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THE CASE FOR MAINTAINING AND ENCOURAGING
THE USE OF VOLUNTARY AFFIRMATIVE
ACTION IN PRIVATE SECTOR
EMPLOYMENT

BARBARA J. FICK*

INTRODUCTION

A precondition for any discussion of affirmative action is defining the meaning of the term. The concept of affirmative action has been bandied about in such an elastic way that many people view it as a code word for reverse discrimination, lower standards or rigid quotas. As used in this paper, affirmative action is a flexible tool to promote equality of opportunity in the employment context. The purpose of affirmative action is to remedy past and present discrimination, as well as to prevent future discrimination. Consistent with the Affirmative Action Guidelines promulgated by the Equal Employment Opportunity Commission, an affirmative action plan identifies employment policies and practices which present barriers to the hiring, advancement and retention of women and minorities, and establishes goals and timetables as a device for measuring progress in overcoming racial and gender discriminatory practices.

An affirmative action plan is based on merit, not the lowering of standards. An affirmative action plan analyzes the employer's current workforce to determine whether there is a manifest imbalance between the racial and gender composition of its workforce and the composition of the "qualified" labor pool from which the employer draws its employees. Where such an imbalance occurs, the employer analyzes its job policies and procedures in an attempt to identify, and discontinue, those practices which may be causing the imbalance. The plan establishes a timetable, taking into account employee turnover and the legitimate interests of non-minority employees, during which time the employer can expect to achieve a racial- and gender-balanced workforce. The plan does not result in hiring unquali-

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fied applicants, nor does it completely bar non-minority candidates from consideration.

This paper will discuss affirmative action only as it is practiced in the private sector employment context. Affirmative action undertaken by federal, state or local government entities is subject to a different set of legal restrictions, and may be justified by different considerations, which will not be discussed herein.

THE LEGALITY OF VOLUNTARY PRIVATE SECTOR AFFIRMATIVE ACTION

The legality of the implementation and maintenance of voluntary private sector affirmative action plans under Title VII of the Civil Rights Act has been affirmed by the Supreme Court in both United Steelworkers of America v. Weber, 443 U.S. 193 (1979) and Johnson v. Transportation Agency, 480 U.S. 616 (1987).

In Weber, the employer's affirmative action plan set aside 50% of the openings in a craft-training program for black employees, to be effective until the number of black craft workers at the plant approximated the percentage of blacks in the local labor force. Less than 2% of the employer's craft workers were black, even though 39% of the labor force was black. The employer established the craft-training program in order to train its own production workers to fill craft openings. No special qualifications were needed to enter the program; the employer used seniority and the affirmative action plan to designate the entrants. A white production employee who was denied entry to the program challenged the affirmative action plan in court, alleging that it discriminated on the basis of race in violation of Title VII. The lower courts agreed, holding that all employment preferences based on race, even those pursuant to an affirmative action program, violated Title VII. The Supreme Court disagreed and reversed the holdings of the lower courts.

Initially, the Court noted that an interpretation of Title VII to forbid all race-conscious affirmative action would be contrary to the purpose sought to be achieved by the law. The statute was intended to cause employers to evaluate their employment practices and attempt to eliminate "the last vestiges of an unfortunate and ignominious page in this country's history." Title VII was not meant as a purely reactionary statute for prosecuting offenders, but was also intended to spur proactive conduct by employers aimed at preventing discrimination.

In discussing the Congressional purpose behind Title VII, the Court read the language of § 703(j) as an indication that Congress chose not to prohibit all race-conscious affirmative action. Section 703(j) states that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of . . . race . . . ." This language does not, however, forbid voluntary action by an employer.

Additionally, the Court noted that Congress wanted to prevent undue federal regulation of business which would interfere with or limit "traditional business freedom" or "management prerogatives" in running the business, including the freedom to establish voluntary affirmative action programs.

Finally, the Court suggested several criteria to consider in determining whether an affirmative action plan is "bona fide" in the sense that it is consistent with the policy and purpose of Title VII. First, the plan must be designed to break historic patterns of racial segregation in employment opportunities and jobs. In Weber, the clear imbalance between the racial composition of the employer's craft force and the local labor force suggested such historic patterns. Second, the plan must not unnecessarily trammel the interests of white employees. In Weber, no white employees lost their jobs because of the plan, and operation of the plan did not absolutely bar white employees from entry into the training program (indeed, 50% of the slots were filled by whites). Last, the plan must be a temporary measure designed to eliminate racial barriers to employment, not to maintain an already achieved racial balance. In Weber, the plan itself stated that it would end when the percentage of black craft workers approximated the percentage of blacks in the labor force.

