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THE LEGALITY OF AFFIRMATIVE ACTION PLANS AND CONSENT DECREES IN THE LIGHT OF RECENT COURT DECISIONS

by

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Introduction

Employers today undertake special efforts to hire, train and promote minorities and women. Such "affirmative action" may be voluntary on the part of the individual employers and unions involved, or may be court ordered. An organization representing minorities or women may sue an employer charging discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended,[1] but before the matter is adjudicated the parties to the law suit may reach an agreement which is approved by a court. Such is called a "consent decree". This paper will present the law as developed in recent court decisions concerning voluntary affirmative action plans in the private and public sectors, as well as the law relating to court ordered affirmative action plans. And, the paper will discuss the legal issues and pitfalls involved in consent decrees.

Voluntary Affirmative Action Plans

Employers have an interest in affirmative action because it is fundamentally fair to have a diverse and representative work force. Moreover, affirmative action is an effective means of avoiding litigation costs associated with discrimination cases, while at the same time preserving management prerogatives, and preserving rights to government contracts. Employers under affirmative action plans (AAP's) may undertake special recruiting and other efforts to hire and train minorities and women and help them advance within the company. However, the plan may also provide job preferences for minorities and women. Such aspects of affirmative action plans have resulted in numerous law suits contending that Title VII of the Civil Rights Act of 1964, as amended, the Fourteenth Amendment and/or collective bargaining contracts have been violated. The Supreme Court has not been able to settle the many

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difficult issues before it with a clear and consistent majority. The Court has decided cases narrowly, with individual justices often feeling compelled to speak in concurring or dissenting opinions.

Private Sector AAP's

The Supreme Court, in the landmark Griggs v. Duke Power Co.[2] decision, made a statement on discriminatory preferences and Title VII stating:

> . . . the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

In McDonald v. Santa Fe Trail Transportation Co.[3] the Supreme Court held that discrimination against whites was prohibited by Title VII. In Regents of the University of California v. Bakke[4] the Supreme Court held that Allan Bakke, an applicant for admission to the University of California Medical School at Davis was denied admission to the school solely on racial grounds and the Constitution forbids such.

It was in the above context that the Supreme Court considered the question of whether Title VII allows an employer and union in the private sector to implement an affirmative action plan which granted a racial preference to blacks where there was no finding of proven discrimination by a court but where there was a conspicuous racial imbalance in the employer's skilled "craft" work force. The Court decided this question in Steelworkers v. Weber.[5] The Court held that the employer could implement such a plan under Title VII. It thus rejected the contentions of the white male plaintiff that the selection of junior black employees over more senior white male employees discriminated against the white males because of their color and was "reverse discrimination" contrary to Title VII. The Court majority chose not to define in detail a line of demarkation between permissible and impermissible affirmative action plans, but certain principles may be extracted from the majority opinion as to what is permissible:

1. The affirmative action must be in connection with a "plan."

2. There must be a showing that affirmative action is justified as a remedial measure. The plan then must be remedial to open opportunities in occupations closed to protected classes under the Act; or designed to break down old patterns of racial segregation and hierarchy. In order to make a determination that affirmative action is justified the parties must make a self-analysis to determine if and where conspicuous racial imbalances exist.

3. The plan must be voluntary.

4. The plan must not unnecessarily trammel the interests of whites.

5. The plan must be temporary.

The Weber decision is the cornerstone on which many subsequent Supreme Court decisions on affirmative action issues are structured.

Public Sector AAP's

In Wygant v. Jackson Board of Education[6] where five judges wrote opinions on the issues before the Court, a sufficient number of justices supported various aspects of the concept of a public sector employer's right to implement a race-conscious affirmative action plan. However, the Court struck down a layoff preference for blacks as violative of the Fourteenth Amendment. Under Wygant a majority of the Supreme Court justices recognized affirmative action in the public sector is permissible where, (1) there is convincing evidence of prior discrimination by the governmental unit involved (the affirmative action is justified as a remedial measure) and (2) the means chosen to accomplish the remedial purpose is "sufficiently narrowly tailored" to achieve its remedial purpose. A majority of justices concluded however, that the "layoffs" were not sufficiently narrowly tailored to survive the Fourteenth Amendment challenge.

The plurality opinion rejected the theory that providing minority role models for minority students to alleviate societal discrimination justified the layoff preference provision for black teachers, saying that such is insufficient to justify racial classifications.

Most of the justices agreed that the public employer does not have to wait for a court finding that it has been guilty of past or present discrimination before it takes action. However, compelling evidence of past or present discrimination must be shown before affirmative action preferences may be implemented.

