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Legality of Voluntary Affirmative Action Plans

Many nongovernmental employers are placing greater emphasis on increasing the racial or gender diversity of their workforces.

Employers have multiple objectives for pursuing diversity. Some employers do so in connection with their obligations as government contractors to pursue hiring goals.[1] Other employers do so voluntarily to enhance equal employment opportunities for members of historically disadvantaged groups.

Employers voluntarily pursuing the goal of increased diversity in the workplace frequently adopt written plans providing for specific benefits for females and minorities. These plans are referred to generically as "voluntary affirmative action plans." Such plans take varied forms and may include programs addressing various employment practices, including hiring, training, retention and promotion.

While employers promulgate voluntary affirmative action plans for what they firmly believe to be laudable and legitimate business reasons, employees in majority groups have occasionally challenged such actions as violating the federal antidiscrimination mandates of Title VII of the Civil Rights Act of 1964, 42 USC §§2000e-2000e-17. In these instances, employees in majority groups assert that they are denied specific benefits or opportunities based on their own race or sex, and that Title VII specifically prohibits such discrimination. Courts and commentators have sometimes referred to such claims as "reverse discrimination."

In this article, we analyze the legal standards courts have applied in determining whether voluntary affirmative action plans comply with Title VII. We also identify the critical issues nongovernmental employers should consider to ensure that their voluntary affirmative action plans comply with Title VII and applicable case law.

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'Weber' and 'Johnson'

Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 USC §§2000e-2(a) & 2(d). The Supreme Court construed this fundamental prohibition to recognize claims by members of both the majority and nonmajority groups for violations of Title VII. *McDonald v. Santa Fe Trail Transp. Co.*, 427 US 273, 280 (1976).

In *United Steelworkers of America v. Weber*, 443 US 193 (1979), a collective bargaining agreement required that the employer reserve 50 percent of the openings in a training program for African-American employees until the percentage of African-American craft workers in the plant was commensurate with the percentage of African-Americans in the local labor force. *Weber*, 443 US 193. When Brian Weber, a white applicant for admission into a company's training program, was denied admission into the program, Mr. Weber claimed that had the voluntary affirmative action plan not been in place, he would have been admitted to the training program because his seniority was greater than the seniority of African-American employees who were admitted. He claimed that this application of the collective bargaining agreement to him violated Title VII's prohibition of race discrimination.

The Supreme Court rejected Mr. Weber's claim of race discrimination and ruled that Title VII permits some, but not all, voluntary race-conscious affirmative action. The Court declined to define the "line of demarcation" between permissible and impermissible affirmative action. Rather, the Court stated that a permissible voluntary affirmative action plan must: (1) further Title VII's statutory purpose by "break[ing] down old patterns of racial segregation and hierarchy" in "occupations which have been traditionally closed to them"; (2) not "unnecessarily trammel the interests of white employees"; (3) be "a temporary measure [that]…is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." 443 US at 208.

The Court recognized that Title VII shall not "be interpreted to require any employer…to grant preferential treatment to any individual or…group…on account of an imbalance which may exist." 42 USC §2000e-2(j). Nevertheless, the Court noted that this provision did not use the phrase "require or permit," and, therefore, "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." Id. at 207.

The Supreme Court further clarified its holding in *Weber* almost a decade later in *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 US 616 (1987). In that case, a transportation agency promulgated a voluntary affirmative action plan "intended to achieve a statistically measurable yearly improvement in hiring, training and promotion of women and minorities…in all major job classifications where they were underrepresented." The plan allowed the consideration of the sex of an applicant as a factor for hiring and promoting, noting that women were represented in numbers far less than their proportion of the county labor force both in the agency as a whole and in several job categories. *Johnson*, 480 US at 620-21. A male employee claimed that this affirmative action plan violated Title VII when a female employee was promoted although she had received a lower ranking than two males in the interview process.[2]

First, the Court reaffirmed that "an employer seeking to justify the adoption of a [voluntary affirmative action] plan need not point to its own prior discriminatory practices, nor even evidence of an 'arguable violation' on its part." Id. at 630.

Rather, it need point only to a "'conspicuous… imbalance in traditionally segregated job categories.'" Id. Second, it established that "a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise…." Id. at 631-632. In contrast, where jobs require special training, the proper "comparison should be with those in the labor force who possess the relevant qualifications." Id. at 632. Applying this newly detailed framework, the *Johnson* Court determined that the plan satisfied the *Weber* criteria.

While the Supreme Court has not had occasion to revisit the issue of voluntary affirmative action plans in the 19 years since *Johnson*, lower courts have had numerous opportunities to apply the *Weber* and *Johnson* standards. Although the Supreme Court rejected the claims of reverse discrimination and upheld the affirmative action plans in both *Weber* and *Johnson*, a number of courts have rejected employers' reliance on affirmative action plans where the employer was not able to meet the standards set forth by the Supreme Court.

