DOCUMENT RESUME

ED 381 864 EA 026 649

AUTHOR Ruiz, Celia M.
TITLE Legal Standards Regarding Gender Equity and Affirmative Action.
PUB DATE Mar 95
NOTE 14p.
PUB TYPE Guides - Non-Classroom Use (055) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Affirmative Action; *Compliance (Legal); Constitutional Law; *Court Litigation; Elementary Secondary Education; Employment Practices; Higher Education; *Legal Problems; *Legal Responsibility; Reverse Discrimination; Sex Discrimination

ABSTRACT

Because affirmative-action programs require governmental entities to act in a race-conscious and/or gender-conscious manner, public employers' affirmative-action programs may be challenged under both Title VII and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. This document describes the standards of review by which courts examine the appropriateness of an affirmative-action plan--the Title VII standard of judicial review and the equal-protection standards of review. The paper addresses the dilemma of whether school districts should formulate affirmative-action plans based on the requirements of Title VII or on the demands of the Equal Protection Clause. To minimize liability, it is recommended that public colleges and universities formulate their affirmative-action plans in accordance with the stricter requirements of the Equal Protection Clause. With the omission of the Sixth Circuit, gender-based affirmative-action plans are constitutional if they are substantially related to government interests. The distinctions between important government interests and substantially related interests are described. In conclusion, public education employers are mandated by federal law to implement gender-based affirmative-action programs if their past employment practices have had a discriminatory effect on women. Programs may also be instituted to redress the results of past social discrimination against women. However, an ill-devised plan may provide grounds for charges of reverse discrimination against the employer. (LMI)

LEGAL STANDARDS

REGARDING GENDER EQUITY

AND AFFIRMATIVE ACTION

Celia M. Ruiz, Esq.
RUIZ & SCHAPIRO
A Professional Association
of Law Firms
Transamerica Pyramid
600 Montgomery Street, 14th Floor
San Francisco, California 94111
(415) 395-9005

301 East Ocean Blvd., Suite 540
Long Beach, California 90802
(310) 436-5534

March 20, 1995

LEGAL STANDARDS REGARDING GENDER EQUITY AND AFFIRMATIVE ACTION[1]

Public colleges and universities have an affirmative duty under federal law to eliminate the pernicious vestiges of racial and sexual discrimination in every aspect of their programs, including in the area of employment. This duty stems from Title VII of the Civil Rights Act of 1964[2] and from decisions of the United States Supreme Court.[3]

Although public colleges and universities have a duty under federal law to implement affirmative action employment programs, they should be aware of the possibility that an ill-designed program may give rise to impermissible "reverse discrimination."

In employment law, the term "affirmative action program" signifies a package of hiring, layoff, recruitment and promotional rules that is designed to remedy the effects of past or present work place discrimination based on race, ethnicity, gender or other protected status. Affirmative action programs invariably require employers to base employment decisions, at least in part, on

---

[1]Permission to Reprint Only Upon Request.

[2]42 U.S.C. §2000e et seq. (1982).

[3]Wygant v. Jackson Board of Education, 476 U.S. 267, 277, 106 S.Ct. 1842, 1848, 90 L.Ed.2d 260 (1986); see Green v. New-Kent County School Board, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 1693-1694, 20 L.Ed.2d 716 (1968); see also Brown v. Board of Education 349 U.S. 294, 299, 75 S.Ct. 753, 755, 99 L.Ed. 1083 (1955) (Brown II). Under Title VI of the Civil Rights Act of 1964, educational institutions which receive federal funds also have a duty not to practice unlawful employment discrimination when they select individuals for internships and for work-study positions. 42 U.S.C. §2000d, 34 C.F.R. §100.3(b)(vi) (c).

racial or gender categories. Thus, some view such programs to be yet another form of racial or gender discrimination despite their remedial purposes.

In the sphere of public employment, affirmative action programs require governmental entities to act in a race-conscious and/or gender-conscious manner. Therefore, public employers' affirmative action programs may be challenged under both Title VII and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[4] However, the standard of review by which courts examine the appropriateness of an affirmative action plan depends on whether the underlying legal challenge alleges that the plan violates the Equal Protection Clause or Title VII. Generally, the standard of review employed by courts in equal protection challenges is far more stringent than the standard used in Title VII cases.[5] Thus, the applicable standard determines how

---

[4]Originally, Title VII's anti-discrimination provisions were not applicable to public employers. However, in 1972, Congress enacted the Equal Employment Opportunity Act which amended Title VII by extending its coverage to public sector employers such as state governments and their subdivisions. 42 U.S.C. §2000e; see Dothard v. Rawlinson, 433 U.S. 321, 323, fn.1, 97 S.Ct. 2720, 2724, fn.1, 53 L.Ed.2d 786 (1977).