In Johnson, the employer used an affirmative action plan in making promotions to jobs in which women were significantly under-represented. The plan required the employer to consider gender as a plus factor when making a decision about whom to promote from among a pool of qualified applicants. When a job vacancy arose for a position of dispatcher, twelve employees applied for the promotion, and seven were found to

3. Id. at 195.
4. Id. at 207.
5. Id. at 200.
6. Although this case involved a public sector employer, the employer's conduct pursuant to its voluntary affirmative action plan was challenged only under Title VII. The petitioner did not raise a constitutional challenge to the plan under the Equal Protection Clause of the Fourteenth Amendment. The Court, therefore, limited its analysis to Title VII jurisprudence.
meet the qualifications for the job. In making its choice from among the seven qualified candidates, the employer considered the fact that there were no women currently employed in the skilled craft category and promoted a woman. A man who was rejected for the job alleged that the employer's decision was sex discrimination in violation of Title VII. The Court of Appeals held that the employer had acted pursuant to a bona fide affirmative action plan; therefore, taking gender into account was lawful under Title VII.

The Supreme Court agreed, and in its holding reaffirmed the crucial role that voluntary employer action plays in eliminating the effects of discrimination in the workplace. The Court found that the employer's affirmative action plan met the criteria established in *Weber* and was therefore valid under Title VII. There was a manifest imbalance between the percentage of qualified women in the labor force and the percentage of women actually employed by the employer. The plan did not authorize the absolute promotion of women; rather, gender constituted one factor among others, including qualifications, to be taken into account in making the decision. No male employee lost his job due to the plan, nor was any male employee barred from consideration for a promotion. Lastly, the plan was temporary in nature, designed to attain a balanced workforce.

The force and continuing applicability of the *Weber* and *Johnson* decisions to private sector affirmative action plans has not been undermined by the Supreme Court's recent rulings on the use of set-asides and minority preferences in the public sector. The latter cases, including the Court's most recent decision in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), are firmly embedded in constitutional jurisprudence and equal protection analysis and apply the strict scrutiny test to governmental conduct based on race. Such constitutional analysis does not, however, apply to non-governmental, private sector employers. Thus, the decisions in *Weber* and *Johnson*, which not only uphold the legality of voluntary private sector programs, but also emphasize their consistency with the underlying goals of Title VII, are as persuasive and binding today as when they were issued.

**ENCOURAGING THE USE OF VOLUNTARY AFFIRMATIVE ACTION**

Even if affirmative action is still legal, that does not imply that it should necessarily be encouraged. It would be naive to suggest that the use of affirmative action in making employment decisions does not create resentment among at least a segment of the American populace. If the barriers to equality have already
been sufficiently breached to allow for equality of opportunity, then the advantages to be gained from further use of affirmative action may not be enough to offset the detriment created within the body politic from its continued use.

Have the barriers been breached? Initially, one can look at the numbers. For every dollar that white males earn, black males earn 74 cents, white females earn 71 cents and black females earn 64 cents.\(^7\) In 1991, the total unemployment rate for black workers (10.1\%) was almost twice that of white workers (5.6\%).\(^8\) The Glass Ceiling Commission Fact-Finding Report found that in Fortune 1000 industrial corporations and Fortune 500 service corporations, 97\% of senior-level managers are white, .6\% are black, .3\% are Asian, .4\% are Hispanic and 3-5\% are women.\(^9\) While these statistics paint a broad picture, they are not refined enough to allow for a conclusion that race or gender discrimination is the reason behind such disparities.

Other studies, however, which have refined the statistical analysis to account for factors such as education, length of employment or career choice, allow for the logical conclusion that race and gender discrimination is a cause for some differences in employment results. A study of the 1972-1975 graduating classes from the University of Michigan Law School revealed significant wage differentials between men and women lawyers after fifteen years of practice. Controlling for grades, hours of work, family responsibilities, labor market experience and choice of career paths, there still existed an unexplained 13\% earnings advantage for males over females.\(^10\)

A 1990 Business Week study of 3,664 business school graduates found that a woman with an MBA degree from a top-twenty business school earned 12\% less in her first year of employment than her male counterpart. The Glass Ceiling Commission Fact-Finding Report concluded that despite identical education levels, ambition and commitment to career, men still progress faster than women.

