

Employment Law for Human Resource Practice

Chapter 8 Affirmative Action

Affirmative Action ¹

- Affirmative action has been defined as:
 - “Those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.”
- And also as:
 - “A management tool designed to ensure equal employment opportunity.”

Affirmative Action ²

- Affirmative action is required of:
 - Most companies that have contracts to sell goods or services to the federal government.
 - A firm when a discrimination suit results in a settlement or court order that includes affirmative action as a remedy.
- Affirmative action plans may also be voluntarily undertaken by a firm.
 - Even voluntary affirmative action plans must comply with certain legal requirements.

Government Contractors

- Companies that contract with the federal government must comply with Executive Order 11246, which requires that:
 - Companies with contracts worth at least \$10,000 must include a nondiscrimination clause in their contracts, and abide by it, and
 - Must include that clause in their contracts with subcontractors, who must also abide by it.

Executive Order 11246

- Contractors promise that they:
 - “...will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during their employment without regard to their race, color, religion, sex, or national origin...”

Settlements & Court Orders

- Affirmative action is one of the remedies available to courts in discrimination cases.
 - It can be imposed either as a remedy following a determination of discrimination, or
 - As part of a judicially approved settlement between the parties, called a consent decree.
- Court-imposed affirmative action is not common, but many police and fire departments have operated under such decrees.

“Reverse” Discrimination ¹

- Many steps taken in support of affirmative action are neutral (announcing hiring or promotion announcements widely, encouraging diverse applicants) and do not leave anyone worse off or raise issue of discrimination.
- Some employers go further and apply a *preference* for women and minorities to achieve affirmative action goals.
- This is legally problematic.

“Reverse” Discrimination ²

- In reverse discrimination cases, an employee who believes he was passed over for an employment opportunity because of affirmative action alleges disparate treatment.
 - The employer has taken a protected class into account in making its employment decision.
- The question is whether this use of affirmative action was legal or discriminatory.
- In deciding that question, courts will consider:
 - The justification for the plan, and
 - The reasonableness of the measures used to implement it.

“Reverse” Discrimination ³

- Using affirmative action does not mean establishing quotas or reserving opportunities solely for persons with the desired class characteristic, regardless of their qualifications.
- Instead, the inquiry is whether, and to what extent, may protected class characteristics be taken into account for the purpose of undoing past discrimination toward women and persons of color.

Johnson v .Transportation Agency

- Facts: Johnson, a white male, was passed over for a promotion. All qualified candidates were given scored interviews. Johnson was tied for 2nd highest score (75), while Joyce, the woman who received the promotion, scored next highest (73).
- Issue: Did Joyce's promotion, based on the agency's affirmative action plan, violate Title VII?
- Held: The agency's action was legal and acceptable because it existed to remedy a documented problem of underutilization of women, without unduly burdening males.

Just the Facts

- Under financial duress, a school district had to lay off several teachers, including one in the business department. Usually, layoffs occurred in reverse order of seniority, but the two candidates (one black, one white) were equal in seniority and performance. Concerned with retaining role models for minority students, and relying on its affirmative action policy, the district laid off the white teacher. Overall, the percentage of African American faculty in the school district exceeded their percentage in the labor market. The white teacher sued. Was her layoff a permissible use of affirmative action?
- [Taxman v Board of Education of Township of Piscataway](#), 91 F23d 1547 (3rd Cir. 1996), cert. dismissed, 118 S.Ct. 595 (1997) [wiki](#)

Legality under the U.S. Constitution

- In constitutional cases, courts review racial preferences with strict scrutiny – the most stringent form of judicial review of government actions.
- A public employer must show:
 - The plan serves a compelling governmental interest, and
 - The measures employed are narrowly tailored.

Just the Facts

- The new mayor of Newark, NJ decided to eliminate all single-race fire companies in the fire department. Dozens of firefighters were involuntarily transferred based on their race. The city subject to a consent decree that mandated policies & benchmarks for the hiring of minority firefighters, but it did not include any mention of the racial balance of fire companies. It was agreed that racial segregation was caused by residence, not by city policies, as firefighters preferred to work near where they lived. 34 firefighters who had been forced to transfer sued. Were the transfers a valid use of affirmative action? Were they required by the consent decree?
 - [Lomack v City of Newark](#), 463 F3d 303 (3d Cir. 2006) [Summary](#)

Drafting Affirmative Action Plans

- EEOC guidelines require that affirmative action plans have 3 main components:
 - A reasonable self-analysis,
 - A reasonable basis for concluding that action is appropriate, and
 - Reasonable action.

Effects of Affirmative Action

- Many believe that people hired through affirmative action have lesser qualifications. But, a major study found that:
 - Firms using affirmative action recruited somewhat more women and minorities.
 - Such hires had somewhat lower educational credentials.
 - Job performance levels were equal to or exceeded job performance levels of others in the firm.
 - Greater training by such firms appears to counteract any lower educational credentials of people hired.

Just the Facts

- An employee sought a promotion to manager. Requirements for the job included a graduate business degree and 5 to 7 years of sourcing-related experience. The employee received the highest score on a panel interview. **Shortly after**, the employer received an inquiry from an **African American woman**. The HR Department determined that the woman was qualified, even though she did not have 5 years of sourcing experience. She received 2 points less on the interview than the employee, but she was hired. **A member** of the panel later told the employee that, although his interview had gone well, he believed that the hiring manager “had a diversity issue” because she was a member of the company’s Workforce Diversity Program and it would have looked bad if she hired all whites for positions reporting to her. **The manager denied** basing the decision on race and cited a number of qualities that she said made the **African American woman** hired the best candidate. Was the decision based on race?

– *Reilly v. TXU Corp.*, 2008 U.S. App. LEXIS 5657 (5th Cir.)

What Would You Do?

- You are the manager of a small restaurant owned by a local family. The restaurant is very much in the mold of Hooter's, where virtually all of the servers are female and scantily clad. But you have just read that, following a suit brought by EEOC against Hooters for sex discrimination against men, Hooter's agreed to settle the case in part by agreeing to hire males to work as servers. Since your restaurant is very similar to the Hooter's brand, hiring only women as servers, you can see that you have a problem. What would you do?

Next:

- Chapter 9 – Harassment
 - When does joking become harassment?
 - When is the company liable for the actions of a manager who engages in harassment?
- The answers to these questions and more are next.

Instructor's Notes

- Instructor's notes for What Would You Do?
 - This is a slightly tongue-in-cheek situation calling for affirmative action, and should bring a chuckle to students as they work through it. First, they should recognize that they need to take the three steps necessary to an affirmative action plan which appear on the slide entitled, “Drafting Affirmative Action Plans,” and presuming they conclude that action is necessary, formulate a plan to hire male wait staff. An interesting option would be to have the students draft an advertisement to attract male servers, which does not violate anti-discrimination laws.