[5]See Johnson v. Transportation Agency, 480 U.S. 616, 626, 107 S.Ct. 1442, 1449, 94 L.Ed.2d 615 (1987); cf. Wygant, supra, 106 S.Ct. at 1846-1847. Prior to 1979, the Supreme Court interpreted Title VII to constitute a blanket prohibition against all types of racial employment preferences, including programs that give preference to minorities and to women. Since the 1979 case of Steelworkers v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court has endorsed voluntary affirmative action programs which favor women and members of racial minorities as a means to *protect* historically disadvantaged groups *against* discrimination. Weber, and cases decided under it, have since become "a important part of the fabric of our law." Johnson, supra, 107 S.Ct. at 1457-1459 (Stevens, J., concurring).

difficult it will be for a public college to legally justify its affirmative action program.

A. TITLE VII STANDARD OF JUDICIAL REVIEW

When non-minority or male plaintiffs challenge affirmative action plans under Title VII, courts employ a "burden-shifting" analysis. The burden-shifting analysis was first articulated by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green[6] in order to "...sharpen the inquiry into the elusive factual question of intentional discrimination."[7]

According to the Court, employers who voluntarily adopt affirmative action plans have not committed illegal "reverse discrimination" under Title VII if they possess sufficient and legitimate reasons for adopting the plan. "Sufficient reasons" include **manifest racial imbalances** in traditionally segregated job categories.[8] The Court's emphasis on "manifest racial imbalances" implies that,

---

[6]411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Justice Scalia, however, argues that legal analyses of affirmative action plans should proceed under the strict scrutiny standard articulated in Wygant even where the cause of action arises under Title VII. Johnson, supra, 107 S.Ct. 1468-1469.

[7]Texas Dept. of Consumer Affa s v. Burdine, 450 U.S. 248, 255, n. 8, 101 S.Ct. 1089, 1094, n. 8, 67 L.Ed.2d 207 (19 1).

[8]See Johnson, supra, 107 S.Ct. at 1449-1451. Thus, employers need *not* show that they have perpetuated discriminatory employment practices in the past before they can voluntarily adopt affirmative action programs in compliance with the purposes of Title VII.

under Title VII, statistical evidence alone may be sufficient to justify employers' voluntary adoption of affirmative action plans.[9]

B. EQUAL PROTECTION STANDARDS OF REVIEW

The Equal Protection Clause is applicable only to public employers because it is intended to govern solely the actions of governmental entities. However, unlike in Title VII cases, the Supreme Court had substantial difficulties in reaching a consensus on the criteria that should be used to examine the legality of affirmative action plans under the Equal Protection Clause. In the late 1980's, a majority of Supreme Court Justices finally agreed to apply a "strict scrutiny" standard in race-based affirmative action cases. The eventual "resolution" of this question mirrored changes in the Court's composition during that decade.

In contrast, the lawfulness of gender-based affirmative action programs instituted by public employers is generally measured by an "intermediate" level of judicial scrutiny. Under intermediate scrutiny, courts would uphold the legality of the public employer's plan only if the relevant gender classifications are substantially related to important governmental objectives.[10] This formulation of the intermediate level of judicial scrutiny is more severe than the

---

[9]The statistical evidence should show gross disparities in the number of racial minorities and women who are employed by a public entity, and the number of such individuals who are present in the pool of all qualified workers.

[10] Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976); Mississippi Univ. for Women v. Hogan, 458 U.S. at 724, 102 S.Ct. at 3336; see City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). Note that the "intermediate" standard is identical to the old "substantial relation" test set forth in Bakke, supra.

"traditional" standard used by courts to determine the legality of alleged violations of the equal protection clause by a public entity.[11] At the same time, it is less stringent than the "strict scrutiny" standard which requires governmental entities to show that their race-based classification schemes are narrowly tailored to achieve a compelling state interest.[12]

---

[11] Under the "traditional" standard, courts presume the validity of the relevant governmental classification and would uphold its legality so long as the governmental entity can establish that the classification is rationally related to a legitimate state interest. Schweiker v. Wilson, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); see City of Cleburne v. Cleburne Living Center, 473 U.S. at 439-440, 105 S.Ct. at 3254. However, the "traditional" equal protection standard is abandoned if the relevant classification is considered "suspect" due to various reasons which usually have historical underpinnings. Suspect classifications generally involve race, national origin, or alienage. The U.S. Supreme Court also abandoned the traditional equal protection yardstick in cases involving government-imposed gender classifications because gender "...generally provides no sensible ground for differential treatment...(r)ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways likely reflect outmoded notions of the relative capabilities of men and women." Cleburne, 472 U.S. at 440-441, 105 S.Ct. at 3254-3255. However, it is interesting to note that the Supreme Court (except in an outdated plurality opinion by Justice Brennan) did not expressly find gender to be a "suspect" classification.

