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ABSTRACT

This paper discusses some basic constitutional and statutory principles related to affirmative action and reverse discrimination in employment of educational personnel. The specifications of the Equal Protection Clause of the 14th Amendment, Title VII of the Civil Rights Act of 1964, other statutes and regulations, and selected Supreme Court cases are outlined, as well as their implications for employment practices. A conclusion is that remedies for intentional and unintentional discrimination against racial and ethnic minorities may pose problems. Preferential programs may only reinforce common stereotypes, which hold that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. (LMI)

EQUAL EMPLOYMENT OPPORTUNITY FOR RACIAL AND ETHNIC MINORITIES: AFFIRMATIVE ACTION, REVERSE DISCRIMINATION, AND RELATED ISSUES

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Introduction

Educational leaders generally believe that educational environments are enhanced by racial and ethnic diversity among professional and support staff employees. In many educational institutions, however, minorities are underrepresented on employment rosters.

There is a substantial body of law that prohibits unjustified employment discrimination based on race and ethnicity; thus, when members of minority groups are specifically recruited and selected for employment or promotion, a different set of legal issues involving the concepts of affirmative action and reverse disrimination may arise. This paper will discuss some basic constitutional and statutory principles that pertain to such issues.

Fourteenth Amendment

The relevant constitutional protections are grounded in the Equal Protection Clause of the Fourteenth Amendment, which provides that "No State ... shall deny to any person within its jurisdiction the equal protection of the laws."

The equal protection analysis comes into play when government creates classifications. When a classification is challenged in court, one of three tests will be applied:

Strict Scrutiny. Classifications that disadvantage a "suspect class" (e.g., race, national origin, alienage) or impinge on the exercise of a "fundamental right" (e.g., Bill of Rights protections, reproduction and family matters, interstate travel, voting equality) will be treated as presumptively invidious; the state must demonstrate that the classification is precisely tailored to serve a compelling government interest.

Heightened Scrutiny. Some classifications (e.g., gender, illigitimacy), while not facially invidious, give rise to "recurring constitutional difficulties"; the state must show that the classification furthers a substantial government interest.

Rational Basis. Most other classifications (e.g., age, mental retardation, most economic and social legislation) are left to the discretion of the legislative body and are presumed valid; the classification must be rationally related to a legitimate government interest.

See, e.g., Kadrmas v. Dickinson Public Schools, 484 U.S. 1000 (1988); Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Plyler v. Doe, 457 U.S. 202 (1982).

As a general rule, any employment decision based on race or ethnicity must receive a most searching examination to make sure that it does not conflict with constitutional guarantees. There are two prongs to this "strict scrutiny" test. First, the classification must be justified by a compelling government interest. Second, the means chosen by government to effectuate its purpose must be narrowly tailored to the achievement of that interest. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267, 273-74 (1986) (Opinion of Powell, J.).

The Equal Protection Clause prohibits only intentional discrimination. Government action will not be held unconstitutional solely because it results in a disproportionate impact on some group. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

Statutes and Regulations

Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §2000e et seq., is the most significant of the federal employment discrimination statutes. This statute applies to both government and nongovernment employers.

The basic prohibition is found in §2000e-2(a):

> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

A major exception to this general prohibition is found in 42 U.S.C. §2000e-2(e), which provides that it shall not be an unlawful employment practice to base employment decisions on "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ..." It should be noted that this provision does not include race or color as a characteristic that could be a

"bona fide occupational qualification."

The Equal Employment Opportunity Commission (EEOC) is the agency responsible for the administration and enforcement of Title VII. The EEOC has established procedural regulations for carrying out its responsibilities, which can be found at 29 C.F.R. Part 1601 (Procedural Regulations).

In contrast to the Equal Protection Clause, which prohibits only intentional discrimination, Title VII prohibits employment practices that involve either "disparate treatment" (intentional discrimination) or "disparate impact" (practices neutral on their face, but that have an adverse impact on a protected class). See Civil Rights Act of 1991, P.L. 102-166, Sec. 3. Purposes, also found in note following 42 U.S.C. §1981.