In Johnson v. Santa Clara County Transportation Agency[7] involving public sector affirmative action, the Supreme Court applied the Weber principles and upheld the public employer's decision under a voluntary AAP to promote a qualified woman over a more qualified man.

It is thus evident that voluntary affirmative action is permissible in both the public and private sectors. The Supreme Court has recently dealt with three types of specific issues involving AAP's and has reached narrow determinations on those issues as follows.

1. Consideration of Sex in AAP's. In the Johnson decision, referred to above, the Supreme Court decided that the public employer did not violate Title VII by promoting a female employee to the position of dispatcher over a higher qualified male employee, under the terms of its voluntary affirmative action plan.

2. Promotion Quotas. In United States v. Paradise,[8] a sharply divided court approved a promotion quota for the Alabama State Police requiring that one black state trooper be promoted for each white state trooper. The plurality opinion found the quota "narrowly tailored" to serve its purpose. Justice Stevens, who cast the deciding vote believed the relief to be proper because of the state agency's egregious past violations of the Equal Protection Clause.

3. Layoff Preferences. In Wygant v. Jackson Board of Education[9] the Supreme Court struck down a layoff provision in a collective bargaining agreement which gave preferences to blacks as violative of the Equal Protection Clause of the Fourteenth Amendment. The plurality opinion stated in part:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes--such as the adoption of hiring goals--are available.[10]

In reading Justice O'Connor's concurring opinion in Wygant in conjunction with the plurality decision, it is apparent that race-based layoff procedures are of dubious legality.

Consent Decrees

Citing Weber, the Supreme Court stated in Firefighters Local 93 v. City of Cleveland[11] that voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who are not actual victims of discrimination. In Weber the voluntary action was the private contractual agreement between the employer and the union. In Firefighters Local 93, a federal district court approved a consent decree between the City of Cleveland and an organization of black and Hispanic firefighters who brought suit against the city charging racial discrimination in promotions and assignments. The terms of a "consent decree" are arrived at through mutual agreement of the parties to a law suit; the court reviews and approves it, and the decree is enforceable by the court. Local 93, while not a party to the lawsuit, was recognized as an intervenor, and did not approve of the consent decree which set forth a quota system for the promotion of minorities over a four year period. Local 93 had contended before the district court that "promotions based upon a criterion other than competence, such as a racial quota system, would deny those most capable from their promotions and deny. . . the City . . . the best possible fire fighting force."[12]

The Supreme Court rejected the Union's argument that Section 706(g) precludes the Court from approving consent decrees benefiting individuals who were not the actual victims of discrimination.[13]

The importance of the Local 93 decision is that while Section 706(g) restricts the district court's powers to order relief such as hiring or promotion orders for individuals who have not actually suffered discrimination, a consent decree is not an "order of the court" according to the Supreme Court majority, and may thus go beyond what a court could have ordered if the case has been litigated to its conclusion.

Union or Individual Challenges to Consent Decrees

The Firefighters Local 93 decision recognized that unions and individuals who object to consent decrees remain free to challenge the decrees under the Equal Protection Clause of the Fourteenth Amendment, and Sections 703(a) and 703(d) of Title VII.

In the private sector, where an employer has a collective bargaining contract with a union, and enters into a

consent decree with the EEOC which contain affirmative action job preferences in conflict with the seniority provisions of the collective bargaining contract, such may be later challenged by the union in a contract violation suit under Section 301 of the LMRA.[14]

Because consent decrees can be later challenged by individuals and unions on the basis of the United States Constitution, Title VII of the Civil Rights Act and labor contracts, it is important that all interested parties be encouraged to participate in developing the agreement which serves as the basis of the decree, so as to preclude further litigation.

Court Ordered Affirmative Action for Non-Victims

The remedial powers of federal courts deciding Title VII actions include injunctions against unlawful practices, affirmative orders requiring the reinstatement or the hiring of employees and the awarding of back pay and seniority rights. The 1972 amendments limit back pay orders to a period of two years prior to the filing of the charge.

In Albermarle Paper Company v. Moody[15] the Supreme Court held that back pay should only be denied victims in limited situations and for reasons which would not frustrate the purposes of Title VII. The Franks v. Bowman Transportation Co. Inc.[16] decision is an example of a remedy fashioned from legislative intent. There the Supreme Court held that the awarding of seniority rights was necessary to eradicate the effects of post-Title VII discrimination against the black employees who were victims of the Company's discriminatory employment and promotion policies.

