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ABSTRACT

Many departments in higher education institutions actively recruit women and minority candidates for faculty positions. When a department decides that an available position should be filled by a woman, are the supporting rationales legally sound? This paper describes some basic principles of federal law that address issues of affirmative action and reverse discrimination. It discusses the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and federal statutes, particularly, Title VII of the Civil Rights Act of 1965. Court litigation regarding affirmative action and reverse discrimination is also reviewed. Some general observations are made about the legal viability of various affirmative-action plans that extend some kind of preferences to women. Such preferences have been struck down because there was not sufficient evidence of an intent to remedy the legacy of discrimination against women. On the other hand, gender preferences have been upheld when courts found that both of the basic requirements about goals and means have been met. First, the evidence demonstrated a need to remedy the legacy of discrimination against women. Second, the preferences were substantially related to the problem sought to be remedied and did not unduly burden the interests of innocent men who were disadvantaged by the preference. (LMI)

GENDER PREFERENCES IN PROFESSIONAL HIRING

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Introduction

Many departments in higher education institutions are actively recruiting women and minority candidates for faculty positions. In some instances where department faculty have been all male, the implicit understanding is that the new hire will be a woman.

There has been in place for a number of years a substantial body of law that protects women against unjustified discrimination in employment, and the notion of equal employment opportunities for women is generally well-accepted. On the other hand, when women are specifically recruited and selected for faculty positions, questions are sometimes raised about the merits of affirmative action and the problems of reverse discrimination.

Assume that a faculty position is available in a university department that has an all-male faculty. It is decided that the position should be filled by a women. What rationales might be offered in support of such a decision? A partial list might include the following: to provide an employment opportunity for some woman; to provide role models for women students; to bring a woman's perspective to the department; to be inclusive of those who have been excluded; to enhance faculty diversity; to provide a more balanced workforce; to overcome the legacy of past societal discrimination; or to remedy the present effects of past departmental discrimination. As a matter of either law or public policy, are any such rationales sound?

This paper sets out some basic principles of federal law that address issues of affirmative action and reverse discrimination. It must be noted, however, that many states also have their own laws that would pertain.

U.S. Constitution

The Equal Protect Clause of the Fourteenth Amendment to the United States Constitution provides that "No State . . . shall deny to any person within its jurisdiction

the equal protection of the laws." An equal protection analysis comes into play when government creates classifications of people, activities, or things.

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

When a classification is challenged in court, one of three tests will be applied: strict scrutiny (state must show that classification is precisely tailored to serve compelling government interest); heightened scrutiny (state must show that classification furthers a substantial interest of the state); and rational basis (challenger must show that classification is not rationally related to any legitimate government interest). See *generally Kadrmas v. Dickenson Public Schools*, 484 U.S. 1000 (1988); *Plyler v. Doe*, 457 U.S. 202 (1982).

U.S. Statutes & Regulations

In the context of gender preferences, the most significant of the federal statutes pertaining to employment discrimination is Title VII of the Civil Rights Act of 1965 (as amended), 42 U.S.C. §2000e *et seq.* Title VII applies to both public and private 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.

The federal agency responsible for the administration and enforcement of Title VII is the Equal Employment Opportunity Commission. Pertinent to this agency and the topic of gender preferences under Title VII are three parts in the Code of Federal Regulations: 29 C.F.R. Part 1601--Procedural Regulations; 29 C.F.R. Part 1604--Guidelines on Discrimination Because of Sex; and 29 C.F.R. Part 1608--Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964, as Amended.

An exception to the general prohibitions of Title VII 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, ..." EEOC guidelines, however, provide that "the bona fide occupational qualification exception as to sex should be interpreted narrowly." 29 C.F.R. §1604.2(a).