Although Title VII prohibits discrimination based on race, color, religion, sex, or national origin, it does not require that any preferential treatment be granted because of any imbalance as measured by those characteristics between the employee work force and the available work force. 42 U.S.C. §2000e-2(j). However, Title VII does not prohibit all private, voluntary affirmative action plans that grant preferential treatment to members of a group with such a characteristic. United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

In fact, the Guidelines promulgated by the Equal Employment Opportunity Commission, as authorized by 42 U.S.C. §2000e-12, encourage voluntary affirmative action. These Guidelines are found at 29 C.F.R. Part 1608 (Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964, as amended). "Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII." 29 C.F.R. §1608.1(c). The Guidelines constitute "a written interpretation and opinion" of the EEOC and persons who have developed affirmative action plans pursuant to these Guidelines can invoke the Guidelines as a defense against charges of reverse discrimination. 29 C.F.R. §1608.2. See also 42 U.S.C. §2000e-12(b)(1).

The amendments to Title VII embodied in the Civil Rights Act of 1991, P.L. 106-166, provide another reason for employers to have affirmative action plans in place. Prior to these amendments, in the so-called "mixed motive" situtations, employers who took race, color, religion, sex, or national origin into account when making employment decisions could avoid liability if they could prove that they would have made the same decision even if they had not taken the impermissible factor into account, see e.g. Price Waterhouse

v. Hopkins, 490 U.S. 228 (1989); however, this defense is no longer available and would seem to pose some problems for unofficial, informal affirmative action plans. Sec. 107(m) of the Act provides that:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.
> 42 U.S.C. §2000e-2(m).

However, Sec. 116 of the Act provides that "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in acordance with the law." 42 U.S.C. §1981 note. For those employers who may wish to take protected characteristics into account in a benign effort to enhance employment opportunities for minorities, it would seem prudent to have a valid affirmative action plan in place.

Another protection against employment discrimination and basis for affirmative action programs is Executive Order No. 11246, as amended (Equal Opportunity in Federal Emploment), which can be found in the notes following 42 U.S.C. §2000e. This Executive Order prohibits government contractors from employment discrimination based on race, color, religion, sex, and national origin and requires such contractors to take affirmative action to insure nondiscrimination. Educational institutions that are involved in goverment procurement contracts are the only ones likely to be covered; thus, the Executive Order is likely to be relevant for many postsecondary institutions, but for few elementary-secondary institutions.

The Office of Federal Contract Compliance Programs has promulgated regulations requiring contractors covered by Executive Order 11246 to develop affirmative action programs. These regulations can be found at 41 C.F.R. Part 60-2 (Affirmative Action Programs).

Another expression of Congressional intent to promote employment opportunities for women and minorities is represented by the "Glass Ceiling Act of 1991." Pub.L. 102-166, Sec. 203; 42 U.S.C. 2000e note. Based on its finding that women and minorities are underrepresented in management and decisionmaking positions, Congress created the Glass Ceiling Commission to conduct a study and prepare recommendations concerning eliminating artificial barriers and increasing opportunities and developmental experiences for women and minorities.

Selected Cases

When employers take affirmative action to enhance the employment of racial and ethnic minorities, they may be subject to challenges of unjustified reverse discrimination. Several cases are offered to illustrate some major issues involved.

The first three cases are Supreme Court decisions that were based on Equal Protection principles.