But perhaps the most telling statistics of all are those obtained in employment testing studies. Employment testing is a technique whereby job applicant characteristics are controlled by selecting, training and certifying testers to create a pool of job

\(^{7}\) Glass Ceiling Comm'n, Dep't of Labor, Good for Business: Making Full Use of Human Capital (1995).


\(^{9}\) See Glass Ceiling Commission, supra note 7, at 9.

applicants who appear to be equally qualified for the jobs they seek. These testers are then paired by either race or gender and sent out to apply for jobs. When tester pairs experience different treatment during the job interview process, it is fairly easy to infer that the difference in treatment was caused by the difference in either race or gender.

The Fair Employment Council of Greater Washington conducted employment testing studies in the D.C. area between 1990 and 1991. The results of the studies indicated that black testers were treated significantly worse than white testers 24% of the time and Hispanics were treated worse than whites 22% of the time. Job offers were given to 46.9% of the white testers, but only to 11.3% of the blacks. In those cases where job offers were given to both white and black testers, whites were offered higher wages 16.7% of the time.11

A 1990 GAO audit study compared the experience of Hispanic and white job testers; Hispanics received 25% fewer job interviews and 34% fewer job offers than whites.12 A 1991 Urban Institute Employment Discrimination study involving black and white testers showed that 20% of the time whites advanced further in the hiring process and 12.5% of the time whites received a job offer and blacks did not. A 1995 study in Philadelphia sent comparably matched resumes of male and female applicants to restaurants. In high-priced restaurants, men were more than twice as likely to receive an interview and five times more likely to receive a job offer.13

Just because the facts indicate that race and gender discrimination are still a very real problem does not necessarily mean that affirmative action is the solution. There are both state and federal laws which prohibit employment discrimination based on race and gender; although more vigorous enforcement of the existing laws is the answer. While obviously enforcement can only help in the fight to ensure equal opportunity, it is not a cure-all for the problem. From a strictly pragmatic viewpoint, more vigorous enforcement is unlikely. Government budgetary cutbacks are contracting enforcement resources. Moreover, given the cost in financial, as well as emotional, terms for an indi-

vidual who pursues litigation, there is no reason to suspect an increase in litigation will occur.

From a realistic viewpoint, litigation is unlikely to achieve the desired goal of eradicating discrimination. It is aimed at trying to fix a problem after it has occurred, rather than preventing it from happening in the first place. The damage has been done, the opportunity lost, and a life and career disrupted, even if years later the employee is hired or promoted.

Employment discrimination in the 1990s is more subtle and indirect than it once was, making it harder to identify and prove via litigation, but making it no less effective in its impact on women's and minorities' employment opportunities. For example, Thomas Pettigrew and Joanne Martin reported the results of two experiments studying and comparing the interactions between black job applicants and white interviewers and white job applicants and white interviewers:

Unknown to the interviewers, the applicants were carefully trained confederates who had rehearsed the same responses to all the interview questions. Consequently, there were no objective differences in the performances of the black and white applicants. But there were major differences in the behavior of the white interviewers as a function of whether they were questioning a black or white applicant. With a black applicant, there were significantly more behaviors that Mehrabian (1968) has labeled "low immediacy." Black applicants received less eye contact, less forward body lean, and shorter interviews—all indications of negative interaction. The black applicants also faced interviewers who sat further away and made many more speech errors.

Do these differential responses make a difference in the applicants' performance? To find out, Word and his colleagues reversed the design of the experiment, using white confederates as interviewers and white subjects as job applicants. The carefully trained interviewers responded to half the applicants with the low-immediacy behaviors that black applicants had received in the first study. The other half of the applicants received the "high-immediacy" behaviors that white applicants had experienced earlier.

The results are dramatic. The subjects exposed to the low-immediacy behaviors were aware that they had been treated coldly; they rated their interviewers as less adequate and friendly. More importantly, when independent judges later rated videotapes of the second study's applicants,
those whites who had been treated "as blacks" were judged to have been more nervous and to have performed less effectively. The interviewers' behaviors had caused a genuine decrement in applicant performance.

