decree could not pass the strict scrutiny standard [27] .

Consent Decrees

A few additional stipulations pertaining to consent decrees are worthy of note. (These apply to the private sector as well.) While the federal courts must approve

consent decress, these decrees are not "an order of the court" [29, at 516]. Thus, consent decrees may go beyond what a court could have ordered if the case had been litigated to its conclusion" [16, at 487].

However, challenges to consent decrees have been barred since the revision of the Civil Rights Act of 1991 under the following circumstances: by those that had actual notice of the proposed order and a reasonable opportunity to present objections, and those whose interests were adequately represented by another person who challenged the decree on the same legal grounds and similar facts [13, 16]. This means that those workers affected by the consent decree but not a party to the agreement and who did not have notice or input may challenge the consent decree and have it struck down or modified to include their interests [29].

Federal courts cannot modify consent decrees, and in particular those situations involving bonafide seniority systems, without a legal finding of discrimination [30]. In *Firefighters v. Stotts,* despite a lack of such a finding of discrimination, the district court modified a seniority policy of "last hired, first fired" because in the event of a layoff most of the minorities would be let go first [30]. As a result of the court's revision, more-senior whites would be laid off in order to retain less-senior minorities. In this case, the Supreme Court overruled the lower court and further directed that competitive seniority could only be awarded to those who were direct victims of illegal discrimination [30].

Layoffs

Voluntary plans that involve the use of layoffs to accomplish affirmative action are generally illegal. In *Wygant v. Jackson Board of Education,* the school system amended its collective bargaining agreement to allow Blacks with less seniority to be retained over white teachers with greater seniority [22]. The argument that minority children need an appropriate "role model" did not rise to the level of a compelling state purpose, nor did the assertion that Blacks have been the victims of "societal discrimination." The Supreme Court said that the concept of "societal discrimination" is "too amorphous a basis for finding a need for race-conscious state action and for imposing a racially classified remedy" [22, at 276]. To remedy prior discrimination, there must first be a factual determination (by the courts, which did not occur in this situation) that remedial action is necessary [22].

While the Court struck down layoffs in this instance as a remedial tool of AAPs, contrary to many employment law textbooks [16], it was unable to agree about whether they are ever necessary. The Court did say that "the Constitution does require the State to meet a heavy burden of justification when it implements a layoff plan based on race" [22, at 277], and several of the justices specifically pointed out that in this case the narrowly tailored requirement of the strict-scrutiny standard was not met, in that lawful alternative restrictive acts were not considered [22].

Goals

The Supreme Court does permit voluntary AAPs to use goals to achieve its employment objectives. The Court suggested that ethnic diversity is an element in a range of factors an organization may properly consider in attaining the goal of a heterogeneous population [23]. On the other hand, for example, within the context of a range of factors promoting a heterogeneous student body, it may also mean that "a farm boy from Idaho can bring something to a college such as Harvard that a Bostonian cannot" [23, at 296]. In developing and administering such a legal selection program,

> race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with other candidates for the available seats. . . . the program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants [23, at 296].

In *Johnson v. Transportation Agency, Santa Clara County,* the Supreme Court made clear that AAPs that embrace goals where race or sex are just one factor in the selection decision are permissible as long as the establishment can show "a conspicuous imbalance in traditionally segregated job categories" [31, at 620]. When the county's AAP was implemented in 1978, there were no women in any of its 238 traditionally male, skilled-craft job classifications [31].

Santa Clara County's AAP was intended to achieve a statistically measurable yearly improvement and ultimately attain a workforce that mirrored the proportion of minorities and women in the area labor force [31]. The plan made clear that these were goals and not fixed targets and as such did not have to be attained every year, but were to be reasonable aspirations in correcting an identified imbalance in its workforce [31].