Title VII proscribes not only overt discrimination but also those practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If the plaintiff shows that a facially neutral employment practice works in fact to the disadvantage of a certain class of applicants or employees, then the employer must show that the discriminatory practice has a manifiest relationship to the employment in question. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

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). On the other hand, Title VII does

not prohibit voluntary affirmative action plans that grant preferential treatment to members of a group with such a characteristic. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616 (1987)(preference based on sex); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)(preference based on race).

Related to the notion of gender preferences are the so-called "mixed motive" situations. A section pertinent to this matter is 42 U.S.C. §2000e-2(m):

> Except as otherwise provided in this title, 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.

The Code further provides in §2000e-5 that if a plaintiff proves that an employment decision violated §2000e-2(m), and the defendant demonstrates that the same decision would have been made even in the absence of the impermissible motivating factor, the court

> (i) may grant declarative relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable to the pursuit of a claim under [this section]; and
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment ... .

Although §2000e-2(m) would seem to eliminate even taking gender into account as one of several factors in an employment decision, the Civil Rights Act of 1991 also included Sec. 116, now found as a note to 42 U.S.C. § 1981, which 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 accordance with the law."

Another federal law pertinent to gender preferences in employment is Executive Order No. 11246, "Equal Opportunity in Federal Employment," Part II of which prohibits discrimination by government contractors against any employee or applicant because of race, color, religion, sex, or national origin and requires such contractors to

take affirmative action to ensure that applicants and employees are treated without regard to their race, color, religion, sex, or national origin. The Office of Federal Contract Compliance Programs is responsible for implementation of Executive Order 11246. Two parts in the Code of Federal Regulations are relevant: 41 C.F.R. Part 60-2--Affirmative Action Programs; and 41 C.F.R. Part 60-20--Sex Discrimination Guidelines.

Affirmative Action & Reverse Discrimination

In the context of affirmative action programs, to satisfy standing requirements the challenger need only show that, but for the program, he would have been considered for the job. He need not show that he would have been hired. *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1190. As the Supreme Court explained in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 113 S.Ct. 2297 (1993):

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to extablish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at 2303.

Perhaps the leading case on gender-based reverse discrimination is *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). The case held that a state statute that excluded males from enrolling in a state-supported professional nursing school violated the Equal Protection Clause. The Court applied the intermediate-level "heightened scrutiny" test, which requires those seeking to uphold a gender-based classification against constitutional attack to show that the classification serves important governmental objectives and is substantially related to the achievement of those objectives.

The Court noted that in some circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that has been disproportionately burdened. In this case, however, although the state recited a benign, compensatory purpose as justification for the classification, it failed to establish this alleged objective as the actual purpose by showing that women had been deprived of opportunities in the field of nursing; instead, the policy of excluding men simply tended to perpetuate the stereotyped view of nursing as a woman's job. Furthermore, the policy also failed the second part of the equal protection test, because the state made no showing that the gender-based classification was substantially and directly related to the alleged compensatory objective. The state claimed that women in the School of Nursing were adversely affected by the presence of men, but the School had allowed men to audit classes and participate fully, with no apparent ill effects.

In most Equal Protection Clause "reverse discrimination" cases where men have challenged preferences given to women, courts have applied the intermediate-level standard of review. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993); *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875. An exception is the Sixth Circuit Court of Appeals, which has applied strict scrutiny to gender-based affirmative action plans. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1190.

It is interesting to note that use of the lesser intermediate standard makes it easier to adopt gender-based preferences than race-based preferences, even though blacks have suffered more egregious discrimination over time. *Contractors Ass'n v. City of Philadelphia*, 735 F.Supp. 1274 (E.D. Pa. 1990). Logically, government must be able to carry a lesser evidentiary burden to support a gender preference than a racial

preference, because requiring the same factual justification for both would eviscerate the difference between strict and intermediate scrutiny. *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993).