[12] This standard is applicable to classifications based upon race, national origin, or alienage. Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). In Frontiero, a plurality of the Justices held that gender classifications must also be subject to "strict judicial scrutiny." However, subsequent Supreme Court cases refused to address the question of whether gender classifications are also "suspect"; subsequent cases simply stated that gender classifications demand a heightened level of judicial examination which would require public entities to establish that such classifications are substantially related to important governmental interests. This latter standard came to be known as the "intermediate" judicial standard for examining alleged equal protection violations by public entities. See Stanton v. Stanton, 421 U.S. 7, 13, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975).

Based upon the foregoing discussion, it appears logical that the legality of any gender-based affirmative action program, if challenged under the Fourteenth Amendment's Equal Protection Clause, would be evaluated in accordance with the "intermediate" judicial yardstick. Hence, the United States Courts Of Appeals for the Ninth Circuit has expressly adopted the intermediate scrutiny standard in these cases.[13]

Somewhat surprisingly, however, the intermediate standard is not uniformly employed by all Circuit Courts of Appeals in cases involving the constitutionality of gender-based affirmative action programs. In particular, the Sixth Circuit[14] held that gender-based affirmative action programs should be evaluated in accordance with the strict scrutiny standard of judicial review.[15]

---

[13] Coral Const. Co. v. King County, 941 F.2d 910, 931 (9th Cir. 1991), citing Associated General Contractors v. City and County of San Francisco, 813 F.2d 922, 932 (9th Cir. 1987).

[14] In the Sixth Circuit, there may be a distinction between a "gender-conscious" affirmative action plan and a plan which perpetuates a "gender preference". It is possible that the former may be subject to the intermediate level of scrutiny while the latter is subject to strict judicial scrutiny. (Generally Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993)) However, it appears that in the Sixth Circuit, an affirmative action plan which requires the hiring of less qualified women before better qualified men will always be characterized as a "gender preference" plan. Id.

[15] Brunet v. City of Columbus, 1 F.3d 390, 403-404 (6th Cir. 1993); see Colin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989); but see F. Buddie Contracting Co. v. City of Elyria, Ohio, 775 F.Supp. 1018, 1031 (N.D.Ohio 1991) (where a District Court Judge in the Sixth Circuit used the "intermediate standard" to examine gender-based affirmative action program). Such a result may be explained by the perception that to employ intermediate scrutiny to measure gender-based affirmative action programs will produce the anomalous result of making it easier for legislatures to enact such programs, even though African-Americans have suffered more egregious discrimination over time. Contractors Ass'n of Eastern

C. THE DILEMMA: SHOULD DISTRICTS FORMULATE AFFIRMATIVE ACTION PLANS BASED UPON THE REQUIREMENTS OF TITLE VII OR UPON THE DEMANDS OF THE EQUAL PROTECTION CLAUSE?

At first glance, it would appear that the equal protection standard for permissible affirmative action programs is much more stringent than Title VII's standard. However, there may exist few practical differences between the two standards in their application.

Under both Title VII and the equal protection analyses, "(first) there must be adequate justification for the use of affirmative action...(s)econd, if the plan is justified, the court must then determine that it does not unnecessarily burden the rights of non-minority employees."[16] In particular, Justice O'Connor attempted to reconcile the Title VII and the equal protection standards of judicial review by suggesting that public employers will be found to have a "firm basis" to implement affirmative action plans under the Equal Protection Clause when there is "demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support *a prima facie (Title VII) pattern or*

Pennsylvania v. City of Philadelphia, 735 F.Supp. 1274, 1302 (E.D.Pa. 1990).

[16]U.S. v. City and County of San Francisco, supra at 1301; see also Johnson, 107 S.Ct. at 1461 (O'Connor, J., concurring).

practice claim by minority teachers..." (emphasis added)[17] This view has found support among some United States District Judges.[18]

Since there may exist few practical differences between Title VII and equal protection analyses, and in order to minimize possible risks of liability, prudent public colleges and universities should formulate their affirmative action plans in accordance with the requirements of the Equal Protection Clause. An affirmative action plan which complies with the stricter demands of the Equal Protection Clause will invariably comport with Title VII's requirements.

D. APPLYING THE INTERMEDIATE JUDICIAL SCRUTINY TO GENDER-BASED AFFIRMATIVE ACTION PROGRAMS

As previously noted, except in the Sixth Circuit, gender-based affirmative action programs are evaluated in accordance with the intermediate equal protection yardstick. That is, gender affirmative action plans are constitutional if they are substantially related to important governmental interests.