A female (ranked third) was promoted to dispatcher (traditionally a male job) over a male applicant who was considered more qualified (ranked second). Given that their differences in qualifications were minimal, her gender was the deciding factor, since the county was underrepresented in the traditional male job classification for which she had applied. However, the Court noted "that the County's plan did not authorize blind hiring but rather it expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs" [31, at 630]. Moreover, the Court pointed out that the county's AAP was consistent with the principle articulated in *Bakke* where the plan, "does not insulate the individual from comparison with other candidates" [23, at 296). In this case every female applicant considered (many were rejected) was subjected to just such a

comparison. Moreover, the Santa Clara plan sought to attain a balanced work force, not to maintain one, which the Supreme Court suggested would make the plan illegal [31].

In its recent *Grutter v. Bollinger* decision, the Supreme Court further clarified its position on the use of voluntary AAPs in the public sector [3]. In *Grutter,* the University of Michigan Law School had instituted an AAP to achieve student-body diversity. In this plan there were no "automatic" acceptances granted minority students, nor were there any set percentages of minorities for admission [3]. However, there was a desire to achieve a "critical mass" of minority students so that they would be represented in the student body in meaningful numbers (around 14%) [3].

This objective could not be achieved by test scores alone (minority representation would drop to around 4%). Additionally, all applicants were evaluated on a flexible range of factors such as test scores, letters of recommendations, essay, background, minority status, etc. In some cases, race might be the determinative factor, while in others it might play no role at all. Evidence was introduced revealing that whites with lower test scores than minority students were admitted, as were a number of minority students with test scores lower than many whites [3].

All of these facts persuaded the Supreme Court to find that the law school's admission program met constitutional muster under its strict scrutiny criterion. The Court further found that "student body diversity is a compelling state interest that can justify using race in university admission . . . that diversity is essential to its educational mission" [3, at 2327].

The university did consider other legal alternatives but found them lacking [3]. With respect to this point, the Supreme Court noted "that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative nor mandate that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of racial groups" [3, at 2338]. Moreover, the Court reiterated its position by quoting *Bakke* that narrowly tailoring also means that an AAP such as this one cannot "insulate each category of applicants with certain qualifications from competition with all other applicants" [3, at 2336; 21, at 315]. Permissible goals such as the ones employed in the Michigan Law School's program, "require only a good faith effort . . . to come within a range demarcated by the goal itself and permits consideration of race as a plus factor in any given case while ensuring that each candidate competes with all other qualified applicants" [3, at 2336].

Unlike its law school AAP, the University of Michigan's undergraduate admissions program simply granted each minority applicant 20 points toward a 90-point minimum (out of 150) for possible acceptance (automatic acceptance at 100 and above). Virtually all minimally qualified minority students were accepted if they had a score of at least 90 [2]. Nonminorities with a score between 90 and 99 were not automatically accepted.

Even though the program did not set aside a specific number of slots for minorities, the chief justice, writing for the court majority, found that a public sector AAP "which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented' minority applicant solely because of race, is not narrowly tailored to achieve the interest of educational diversity . . . the current policy does not provide individual consideration . . . the automatic distribution of 20 points has the effect of making the factor of race 'decisive' for virtually every minimally qualified underrepresented minority applicant" [2, at 2433, 2434]. The university defense that it would be too much of an administrative burden to consider each applicant's file on an individual basis was rejected by the Court.

CONCLUSIONS

Affirmative action is a much-misunderstood issue and policy. However, it is for the most part not a quota system, nor does it require that unqualified candidates be hired, promoted, or retained. In fact, affirmative action under Executive Order 11246 and as applied in the public sector, affirmative action simply requires that race or sex be one of the considerations in employment, not the only consideration. Quotas are allowed only temporarily when organizations engage in egregious conduct, or in the event that a private business voluntarily adopts such a plan to address past discriminatory practices.

Consequently, employers should embrace affirmative action concepts and requirements as a way to ensure that discrimination is removed from the organization, no matter where it lurks. In time, as the workforce mirrors that of its community and the last vestiges of discrimination are expunged, there will be no need for affirmative action.

ENDNOTES

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28. *Black Fire Fighters Association of Dallas v. City of Dallas,* 805 F. Supp. 426 Northern Dist. of Texas (1992).
29. *Martin et al. v. Wilks et al.,* 490 U.S. 755 (1989).
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