These two interview experiments capture important elements of modern racial behavior. Low immediacy behaviors are subtle—particularly in contrast to the blatant bigotry of dominative prejudice. Not surprisingly, whites are generally unaware of these shifts in their behavior; typically, they perceive black responses to them as caused not by their own behavior but by something distinctive about the blacks.14

Another subtle, indeed often unconscious, yet proven hiring phenomenon is what Lester Thurow has labeled "statistical discrimination." Statistical discrimination occurs when an employer uses a group identifier, such as race or sex, because it believes different traits attributable to the group are predictors of job performance, and the employer is either unable or unwilling to determine on an individual basis whether the applicant indeed possesses the group trait. With regard to a particular applicant, the employer's assumption that race or sex is a valid indicator of work behaviors may or may not be correct. But, if on the average the employer expects to be correct in his assumptions, he will continue to use group membership as a basis for choosing among otherwise qualified applicants.

For example, the employer believes that on the average, when women have children they will quit work. In reviewing applications, the employer is looking for candidates not only with the appropriate job skills, but also possessing job personality traits. The employer, in choosing among candidates, all of whom have similar skills, is looking for a "reliable" employee. In rejecting a female candidate, the employer may act on his assessment of the candidate's reliability based on his assumptions about the reliability of women generally.

A study done by Jomills Henry Braddock III and James McPartland found statistical discrimination affected hiring decisions for lower level jobs. In hiring for these types of positions, employers are generally unwilling to invest much time or effort in screening candidates; it is not cost-effective. The lack of information about specific candidates resulted in employers filling in the gaps by using "statistical discrimination." Braddock and McPartland found that "attitudinal traits are at least as important

as educational training in hiring decisions for many jobs, especially jobs filled by high school graduates.\textsuperscript{15} Their study also revealed that the average employer perceives racial and ethnic differences related to these attitudinal traits. Blacks are perceived as higher-risk employees; therefore, employers are more likely to avoid hiring minorities, particularly for those jobs where attitudinal traits are important.\textsuperscript{16}

A 1986 study for the Center for Social Organization of Schools at Johns Hopkins University on the effect of applicant race on job placement was based on a national survey of 1101 personnel officers and other executives responsible for hiring. The results showed that "white personnel officers tend to assign black male high school graduates to lower paying positions than those assigned to white male high school graduates."\textsuperscript{17} The study also found that among college graduates, race was a significant determinant of a female's job status. The authors suggested that these results were likely caused either by "old fashioned prejudice" or "statistical discrimination."\textsuperscript{18}

A related phenomenon that affects both hiring and promotion decisions is known as "homsocial reproduction," a term coined by Rosabeth Kanter in her book \textit{Men and Women of the Corporation}. "There is ample evidence from organizational studies that leaders in a variety of situations are likely to show preference for socially similar subordinates and help them get ahead."\textsuperscript{19} In other words, people tend to hire people like themselves; those inside an organization attract and select others like themselves. Peggy Stuart, in a 1992 article, noted that "[e]xecutives hire by the white male model." She quotes from the president of a corporate consulting firm who stated, "It's unintentional, but executives hire and promote by the white male model. They tend to pick guys like themselves."\textsuperscript{20} So long as whites and males continue to occupy the majority of managerial positions within corporations, the potential for homosocial reproduction exists.


\textsuperscript{16} Id. at 13-14.

\textsuperscript{17} Jomills Henry Broddock III et al., \textit{Applicant Race and Job Placement Decisions: A National Survey Experiment}, 6 INT'L J. SOC. \& SOC. POL'Y 3, 21 (1986).

\textsuperscript{18} Id.


Given the subtle and indirect nature of modern day employment discrimination, a proactive policy embodied in an affirmative action plan requiring decision-makers to confront the issues of race and gender as they make their employment decisions will help to prevent them from unconsciously discriminating in their decisions based on race and gender. The way in which discrimination operates shows us that when employers do not take race or gender into account the result is not neutral decision-making, but rather decisions which unconsciously favor whites and males.