'Schurr'

For example, in *Schurr v. Resorts International Hotel, Inc.*, 196 F3d 486 (3rd Cir. 1999), the U.S. Court of Appeals for the Third Circuit reversed a district court's decision to uphold an affirmative action plan that was mandated by state law on the ground that the plan violated Title VII. The Casino Control Act, established by the Casino Control Commission, required that casino licensees take "affirmative steps" to ensure that women and other minorities "are recruited and employed at all levels of the operation's work force…." *Schurr*, 196 F3d at 488-89 (citing NJAC 19:53-4.3(a)). The statute specifically required casino licensees to "improve the representation 'of women and minorities in job titles within EEOC job categories in which the casino licensee is below the applicable employment goals established by the [Code].'" Id. at 489 (citing NJAC 19:53-4.3(b)(2)). Plaintiff Karl Schurr, a white male, sought employment with Resorts. Resorts narrowed the pool of applicants "under consideration to [Mr.] Schurr and…a black male…[who were viewed as] equally qualified." Id. at 490. Where the percentage of minorities employed by Resorts for the job category at issue was below the goal established by the Casino Control Act, Resorts believed it "was obligated to hire the minority candidate if one of the two qualified applicants for a position was a minority…." Id.

Following the hiring decision, Mr. Schurr sued Resorts and the Casino Control Commission, alleging that the affirmative action plan violated Title VII, among other statutes. Finding that the affirmative action plan "[was] not based on any finding of historical or then-current discrimination in the casino industry, …[nor was it] put in place as a result of any manifest imbalance or in response to a finding any relevant job category was or ever had been affected by segregation," the court held that the plan relied on by Resorts violated Title VII. Id. at 497-98. [3]

> Some courts also have applied Title VII to reject claims of reverse discrimination based on supported affirmative action plans, as the Supreme Court did in 'Johnson.' For example, in 'Farmer,' a university had a voluntary affirmative action plan where a department hiring a minority candidate for the faculty got permission from the university to hire an additional faculty member.

'Farmer'

By contrast to *Schurr*, in appropriate circumstances courts also have applied Title VII to reject claims of reverse discrimination based on appropriately supported affirmative action plans, as the Supreme Court did in both *Weber* and *Johnson*. For example, in *University and Community College System of Nevada v. Farmer*, 930 P2d 730 (Nev. 1997), a university established a voluntary affirmative action plan where a department hiring a minority candidate for a faculty position received permission from the university to hire an additional faculty member. *Farmer*, 930 P2d at 732. Plaintiff Yvette Farmer, a white female, applied for a faculty position in the sociology department of the university. Although the search committee included Ms. Farmer as one of three finalists, the position ultimately went to a black African male emigrant. The department hired Ms. Farmer one year later as a result of the additional position created by the policy, but Ms. Farmer nonetheless brought suit, claiming that the affirmative action plan violated Title VII. Id. at 733. The university's Affirmative Action Report revealed that only one percent of Nevada's faculty were African-American, and 87 to 89 percent of the full-time faculty were white; accordingly, the plan was instituted to "rectify the racial imbalance."

The court held that the university attempted to attain—and not maintain—a racial balance in its faculty by use of its voluntary affirmative action plan. Because the university's plan conformed to the *Weber* factors, the court held that it did not violate Title VII. Id. at 735-36.

Practice Pointers

As demonstrated by the *Schurr* case, nongovernmental employers who pursue diversity initiatives pursuant to voluntary affirmative action plans should ensure compliance with the Supreme Court's mandates in *Weber* and *Johnson*.[4] In particular, employers may wish to ask the following questions regarding their voluntary affirmative action plans:

- Is the plan intended to break down old patterns of segregation and hierarchy in occupations which have been traditionally closed to women or minorities?
- Is the plan premised on an understanding of what the Supreme Court meant by "traditionally segregated job categories"?
- Does the plan avoid unnecessarily trammeling the interests of white or male employees by ensuring the opportunities continue to be available to them?
- Does the plan envision an end point at which time the plan will no longer be necessary, so that it is viewed as a temporary measure that is not intended to maintain racial or gender balance, but simply to eliminate a manifest racial or gender imbalance?
- Is the plan based upon statistics demonstrating a manifest imbalance between the number of women or minorities in the relevant labor market who are qualified for the positions and the number of women and minorities in the workforce?
- Is the plan predicated on a sufficient level of disparity to constitute a manifest imbalance worthy of a remedy by affirmative action?

Given the complexity of the law governing the above issues, employers certainly should consult with counsel in promulgating or revising voluntary affirmative action plans.

1. Exec. Order No. 11,246, 3 CFR 339 (1964-1965), reprinted as amended in 42 USCA §2000e (2003).

2. "Where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause," but because neither party raised constitutional issues, the *Johnson* Court decided "only the prohibitory scope of Title VII." Id. at 620, n2.

3. See also *United States v. New York City Board of Education*, 2006 WL 2591394 (EDNY Sept. 11, 2006) (where an affirmative action plan granted preferential seniority as to layoffs, these sections failed Title VII's unnecessary-trammeling test).

4. In addition to compliance with the standards set forth by *Weber* and *Johnson*, employers also should consider the applicability of EEOC regulations specifying guidelines for affirmative action plans that the EEOC will view as satisfying the requirements of Title VII. See 29 CFR §§1608.4 & 1608.10 (2006).