In the context of race discrimination, the Supreme Court has made it clear that a government entity cannot justify a race-based preference 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.). Some courts have followed the same approach in cases involving sex discrimination, requiring evidence of government discrimination to justify preferential treatment as a remedy, *see, e.g., Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993); however, other cases suggest that a remedy directed at more general, endemic discrimination would be valid. *See, e.g., Associated General Contractors of California, Inc. v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987). But some degree of discrimination must have occurred in a particular field before a gender-specific remedy may be instituted in that field; unlike the strict standard of review applied to race-conscious programs, however, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy. *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875.

Some interesting *dicta* is provided by *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), *cert. denied*, 111 S.Ct. 2261.

> The Supreme Court does not consider discrimination against women to be as invidious--as harmful and as difficult to justify--as discrimination against blacks or other racial minorities; nor, to come to the point, does it consider discrimination against men to be as invidious as racial discrimination. ... (In treating sex discrimination less severely than racial discrimination, the Court is

following a distinction in Title VII of the Civil Rights Act of 1964, which establishes a defense of bona fide occupational qualification for sex discrimination but denies it for racial discrimination.) ... On the one hand it can be argued that if discrimination against women is not so invidious as discrimination against blacks, the case for using discrimination to remedy past wrongs is less urgent; the past wrongs were less severe, less harmful. On the other hand it can be argued that if sex discrimination is not so serious a wrong as racial discrimination we need not worry about confining its use to the the remedial setting. (citations deleted) *Id.* at 422.

A possible nonremedial justification for a gender preference is provided by *Barhold v. Rodriguez*, 863 F.2d 233 (2nd Cir. 1988), which identified "operational need" for a balanced workforce as a possible compelling state interest. The court explained that "operational need" refers to a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public, and is respected by the community it serves. Another possibility is the "role model" theory. Although this rationale has not fared well as a justification for racial preferences subjected to the strict scrutiny test, *see Wygant v. Jackson Board of Education*, 476 U.S. 267, 276-77 (1986)(opinion of Powell, J.), perhaps it could survive the less demanding standard of intermediate scrutiny; there is a need for women faculty in some fields to demonstrate to young women the professional possibilities that are available. Finally, in some instances a gender preference might serve to enhance the diversity of a professional staff. Although its precise contours are unclear, a state interest in promoting diversity in a student body has been found to be "compelling" in the context of higher education. *Wygant* at 286 (opinion of O'Connor, J.).

Under heighted scrutiny, not only must the government show that a gender-based classification serves an important governmental objective, it must also show that the discriminatory means employed are substantially related to the achievement of the objective. The requirement of that close relationship assures that the validity of a

classification is determined through reasoned analysis rather than through the application of traditional assumptions about the proper roles of men and women. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-26 (1982). "When the government treats people differently because of their sex, equal-protection principles at the very least require that there be a meaningful factual predicate supporting a link between the government's means and its ends." *Lamprecht v. F.C.C.*, 958 F.2d 382, 398 (D.C. Cir. 1992).

In *Associated General Contractors of California, Inc. v. City & County of San Francisco*, 813 F.2d 922 (9th Cir 1987), the court upheld a preference it thought bordered on being overinclusive, but cautioned against preferences in areas where women were not disadvantaged.

> While governmental action, particularly where it is plainly remedial in character, need not operate with surgical precision, there must be strong assurances that it is not merely the result of patronizing assumptions about the status and abilities of women, but an attempt to provide assistance where it is needed and warranted." *Id.* 942.

The interests of those disadvantaged by a preference must also be considered. In *Conlin v. Blanchard*, 745 F.Supp. 413 (E.D.Mich. 1990), *aff'd*, 947 F.2d 944, the court approved an augmented certification plan, a process used to place qualified applicants who were members of protected classes in the pool of applicants considered for a given position in which minorities and women were underrepresented. The court noted that "[t]he interests of male employees were not unduly trammeled by the plan because the plan did not create an absolute bar to their promotion, did not require the discharge of employees, and was a temporary measure designed to attain a racial and gender balance in the work force." *Id.* at 423.