THE NECESSITY FOR GOALS IN AFFIRMATIVE ACTION PLANS

Affirmative action plans without goals or numerical targets are ineffective. Many critics of affirmative action see goals or targets as requiring the hiring or promotion of unqualified persons in order to achieve the goal. This is rarely the case. First, it should be noted that the goal is based on the racial or gender composition of the "qualified" labor pool; the goal is established taking qualifications into account. Second, an employer establishes the timetable for achieving the goal taking into account employee turnover and the availability of qualified applicants. Third, the employer has voluntarily established the plan, and it is not in its own best interest to slavishly adhere to numerical goals of its own making at the expense of productivity and profitability. The employer's interests in achieving both its affirmative action goals as well as maintaining and increasing profitability ensure that goals remain flexible and not rigid. There is no incentive for an employer to hire an unqualified person merely to achieve a voluntarily set goal.

Given that goals are indeed flexible, it is fair to ask what purpose they achieve. In answer to this query, it is instructive to consider the U.S. experience in its negotiations to open the Japanese markets to American products. Throughout these negotiations, the U.S. has consistently demanded that numerical targets be set in order to assess the progress made toward achieving the objective of open markets. As a New York Times article noted, many American corporations argue that "while in formal terms, Japan's market may be open, in practice it is not."21 Japan's history of mercantilist protectionism, its deep cultural traditions, and the clubby nature of its business connections make the Japanese market difficult to break into. Thus, market share statistics become an objective indicator of progress toward market entry.

This same analysis could be applied to entry into the U.S. employment market by women and minorities. While in formal terms, given the legal prohibitions of Title VII, equal opportunity is assured, in practice it has not yet been achieved. The history of racial and gender discrimination in this country, the social and cultural biases and stereotypes, and the subtle and indirect form which much discrimination takes, make the employment market difficult to break into. Numerical goals are needed to measure progress so that the purpose of the affirmative action plan is more than merely aspirational.

It is somewhat of an axiom in corporate life that if you value a concept you measure it. Corporations measure corporate performance through profit and loss statements, they measure employee performance though job evaluations, and they measure product quality through customer surveys. If the concept of equality of job opportunity is to be truly valued in corporate America, it is important to measure the corporation's performance in this area as well. A measuring device is essential for determining progress; affirmative action goals and timetables are the means for assessing performance and progress.

CONCLUSION

Should the use of voluntary affirmative action in private sector employment be maintained and encouraged? Yes. Discrimination is not a thing of the past. Affirmative action is a useful and effective tool to help break the barriers to equality of opportunity. It is not the only answer, but it is an appropriate one. The Johns Hopkins study concluded that a commitment by employers to affirmative action accounts for a modest but significant increase in annual median wage for black male high school graduates, and employers with strong affirmative action policies were more likely to assign white female college graduates to more gender-balanced jobs. Most interesting, the study showed that affirmative action is not always a zero-sum game: "White workers also receive higher, although not statistically significant, pay and prestige increments as a result of strong employer commitment to affirmative action."22 Jonathan Leonard's study on the effect of affirmative action on employment also concluded that "affirmative action has actually been successful in promoting the employment of minorities and females, though less so in the case of white females."23 The Glass Ceiling Commission recom-

22. Braddock et al., supra note 17, at 17.
mended that affirmative action be used as one method, among others, to select and promote qualified women and minorities.

Affirmative action is a realization that merely forbidding discriminatory acts is not sufficient to remedy the long history of discrimination in this country, nor is it sufficient to weed out the ingrained and often unconscious societal and cultural biases and stereotypes which act as barriers to equality of opportunity. For those who suggest that attitudes have changed and it is time to look ahead, not behind, my answer is that we don't need to look behind to see discrimination at work. We are within one generation of rampant, overt race and gender discrimination, and as studies show, subtle and indirect discrimination is still at work. One need only look to Northern Ireland or the former Yugoslavia for evidence that social and cultural biases are not so easily eradicated over a few years, or even several generations. We always hope for the quick fix, but some problems are not so easily cured. As a society we are reluctant to talk about racism and its existence, perhaps hoping that if we ignore the problem it will go away; that if we tell employers not to consciously consider race and gender in making employment decisions, the results will be race- and gender-neutral decisions. This is not so. Denying the fact that race and gender still matter will result in decision-making that falls back into the old habits—habits which favor whites and males. Maybe one day we will achieve a society where race and gender will not be a disadvantage in competing for employment; that time is not yet here.