In Sheet Metal Workers Local 28 v. EEOC[17] the Supreme Court held that district courts were not limited to awarding preferential relief only to the actual victims of unlawful discrimination, but may order preferential relief such as requiring the employer to meet goals and timetables for the hiring of minorities where an employer or labor union has engaged in persistent and egregious discrimination or where it is necessary to dissipate the lingering effects of pervasive discrimination. The Court stated however, that in the majority of Title VII cases where the Act has been found to have been violated, the district court will need only to order the employer or union to cease the unlawful practices and award make-whole relief to the individuals victimized by those practices.

Reverse Discrimination

When an employer's affirmative action plan is not shown to be justified or when it "unnecessarily trammels" on the interests of non-minority employees in regards to promotions, training or other employment expectations, it is said that the employer's action is unlawful "reverse discrimination." In these so called "reverse discrimination" cases, the courts apply the Weber principles to test the validity of the employer action in question.

In Jurgens v. Thomas[18] a suit brought by white male employees of the Equal Employment Opportunity Commission, the Court held that the EEOC itself had acted contrary to the Weber decision in its promotion and hiring procedures. The Court determined that clear evidence of preferences for minorities and women was found in the EEOC's affirmative action plans, its "Special Hiring Plan for Hispanics," and its District Directors Selection Program. After extensive discussion and an analysis of statistics on the affirmative action plans, the Court held that the evidence showed that through the process of reorganization, white male district directors were reduced from ten to two. Also the Special Hiring Plan for Hispanics was discussed by the Court in the lengthy decision. Hispanics constituted 6.8% of the national population but 12.9% of the EEOC workforce, and the Plan called for a 10% hiring goal even in field offices where the local population was less than 10% Hispanic. The preferences of this plan were not temporary, according to the Court, because of the follow-up procedure built into the plan whereby those offices that did not meet initial hiring goals, "committed" one or more positions to future recruitment of Hispanics. The Court held that the affirmative action plans were not remedial because the jobs were not traditionally closed to women and minorities; nor were they temporary for the preferences appeared in slightly different form in each of the seven plans at issue. The Court held that Weber's language should not be read to permit an employer with statistical parity in its own plant to use "status" as a basis for decisions as a means of compensating for unremedied societal discrimination elsewhere. The Court held that the EEOC's affirmative action plans unnecessarily trammeled the interests of the plaintiffs and violated Title VII.

In the San Francisco Police Officers' Association v. San Francisco[19] decision, the U. S. Court of Appeals applied the Weber standards and found that the City's decision to rescore promotional tests in order to achieve specific and identified racial and gender percentages for promotion purposes "unnecessarily trammelled" on the interests of white male police officers.[20]

Conclusion

Recent court decisions have settled many difficult issues involving affirmative action plans and consent decrees. Voluntary affirmative action plans which conform to the standards set forth in the Weber case are permissible in the private sector. From Wygant and Johnson v. Santa Clara Country Transportation Agency it is clear that a Supreme Court majority also supports voluntary affirmative action plans in the public sector. However, it is also clear from Wygant that race-based lay off procedures are of dubious legality. In the Firefighters Local 93 decision the Supreme Court rejected the argument that a court consent decree could not benefit non-victims of discrimination and thus recognized that a consent decree can go beyond what a court could have ordered if a case had been litigated to its conclusion. The parties to affirmative action plans must be on the alert to make certain that their plans conform to the principles set forth in Weber. If not, their plans may be set aside in a so called "reverse discrimination" suit.

FOOTNOTES

1. 42 U.S.C. 200 et seq.
2. 401 U. S. 424 (1971).
3. 427 U. S. 2173, 12 F.E.P. 1577 (1976).
4. 438 U. S. 265, 17 F.E.P. 1000 (1978).
5. 443 U. S. 193 (1979).
6. 106 S. Ct. 1842 (1986).
7. 107 S. Ct. 1442 (1987).
8. 107 S.Ct. 1053 (1987).
9. 40 F.E.P. 1321 (1986).
10. Id. at 1326.
11. 106 S. Ct. 3063 (1986).
12. Id. at 3068.

13. Section 706(g) states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable reflief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a). (As amended by P. L. No. 92-261, eff. March 24, 1972.)

14. W. R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983).

15. 422 U. S. 405 (1975).

16. 424 U. S. 747 (1976).

17. 106 S. Ct. 3019 (1986).

18. 29 F.E.P. 1561 (1982).

19. 812 F.2d 1125 (9th Cir. 1987).

20. See also Hammond v. Barry, 42 E.P.D. 36,804 (D.C. Cir. 1987) where Washington, D. C.'s affirmative action plan for its Fire Department was found to be illegal where the Department was no longer engaged in hiring practices that discriminate against blacks and no dismantling of the structures of past discrimination remained.