The leading case addressing a Title VII challenge to a gender-based preference in a voluntary affirmative action plan is *Johnson v. Transportation Agency*, 480 U.S. 616

(1987). The Transportation Agency unilaterally promulgated an affirmative action plan applicable to promotions of employees. The plan set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were underrepresented. The issue was whether taking an applicant's sex into account in making a promotion violated Title VII.

The Court first examined whether consideration of sex was justified by the existence of a manifest imbalance that reflected underrepresentation of women in traditionally segregated job categories, and found such an imbalance by comparing the percentage of women in various job categories with the percentage of qualified women in the area labor pool. The Court concluded that it was approporiate to take the gender of a qualified applicant into account to further a plan designed to eliminate a workforce imbalance in a traditionally segregated job category.

The Court next considered whether the plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement, and concluded that it did not. The plan set aside no positions for women. Sex was but one of numerous factors considered. No persons were automatically excluded; all were able to compete with other applicants. The denial of a promotion was not as burdensome as a dismissal would have been. Finally, the plan was intended to attain a balanced work force, not to maintain one.

In arriving at its decision, the Court established some basic principles to be used when affirmative action plans are challenged. First, the Court had held in a prior case that the burden lay with the challenger to demonstrate the unconstitutionality of an affirmative-action program involving a racial preference, and saw no basis for a different rule in this Title VII case involving a gender preference. Next, the Court set out the analytical framework for a reverse discrimination case under Title VII.

> Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, ... , that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff. *Id.* at 626-27.

Also, the Court noted in its opinion that the manifiest imbalance in job categories need not be such that it would support a prima facie case of discrimination against the employer. *Id.* at 631. The Title VII prohibition with which an employer must contend was not intended to extend as far as that of the Equal Protection Clause. *Id.* at 628, n. 6.

Finally, in a few instances the bona fide occupational qualification (BFOQ) exception to the general prohibitions of Title VII provides a possible nonremedial justification for a gender preference. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 405 (1977)(prison guards in contact positions must be male). But the possibility that being female would be a bona fide occupational qualification for a professional position seems remote. *International Union, UAW v. Johnson Controls*, 111 S.Ct. 1196 (1991) emphasized that under the BFOQ exception permissible discrimination based on sex is limited to those instances where an employee's sex or capacity to become pregnant interferes with the employee's ability to perform the job.

Conclusion

Some general observations about the legal viability of various affirmative action plans that extend some kind of preferences to women can be gleaned from the cases.

Such preferences have been struck down because there was not sufficient evidence of an intent to remedy the legacy of discrimination against women. Some courts

have required that the discrimination be attributable to the government entity extending the preference, *e.g.*, *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1190; other courts would have been satisfied with evidence of general social and economic discrimination, *e.g.*, *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993). Other gender preferences have been struck down because they were not substantially related to the stated goals, *e.g.*, *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992), or because they utilized an overly burdensome quota system, with no identifiable time limit, and did not consider other less burdensome alternatives, *e.g.*, *Quirin v. City of Pittsburgh*, 801 F.Supp. (W.D.Pa. 1992).

On the other hand, gender preferences have been upheld when courts have found that both of the basic requirements about goals and means have been met. First, the evidence demonstrated a need to remedy the legacy of discrimination against women, sometimes that imposed by the entity extending the preference, *e.g.*, *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 86, and sometimes that imposed by general economic and social forces, *e.g.*, *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875. Second, the preferences were substantially related to the problem sought to be remedied, *e.g.*, *Associated General Contractors v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), and did not unduly burden the interests of innocent men who are disadvantaged by the preference, *e.g.*, *Conlin v. Blanchard*, 745 F.Supp. 413 (E.D.Mich. 1990), *aff'd*, 947 F.2d 944.

These principles should be kept in mind when considering the advisability of using gender preferences in professional hiring. Both the need for such a preference and the means used to implement it should be thought through very carefully.