Any discussion of affirmative action and reverse discrimination should include Regents of University of California v. Bakke, 438 U.S. 265 (1978). Although Bakke involved a challenge to a special minority admissions program to a University of California medical school, the principles on which it was decided served as the basis for ensuing employment cases. A special admissions program set aside 16 of the 100 places in an entering class for minority students. The Court analyzed the program against the requirements of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance, see 42 U.S.C. §2000d, and the Equal Protection Clause. Title VI was held to proscribe only those classification that would violate the Equal Protection Clause. Race and ethnic distinctions of any sort are inherently suspect and call for exacting judicial examination. A person subject to such a classification is entitled to a judicial determination that the burden asked to be borne on that basis is precisely tailored to serve a compelling governmental interest. Although the attainment of a diverse student body was a constitutionally permissible goal for an institution of higher education, the assignment of a fixed number of places to minorities was not a necessary means toward that end. Racial or ethnic minority status could be deemed a "plus," however, as long as it did not insulate the individual from comparison with all other candidates. (Opinion of Powell, J.)

The issue in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) was whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin. Because this classification was inherently suspect, it was subject to the "strict scrutiny" examination, which includes two prongs: first, the classification must be justified by a compelling governmental interest; and second, the means chosen by the state to achieve this purpose must be narrowly tailored to the achievement of that goal. Neither general societal discrimination nor a role model theory would justify a racial classification. But even if there had been a showing

of prior discrimination on the part of the school board that would justify the use of a racial classification as a remedy, the layoff provision was not sufficiently narrowly tailored to achieve that end. The burden of the layoff provision was too intrusive; other less intrusive means, such as adopting hiring goals, were available.

In City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Court struck down a city-adopted plan that set aside 30 percent of each city construction contract for minority business enterprises. When the plan was analyzed pursuant to the Equal Protection Clause, it was found to violate both prongs of the strict scrutiny test. First, the city had failed to demonstrate a compelling governmental interest justifying the plan, because the factual basis offered in support did not establish the kind of discrimination in the city's construction industry that would justify a race-conscious remedy. Second, the plan was not narrowly tailored to remedy the effects of any prior discrimination, because it entitled minority contractors from anywhere in the country to participate and its 30 percent quota was too rigid.

The two Supreme Court cases that follow were decided on Title VII grounds.

United Steelworkers v. Weber, 443 U.S. 193 (1979), held that Title VII's prohibition against racial discrimination does not condemn all private-sector, voluntary, race-conscious affirmative action plans. A master collective bargaining agreement contained an affirmative action plan designed to eliminate conspicuous racial imbalances in the almost exclusively white craftwork forces. Black craft-hiring goals were set equal to the percentage of blacks in the local labor forces, and on-the-job training programs to teach the skills necessary to become craftsmans were established, with 50 percent of the openings reserved for black trainees. The Court found that the plan was consistent with the intent of Title VII and that the plan did not unnecessarily trammel the interests of the white employees.

In Johnson v. Transportation Agency, 480 U.S. 616 (1987), the Court upheld a voluntary affirmative action plan that took race and gender into account. The plan provided that when making promotions to positions within traditionally segregated job classifications in which women and minorities had been underrepresented, sex or minority status would be one factor in determining who should be promoted. Although the case involved a reverse discrimination challenge to a promotion where sex was the factor taken into account, the reasoning should pertain to racial and ethnic minority preferences as well. Under the Title VII analysis, the

employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discrimination, but only to conspicuous imbalances in traditionally segregated job categories. For a job requiring special training, the comparison for determining whether an imbalance exists should be between the employer's work force and those in the area labor force who possess the relevant qualifications. In this case, the plan did not authorize blind hiring by the numbers, but directed that numerous factors be taken into account, including the number of female applicants qualified for the job. Finally, the plan did not unnecessarily trammel male employees' rights or create an absolute bar to their advancement; the plan involved no quotas, and it was designed to attain, but not maintain, a balanced work force.

The final case to be discussed is Cunico v. Pueblo School District, 917 F.2d 431 (10th Cir. 1990). The court of appeals struck down a reduction in force decision that was unjustified reverse discrimination. A black administrator was retained, solely because of his race, for a position to which the white plaintiff was entitled under the RIF policy. There was no evidence of racial imbalance or discrimination to justify race-conscious affirmative action.

