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Championing Diversity Without Discriminating: An Employer's Dilemma

June 7, 2018

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A version of this article was originally published in the June 2018 issue of The HR Specialist. It is reprinted here with permission.

Most employers value a diverse workforce, and many employers are required by clients or customers to have diversity initiatives and meet diversity requirements. While these initiatives and requirements are meant to increase diversity, and provide diverse applicants and employees with increased opportunities, they can present a challenging dynamic for employers. Is hiring a candidate because of his or her protected category considered to be discrimination itself? Is staffing a project with diverse employees per client request discriminatory?

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In most cases, Title VII, a federal law, prohibits employers from making decisions based on an applicant's or employee's protected status. The only legally recognized exception is when employers establish "affirmative action" plans based on a historical imbalance or disparity in the workforce. *See Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616 (1987). These plans are permissible when (1) preferences are intended to "eliminate conspicuous racial imbalances in traditionally segregated job categories"; (2) the rights of nonminority employees are "not unnecessarily trammeled"; and (3) the preferences are temporary in duration. *United Steelworkers of Am. v. Weber,* 443 U.S. 193 (1979).

Although it may seem common sense that courts generally support affirmative action plans, in practice, courts scrutinize these plans very closely. For example, in *Schurr v. Resorts International Hotel*, a Caucasian plaintiff alleged that he was denied a technician position based on race when the job was offered to an equally well-qualified minority candidate. 196 F.3d 486 (3d Cir. 1999). Under the Casino Control Act, the employer was required to take affirmative steps to employ minorities. At the time of the hiring decision, the technician category was 22.5 percent minorities, compared to the regulation's goal of 25 percent, so the employer believed it was obligated to hire the minority applicant. The Third Circuit held that the employer's affirmative action plan violated Title VII because it was not based on a finding of discrimination in the casino industry or the technician job category and so was not put in place based on a historical imbalance or disparity in the workforce.

Schurr illustrates the challenge facing employers. Even when an affirmative action plan is required by state regulation, it can be found to be in violation of Title VII. Thus, employers that are considering affirmative action plans must ensure that they meet all the required factors. While there is no bright-line rule on what constitutes a "conspicuous racial imbalance," case law provides some guidance. *See, e.g., Shea v. Kerry*, 796 F.3d 42 (D.C. Cir. 2015) (sufficient degree of imbalance when 631 of 655 officers were white); *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987) (sufficient degree of imbalance when 11.4 percent of the workforce was minority, versus 30 percent of the city's population, and when 7.3 percent of the workforce was black, versus 17 percent of the population).

Another potential exception to Title VII's prohibition on making employment decisions based on protected status is Executive Order 11246, which requires certain federal

contractors and subcontractors to take affirmative action to ensure equal employment opportunity. Affirmative action plans under the Executive Order are typically mandated by government contract, whereas affirmative action plans that address a historical imbalance or disparity are typically either voluntary or mandated by court or agency order. The courts have not yet decided whether hiring decisions based on an affirmative action plan can still violate Title VII.

What should employers do when they do not meet the requirements of an affirmative action plan, but still want to promote diversity? Courts have made it clear that any non-remedial affirmative action plan, if aimed at promoting diversity, rather than remedying discrimination, could be in violation of Title VII. *See, e.g., Taxman v. Bd. Of Educ.*, 91 F.3d 1547, 1550 (3d. Cir. 1996) ("Given the clear antidiscrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster.").

While there is no clear legal guidance for employers, it is helpful to analogize to the educational context, which suggests the solution may lie in treating diversity as a factor in employment decisions, rather than as a preference or a deciding factor. Similarly, it behooves employers to have diversity goals, rather than specific quotas or numbers.

In 2003, the Supreme Court upheld a college admissions system that considered the race or ethnicity of applicants a "plus" factor, *Grutter v. Bollinger,* 539 U.S. 306 (2003), and struck down a system that allocated points to underrepresented minorities, *Gratz v. Bollinger*, 539 U.S. 244 (2003).

In *Fisher v. University of Texas*, the most recent Supreme Court decision on the issue, the Court upheld an admissions system in which "consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities." 136 S. Ct. 2198, 2207 (2016). In the system at issue, the university made decisions based on an applicant's Academic Index and Personal Achievement Index (PAI) scores. A PAI score is based on information such as essay scores, letters of recommendation and community service, with race given weight as a subfactor. Thus, "although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus." Id. at 2207.

Applying *Fisher* to the employment context, employers should consider diversity as one factor in their overall assessment of a candidate. Employers should never hire a diverse candidate based solely, or primarily, on the candidate's diversity. Rather, employers should consider diversity as one of the many individualized considerations about a candidate. In the context of individualized assessments and diversity goals (rather than quotas or other hard numbers), it is likely that a court would uphold an employer's decision to hire a diverse, qualified candidate. However, such an outcome is never guaranteed, and the decision to promote workplace diversity is ultimately a business decision that comes with potential risks.