1. Important Government Interests

One major practical difference between the "intermediate" judicial standard and the "strict" scrutiny standard when applied to affirmative action plans is that, unlike strict scrutiny analyses, under the former intermediate standard, a district's desire to remedy societal discriminations encountered by women may be cited as a sufficiently "important" state interest for the district to institute a gender-based

---

[17]Wygant, supra, 106 S.Ct. at 1856.

[18]See U.S. v. City and County of San Francisco, supra.

affirmative action program.[19] The Supreme Court has stated that "(r)eduction in the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective."[20]

Of course, mere recitation by a public entity that its affirmative action plan is intended to compensate women for societal discrimination would be inadequate to insulate the entity from equal protection liability. Districts must be prepared to offer evidence that women have suffered active or passive societal discrimination in the relevant industries that are located in their areas. Such evidentiary burden may be satisfied by introducing affidavits from individuals who have suffered such discrimination in the past.[21]

However, it appears unlikely that a public educational institution can justify a gender-based affirmative action program on the ground that such programs are necessary in order to provide female "role models" for its students. Although there exists few if any Supreme Court cases that address the "role model" theory in the context of gender-based affirmative action programs, it is evident that several members of the existing Court do not view this theory with

---

[19] Associated General Contractors, 813 F.2d at 941. Societal discrimination, however, is not sufficiently "compelling" to justify a public employer's voluntary adoption of a race-based affirmative action program.

[20] Califano v. Webster, 430 U.S. 313, 317, 97 S.Ct. 1192, 1194, 51 L.Ed.2d 360 (1977).

[21] See Coral Construction Co., 941 F.2d at 932-933.

favor. In Wygant, Justice Powell, speaking for Justices Rehnquist, Burger, and O'Connor, criticized the "role model" theory as follows:

> "...the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose...Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students."[22]

Because the above criticism is directed at the scope and possible harm posed by any affirmative action program that is based on the "role model" theory, it appears likely that several members of the existing Court would not rule in favor of the "role model" theory even in cases involving gender-based affirmative action plans.

2. Is the Gender-Based Plan "Substantially Related" to the Important Government Interest?

Under the intermediate judicial scrutiny, a gender-based affirmative action plan also must be "substantially related" to the identified important governmental interest. The criteria often used by Courts to measure whether a plan is "substantially" related to the identified goal include: the scope of the advantage given to women, (e.g. whether an advantage is given to women even

---

[22] Wygant, 476 U.S. at 275-276, 106 S.Ct. at 1847-1848.

in those areas where they do not have a disadvantage), and the degree of burden placed upon qualified men.[23] However, these criteria are rarely insurmountable.

In Associated General Contractors, the Ninth Circuit held that a gender-based contractors preference program in favor of women-owned businesses instituted by the City and County of San Francisco survived a challenge even though the preference was extended to virtually every industry in which San Francisco contracted with outside bidders. The Court noted that "(a)lthough the city's program may extend preferences to some fields where women are not disadvantaged, experience suggests that these are still the exceptions."[24] In this case, however, the Court indicated that its ruling might have been different if the challenger offered credible evidence that women received preference even in fields where they have not been disadvantaged.

In Coral Construction Co., another contractor set-aside program decided by the Ninth Circuit, the Court held that the State of Washington's system for awarding contracts to women-owned businesses is a legitimate means to further its objective of remedying past and present societal discrimination against women contractors. The court ruling is based upon the flexible nature of Washington's gender-affirmative action plan. Under Washington's plan, for contracts under $10,000, women-owned businesses receive preferences if their bids are within 5%

---

[23] See Coral Construction Co. v. King County, 941 F.2d at 932; see also Associated General Contractors, 813 F.2d at 941.

[24] Associated General Contractors, 813 F.2d at 941.

of the lowest bid. On contracts over $10,000, the plan requires a successful contractor to use women-owned businesses for a prescribed percentage of the work performed on the contract, while the actual percentage is determined on an ad hoc basis according to the availability of qualified women-owned businesses. The affirmative action plan also permits a reduction in the amount of the subcontractor set-aside levels for a given contract if it is not feasible to meet higher levels, qualified women-owned businesses are unavailable, or their prices are not competitive.[25]

E. CONCLUSION

Public colleges and four-year universities have a duty under federal law to implement gender-affirmative action programs if their past employment practices have had a discriminatory effect upon women. Public education employers may also institute such programs to redress the results of past societal discriminations against women. However, public employers must exercise care in formulating any affirmative action plans; an ill-devised plan may subject the relevant employer to liability for "reverse discrimination" under either Title VII or under the principles of the Equal Protection Clause.

By Celia M. Ruiz, Esquire[26]

---

[25] Coral Construction Co., 941 F.2d at 914, 932.

[26] Ms. Ruiz is an attorney in San Francisco who specializes in employment and public education law and litigation.