In this case, the court provided an interesting comparison of Equal Protection and Title VII analyses. The purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group. The level of proof necessary to justify the consideration of race in an employer's hiring practices, however, differs depending on whether the challenge invokes Title VII or the Equal Protection Clause. Under Title VII, an affirmative action plan must be justified by the existence of a "manifest imbalance" in a traditionally segregated job category. Once this imbalance is demonstrated, the court must also consider whether the rights of the discriminatee are "unnecessarily trammeled" by the affirmative action plan. By contrast, review of a claim of an equal protection violation is made under the more demanding "strict scrutiny" analysis. Under this standard, the preference given to minorities must be justified by a compelling governmental interest and acheived only through narrowly tailored means.

Some Basic Principles

When employers take affirmative action to enhance the number of racial and ethnic minorities, there may be challenges of unjustified reverse discrimination.

In the context of discrimination based on race or ethnicity,

the Supreme Court has made it clear that the government entity proposing race-based preferences cannot justify such preferences on the basis of general societal discrimination; rather, the entity must show that the preference is intended to remedy its own discriminatory practices. City of Richmond v. J.A. Croson, 488 U.S. 469, 504 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986) (Opinion of Powell, J.).

A government entity can find itself in a real dilemma. If to justify an affirmative action plan it proves that it has a basis for believing that it has discriminated in the past, then it leaves itself open to charges brought by those who may have been victims of that discrimination. See Johnson v. Transportation Agency, 480 U.S. 616, 632 (1987); Wygant v. Jackson Board of Education, 476 U.S. 267, 284 (1986) (O'Connor, J., concurring).

A government entity may find evidence of discrimination based on statistical differences between those employed by the political entity and the relevant labor pool of those who are qualified for the particular job. Johnson v. Transportation Agency, 480 U.S. 616, 632 (1987).

The means employed must not "unnecessarily trammel" the interests of innocent parties. See Wygant v. Jackson Board of Education, 476 U.S. 267, 282-83 (1986) (Opinion of Powell, J.); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (Blackmun, J., concurring).

A governmental entity has a legitimate and substantial interest in remedying the present effects of its own past discrimination that may justify its use of race or ethnic classifications. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (Opinion of O'Connor, J.); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (Opinion of Powell, J.); Regents of University of California v. Bakke, 438 U.S. 265 (1978) (Opinion of Powell, J.).

Although government units may take remedial action when they have evidence that their own practices constituted or are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986) (Opinion of Powell, J.).

Societal discrimination, without more, is too amorphous a basis for a remedy based on minority classification. For discriminatory remedies that work against innocent people, specific findings are needed; societal discrimination is insufficient and overexpansive. Wygant v. Jackson Board of

Education, 476 U.S. 267, 276 (1986) (Opinion of Powell, J.).

Providing "role models" for minorities is not a compelling need. "Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in Brown v. Board of Education, 347 U.S. 483 (1954)." Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986) (Opinion of Powell, J.).

Even if there is a compelling interest in extending some form of minority preference, a "quota" may not be narrowly tailored to achieve that legitimate purpose if it unnecessarily burdens innocent nonminorities, Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (Opinion of Powell, J.; opinion of White, J.), or if it is not specifically related to prior discrimination. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

While state government entities that extend preferences to minorities must satisfy the "strict scrutiny" equal protection test, the federal government may be required to satisfy only the more lenient "intermediate level" review. Benign race-conscious measures mandated by Congress--even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination--are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. Metro Broadcasting, Inc. v. Federal Communications Commission, - U.S. -, 110 S.Ct. 2997 (1990).

Conclusion

Racial and ethnic minorities have been subjected to both intentional and unintentional discrimination that has placed them at a real disadvantage. Few would argue that such wrongs should be remedied. But sometimes the remedies pose other problems. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Regents of University of California v. Bakke, 438 U.S. 265, 298 (1978) (Opinion of Powell, J.).